2007 REPORT

ON

LAWYERS' OPINIONS IN BUSINESS TRANSACTIONS

BY THE

SPECIAL JOINT COMMITTEE

OF THE

SECTION OF BUSINESS LAW

AND THE

SECTION OF REAL PROPERTY, PLANNING AND ZONING

OF THE

MARYLAND STATE BAR ASSOCIATION, INC.

JUNE 14, 2007

REPORT ON LAWYERS' OPINIONS IN BUSINESS TRANSACTIONS BY THE SPECIAL JOINT COMMITTEE OF THE SECTION OF BUSINESS LAW AND THE SECTION OF REAL PROPERTY, PLANNING AND ZONING OF THE MARYLAND STATE BAR ASSOCIATION, INC.

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ACKNOWLEDGMENTS

In his address to the Maryland State Bar Association in 1897, our Association's first President, Chief Judge James McSherry, lamented what he saw as a lack of standards in the Bar and challenged lawyers of his day to "bring the *whole* Maryland Bar back to the exalted standard of former days, and . . . elevate it to the equally high position which its acknowledged leaders at this time occupy and then the proudest and most distinguished encomium which can be spoken of each of its members will be to say of him 'he is a *Maryland* lawyer.'" Chief Judge McSherry would be proud of the contributions of more than forty *Maryland* lawyers who gave so generously of their time and talent to this project.

This publication reflects a desire to articulate in a discrete area of practice what it is that we, as *Maryland* lawyers, believe is reasonable to request and to give. As explained in more detail in the pages that follow, the conversation to build the consensus, and the effort to write something that clearly describes what it is, has taken thirty months. Over these many months and the long hours, there was no compensation, simply the desire to get it right.

In a real sense, our work began with the 1989 Report of the Special Committee on Lawyer's Opinions in Commercial Transactions of the Maryland State Bar Association, Inc. and the Bar Association of Baltimore City (the "1989 Report"). At that time, more than twenty lawyers prepared from whole cloth a scholarly and practical work. It enjoyed instant credibility and served members of our Association well for nearly two decades. It also added immeasurably to the national discourse on this important subject. At the helm of that project were Bennett Gilbert Gaines, Edward J. Levin, and S. Nelson Weeks. We began by editing their product, and no acknowledgment could begin without first recognizing those on whose shoulders we have stood during every step of our effort.

I am thankful for the leadership of the Real Property and Business Law Sections of our Association that recognized the need to re-visit this topic. It takes courage to try to improve upon something that has enjoyed widespread acceptance. The leadership of both Sections supported this effort throughout its long gestation.

Our process included lengthy discussions among the Committee as a whole. We have listed each member, and I am grateful for the contributions of each and every person. They came from every part of our state and shared their ideas, drafts and edits. Soon to be *Maryland* lawyers, Gwendolyn Allen, Cara McConville, and Puja Mehta, students at the University of Maryland School of Law, also contributed.

The arduous task of synthesizing the reports of the various subcommittees into what is hopefully an integrated whole fell to the Steering Committee. I have never seen a group work more diligently or more selflessly. Our unquestioned leader was Edward J. Levin. His intellect, hard work and good humor sustained us. He brought to this effort more than two decades of focused study and prolific writing. That we were revising something which he had been instrumental in writing the first time did not slow his willingness to consider alternatives. I am humbled by his contribution. That it is the second time he has done this for our Association is, to me, almost unimaginable.

Deborah Diehl, David Kochanski, Sharon Kroupa and Eric Orlinsky are each seasoned lawyers of, in the words of Chief Judge McSherry "splendid talents, great wisdom and lofty integrity." Michael Schiffer brings insight beyond his years at the Bar and is poised, should he choose to do so, to become a national leader in this field. Each of these members of the Steering Committee demonstrated a commitment to this effort that reflects the best of what it means to be a professional.

The difference between a book and a discussion is the difference between our project with and without Kathy Bishop. She was a divine gift – a remarkably talented lawyer, with insight into opinion practice and an interest in serving as our reporter. When this project began I was afraid no such person existed. I am now convinced there is only one, and I could not be more pleased we found her. She was ably assisted throughout this process by Cathy Thompson, whose expert typing and formatting skills were essential for the completion of this exercise.

My Vice-Chair, Scott Freed, helped to keep the project on track when we faltered. Always willing to pick-up those pieces that seemed to be falling through the cracks, his humility could not hide his mastery of the subject nor his attention to detail.

I would be remiss if I did not acknowledge for the entire Committee the generous contribution of my partners at Venable LLP. Through more meetings than I can remember, we were housed and fed. Still other meetings were hosted by DLA Piper. I am mindful of the role such hidden contributions play in these efforts, contributions with real costs, and wish to recognize them here.

A similar word of thanks, on behalf of the entire Committee, to all of our colleagues. We appreciate that the time to invest in the collective good of our profession may detract from our shared effort to serve our clients. I know we were only able to dedicate the time this project required because of your support. Thank you.

Finally, and most importantly, a word to those whom we missed, and who missed us, while we were working on this Report. Time is so remarkably precious. Finding a way to balance our desires to be with the ones we love, with our deep commitment to our profession, is difficult. This project required sacrifice from our families. Late nights, early mornings, the simple reality of what it means to spend hundreds of hours on a Bar related project, imposed real burdens. Expressing gratitude for the Committee for such a personal sacrifice is difficult, but I am certain my experience is not unique. On the off chance any loved one of any member of the Committee ever reads this publication, I hope you know we are grateful for your sacrifice and that you find some small comfort in your pride for the contribution made by your *Maryland* lawyer.

Charles J. Morton, Jr.
June 2007
Baltimore, Maryland

REPORT ON LAWYERS' OPINIONS IN BUSINESS TRANSACTIONS BY THE SPECIAL JOINT COMMITTEE OF THE SECTION OF BUSINESS LAW AND THE SECTION OF REAL PROPERTY, PLANNING AND ZONING OF THE MARYLAND STATE BAR ASSOCIATION, INC.

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A. INTRODUCTION AND HISTORY OF THE PROJECT

The Special Joint Committee on Lawyers' Opinions in Business Transactions was formed by the Section of Business Law and the Section of Real Property, Planning and Zoning of the Maryland State Bar Association, Inc. (the "Committee") in January 2005, in response to a perceived need to update the 1989 Report prepared by the Special Joint Committee on Lawyers' Opinions in Commercial Transactions[1] (the "1989 Report"). The 1989 Report has served Maryland lawyers well for more than fifteen years. Nonetheless, over that time a number of significant developments have occurred that impact opinion practice in business transactions. Those developments provide the impetus for this effort.

There was a consensus among the members of the committee that prepared the 1989 Report that the quality of lawyers' opinions and their value to their recipients could be improved significantly by the compilation of certain guidelines to assist practitioners in this area. Prior to the 1989 Report, there were no clear sources of guidance available to aid a Maryland opinion giver or to assist the opinion recipient in interpreting its meaning and in understanding what steps were taken to reach the opinion that was rendered. Similar projects had been undertaken by bar associations in other states prior to 1989.[2]

The 1989 Report provided a great service to the Maryland Bar. The report quickly became the standard for opinion practice within Maryland. It defined the consensus among Maryland lawyers for a generation on what is reasonable for an opinion recipient to request and

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[1] 45 BUS. LAW. 705 (1990).

[2] *See, e.g.*, Joint Committee of The Real Property Law Section of the State Bar of California and The Real Property Section of the Los Angeles County Bar Association, *Legal Opinions in California Real Estate, Transactions*, 22 REAL PROP., PROB. & TRUST J. 373 (1987) (a slightly revised version is also printed in 42 BUS. LAW. 1139 (1987) (hereinafter "California Real Estate Report"); Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers' Association, *Legal Opinions to Third Parties: An Easier Path*, 34 BUS. LAW. 1891 (1979) (hereinafter "New York County Lawyers' Ass'n Special Committee"); Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers' Association, *An Addendum -- Legal Opinions to Third Parties: An Easier Path*, 36 BUS. LAW. 429 (1981); Subcommittee on Opinion Writing, Committee on Corporate Banking, and Business Law, Massachusetts Bar Association, *Omnibus Opinion for Use in Loan Transactions*, 60 MASS. L.Q. 193 (1976); Subcommittee on Opinion Writing, Committee on Corporate Banking, and Business Law, Massachusetts Bar Association, *Omnibus Opinion for Use by Seller's Counsel in the Sale of a Closely-Held Business*, 61 MASS. L.Q. 108 (1976); Committee on Corporations of the Business Law Section of the State Bar of California, *Report of the Committee on Corporations Regarding Legal Opinions in Business Transactions* (August, 1982), 14 PAC. L.J. 1001 (1983); *1989 Report of the Committee on Corporations of the Business Law Section of the State Bar of California Regarding Legal Opinions in Business Transactions*, 45 BUS. LAW. 2169 (1990); *Report of the State Bar of Arizona Corporate, Banking, and Business Law Section Subcommittee on Rendering Legal Opinions in Business Transactions*, February 1, 1989, 21 ARIZ. ST. L.J. 563 (1989) (hereinafter "Arizona Report"); and Committee on Corporations of the Business Law Section of the State Bar of California, *Report of the Committee on Corporations Regarding Legal Opinions in Business Transactions*, 14 PAC. L. J. 1001 (1983).

opinion giver to provide. The 1989 Report has also been cited widely outside of Maryland and has added to the national discourse on the subject.[3]

Since 1989, various bar associations have paid much attention to opinion practice. In 1991, after a conference held in Silverado, California, the Section of Business Law of the American Bar Association ("ABA") published the Third-Party Legal Opinion Report, including the Legal Opinion Accord (the "Accord").[4] In 1993, the Section of Real Property, Probate and Trust Law of the ABA and the American College of Real Estate Lawyers ("ACREL") prepared an adaptation to the Accord to enable an Accord-based opinion to be given with respect to real estate secured transactions (the "Real Property Adaptation").[5] In 1998, the Section of Real Property, Probate and Trust Law of the ABA and ACREL prepared their Inclusive Real Estate Secured Transaction Opinion Project Report (the "Inclusive Opinion Report"). The Inclusive Opinion Report includes a form opinion that is based on the Accord as modified by the Real Property Adaptation but which is self-contained and does not require reference to an external report (the "Inclusive Opinion").[6]

In 2002, the Committee on Legal Opinions, ABA Section of Business Law, published *Guidelines for the Preparation of Closing Opinions* (the "Business Law Guidelines")[7] and, in 2003, ACREL's Attorneys' Opinion Committee and the Committee on Legal Opinions in Real Estate Transactions, ABA Section of Real Property Probate and Trust Law, prepared *The Real Estate Opinion Letter Guidelines* (the "Real Estate Guidelines").[8] These guidelines set forth principles to guide practitioners in giving and receiving third party opinion letters in connection with business transactions and transactions secured by real estate, respectively.

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3 *See, e.g., infra* note 6.

4 *Third-Party Legal Opinion Report*, 47 BUS. LAW. 167 (1991) and 29 REAL PROP. PROB. & TR. J. 487 (1994).

5 *See* A.B.A. Section of Real Property, Probate and Trust Law 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) (hereinafter "1994 ABA/ACREL Report").

6 An opinion letter based on the Inclusive Opinion Report is called an "Inclusive Opinion." The Inclusive Opinion Report is posted on the internet at the following addresses: www.acrel.org, www.abanet.org/rppt/inclusive-art.html; and http://cctr.umkc.edu/dept/dirt/files/incl_rep.htm.

7 57 BUS. LAW. 875 (2002). *See also* A.B.A. Section of Business Law Committee on Legal Opinions, *Legal Opinion Principles*, 53 BUS. LAW. 875 (2002) (hereinafter "Business Law Principles"). The Business Law Guidelines are designed to be read and applied with the Business Law Principles.

8 38 REAL PROP. PROB. & TR. J. 241 (2003).

The TriBar Opinion Committee has contributed a number of thoughtful publications.[9] Additionally, since the 1989 Report many other bar associations have published reports relating to opinion practice.[10] This ever-growing body of bar association reports provides careful insight and guides the evolution of opinion practice. In addition, in 1992, Scott FitzGibbon and Donald Glazer published their landmark treatise *FitzGibbon and Glazer on Legal Opinions* (today, *Glazer and FitzGibbon on Legal Opinions*).[11] This work provided indispensable guidance to the Committee in the preparation of this Report, particularly in the areas not addressed in the 1989 Report. The Committee strongly recommends this reference book as a resource.

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[9] The TriBar Opinion Committee includes members of the following organizations functioning as a single Committee: (i) Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers' Association; (ii) Corporation Law Committee, The Association of the Bar of the City of New York; and (iii) Special Committee on Legal Opinions of the Business Law Section, New York State Bar Association. In recent years, the TriBar Opinion Committee expanded its membership beyond New York. *See, e.g., Report of the TriBar Opinion Committee: Third-Party Closing Opinions*, 53 BUS. LAW. 591 (1998) (hereinafter "TriBar 1998 Report"); *Special Report of the TriBar Opinion Committee: Uniform Commercial Code Security Interest Opinions*, Revised Article 9, 58 BUS. LAW. 1451 (2003) (hereinafter "2003 TriBar U.C.C. Report"); *and Special Report of The TriBar Opinion Committee: The Remedies Opinion – Deciding When to Include Exceptions and Assumptions,* 59 BUS. LAW. 1449 (2004) (hereinafter "TriBar Remedies Report"*).*

[10] *See, e.g.*, State Bar of California, Business Law Section, Report on Legal Opinions Concerning California Limited Liability Companies (2000); State Bar of California Business Law Section, *Report on Third-Party Remedies Opinion* (2004)*;* Florida Bar Opinion Committee, *Report on Standards for Opinions of Florida Counsel of the Special Committee on Opinion Standards of the Florida Bar Business Law Section,* 46 BUS. LAW. 1407 (1991); *Report of the Special Committee on Secured Transaction Opinions of The Florida Bar Business Law Section on Secured Transactions Under the Uniform Commercial Code* (1998); Legal Opinion Committee of the Corporate and Banking Law Section of the State Bar of Georgia, *Report on Legal Opinions to Third Parties in Corporate Transactions* (1992) (hereinafter "Georgia Report"); *Report of the Ad Hoc Committee of the Business Law Section of the State Bar of Michigan on Standardized Legal Opinions in Business Transactions*, 14 MICH. BUS. L.J. (1991); Report of the Legal Opinion Committee of the Business Law Section of the North Carolina Bar Association (2004), *Third-Party Legal Opinions in Business Transactions, Second Edition* (2004) (hereinafter "North Carolina Report"); Legal Opinion Steering Committee of the Corporation, Banking and Business Law Section of the Pennsylvania Bar Association, *Pennsylvania Third-Party Legal Opinion Report* (1999) Legal Opinion Steering Committee of the Corporation, Banking and Business Law Section of the Pennsylvania Bar Association, *Model Closing Opinion Letter (Annotated)* (1999) (hereinafter "Pennsylvania Report"); *Report of the Legal Opinions Committee of the State Bar of Texas Business Law Section Regarding Legal Opinions in Business Transactions*, 29 St. B. Tex. Bus. Bull. Nos. 2 and 3 (1992) (hereinafter "Texas Reports"); Ad Hoc Committee on Third-Party Legal Opinions of the Business Law Section of the Washington State Bar Association, *Report on Third-Party Legal Opinion Practice in the State of Washington* (1999) (hereafter "Washington Report"); Ad Hoc Committee on Third-Party Legal Opinions of the Business Law Section of the Washington State Bar Association, *Supplemental Report on Third-Party Legal Opinion Practice in the State of Washington Covering Secured Lending Transactions* (2000).

[11] DONALD W. GLAZER, SCOTT FITZGIBBON AND STEVEN O. WEISE, GLAZER & FITZGIBBON ON LEGAL OPINIONS (2nd ed. 2001 and 2006 Cumulative Supplement) (hereinafter "Glazer and FitzGibbon").

One of the reasons opinion practice has been so ripe for ongoing scholarly inquiry is the constant evolution of the laws underlying many opinions. For example, since 1989, the use and acceptance of limited liability entities has increased dramatically.[12] Recent revisions to Article 9 of the Uniform Commercial Code have significantly changed how security interests are perfected. Also of particular interest to Maryland practitioners, the last decade has seen the explosion of the use and prominence of real estate investment trusts ("REITs").

As a result of these developments, the Committee determined that its focus would be slightly broader than that of the 1989 Report. The scope of the 1989 Report was generally limited to loan transactions and real estate transactions. This Report, in contrast, addresses issues that are confronted in rendering legal opinions in many types of business transactions. The Committee developed four "Illustrative Opinion Letters" to illustrate the issues discussed in this Report.[13] The first opinion is based on a business loan where the client is a corporation (the "Illustrative Business Transaction Opinion Letter"). It may be readily adapted to other types of business transactions. The second opinion assumes that the client is a limited partnership and that the transaction is a loan secured primarily by real estate (the "Illustrative Real Estate Loan Opinion Letter – Long Form"). This opinion includes all of the implicit assumptions and qualifications that are inherent in this type of opinion as a matter of customary opinion practice in Maryland, whether stated or not. The third opinion (the "Illustrative Real Estate Loan Opinion Letter – Short Form") is based on the same structure as the second, but it does not include many of the implicit assumptions and qualifications. The fourth opinion assumes that the client is a real estate investment trust engaging in an equity financing transaction involving the issuance of shares (the "Illustrative Share Issuance Opinion Letter").

Every effort has been made to ensure that this Report reflects a broad consensus within the Maryland bar. Lawyers have participated in this process from every part of the State, from large firms and small. Lawyers active in various practices, from real estate to private equity, from REITs to traditional bank loans, have all been consulted. This Report was not published until there was ample time for public comment and careful consideration of the comments.

The Committee was composed of 43 lawyers from throughout the State of Maryland. Charles J. Morton, Jr. served as Chair, and D. Scott Freed Vice-Chair of the Committee. Katherine L. Bishop, a Maryland business and real estate lawyer, served as the Reporter for the Committee. Deborah H. Diehl, David M. Kochanski, Sharon A. Kroupa, Edward J. Levin, Eric G. Orlinsky and Michael D. Schiffer served on the Steering Committee. In order to subject each aspect of the legal opinion to careful scrutiny, and to involve more lawyers in the process of preparing this Report, twelve subcommittees were formed. Each subcommittee was charged with examining a distinct issue in the opinion process. The membership of each subcommittee

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[12] Limited liability companies, or LLCs, were created by statute in Maryland in 1989. Since that time, other limited liability entities have been created in Maryland and other jurisdictions, *e.g.*, statutory business trusts, limited liability partnerships and limited liability limited partnerships. *See infra* Section D.1, "Existence and Good Standing." These forms of business organizations are frequently involved in business, real estate, secured lending and securitization transactions, and practitioners must be familiar with the unique issues that arise when giving legal opinions in transactions involving these entities.

[13] *See* Section E, "Illustrative Opinion Letters and Certificate."

was expanded in many cases to include lawyers who were not members of the Committee, and a balance between opinion recipients' lawyer and opinion givers was sought on each subcommittee. This Report is the product of more than two years of study and discussion by the various subcommittees and the full Committee that began in January 2005. Over that period of time, members of the Committee spent hundreds of hours reviewing the 1989 Report, comparing that report to subsequent published efforts, and discussing how opinion practice has evolved.

A draft of this Report was presented as a continuing legal education seminar at the June 2006, meeting of the Maryland State Bar Association ("MSBA") in Ocean City, Maryland. In addition, the Committee made a presentation of the draft Report as part of the Maryland Institute for Continuing Professional Education of Lawyers, Inc. ("MICPEL's") Advanced Real Property Institute in September 2006, in Baltimore and as a stand alone MICPEL program in Columbia, Maryland in November 2006. The Committee solicited comments on the June 2006, draft of this Report from Maryland practitioners and also from other interested persons, including opinion recipients and clients of opinion givers. Drafts of this Report were posted on the websites of the Section of Business Law and of the Section of Real Property, Planning and Zoning of the MSBA and otherwise circulated, and they generated comments from persons representing a wide range of interests. The Section Councils of each of the Section of Business Law and of the Section of Real Property, Planning and Zoning of the MSBA endorsed this Report. In June 2007, at its annual meeting, the MSBA awarded its annual "Best Section Project Award" jointly to the two Sections.

B. STATEMENT OF POLICY

The Committee believes that lawyers and clients have benefited from the more uniform and better understood assumptions, qualifications, guidelines, and procedures for third party legal opinions in business transactions in Maryland, modified, as appropriate, to meet (1) the unique circumstances of each transaction, (2) the needs of the parties involved, and (3) the relationship of the opinion giver to the parties and the transaction, as presented and discussed in the 1989 Report. The Committee determined that the 1989 Report needed to be updated to reflect changes in the law and in opinion practice since 1989. Therefore, the Committee has prepared the following considerations, assumptions, qualifications, guidelines, procedures, and interpretations, as well as the Illustrative Opinion Letters included herein, to clarify and illustrate those changes, and recommends this Report for the assistance and guidance of lawyers requesting or rendering legal opinions in business transactions in Maryland or based on Maryland law.

C. PRELIMINARY CONSIDERATIONS

1. Purposes of Opinion Letters

The proper purpose of a third party legal opinion given in a business transaction is to provide some or all of the parties to the transaction who are not the opinion giver's client with comfort regarding specified legal aspects of the transaction.[14] If the lawyer is unable to give such an opinion, the recipient may be alerted to the existence of potential problems in the transaction and/or the need to seek comfort from other sources.[15] This Report does not generally address a lawyer's advice to that lawyer's own client, although occasionally the types of opinions discussed in this Report are rendered to the opinion giver's client rather than to a third party.

Although legal opinions are given in a variety of business contexts, they are commonly requested, for example, as part of the due diligence process of lenders, investors or acquirers.[16] The size, nature, and scope of the transaction and the relationship of significant legal issues to the transaction may well affect the scope of the opinion requested. A primary role of legal opinions in business transactions is to provide assurance that the documents are valid, binding, and enforceable, subject to certain qualifications, based on the opinion giver's adherence to certain due diligence procedures and standards of care.[17] Legal opinions in this context may also reveal defenses to enforcement that may exist at the outset, as well as point out potential problems to enforcement that may arise later.[18] In addition, legal opinions may help to characterize the business transaction as an arm's-length agreement that should be upheld.[19]

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14 Throughout this Report, the term "legal opinion" means third-party legal opinions.

15 *See* James Fuld, *Legal Opinions in Business Transactions - An Attempt to Bring Some Order Out of Some Chaos*, 28 BUS. LAW. 915, 916 (1973) (hereinafter "Fuld").

16 Business Law Guidelines, *supra* note 7, at 875.

17 *See* Edward J. Levin, *Due Diligence, Legal Opinions and the Inclusive Opinion Report*, PROBATE & PROPERTY (Sept./Oct. 2000), http://www.abanet.org/rppt/mo/premium-rp/publications/so00levin.asp?PremiumReferer=http%3A%2Fwww%2Eabanet%2Forg%2Frppt%2Fso00toc%2Ehtml. *See generally* Gary M. Lawrence, *Due Diligence in Business Transactions* § 5 Law Journal Press (2006) (containing general due diligence materials, checklists, sample legal opinion checklists and memoranda).

18 California Real Estate Report, *supra* note 2, at 378.

19 "[T]he opinion becomes a part of the legal analysis because it is evidence of the parties' mutual intent and informed consent with respect to the character and purpose of the transaction." *Id.* at 379.

An opinion giver is not and should not be thought to be providing a guaranty of the transaction or to be acting as an insurer against loss to the opinion recipient.[20]

An opinion does not deal with law in the abstract, but rather with specific laws as they are applied to the particular facts of the transaction. An opinion giver should not be asked to be an additional warrantor of facts; the distinction, however, between questions of law and questions of fact may at times be difficult to separate in certain areas that are commonly addressed by an opinion.

The opinion recipient's lawyer will be held to a standard of reasonable care in determining whether to rely on an opinion as a part of that lawyer's own due diligence investigation, or in lieu of taking other steps necessary to assure itself and the opinion recipient that the transaction documents are valid, binding, and enforceable, subject to the normal caveats, and that the opinion recipient has obtained the legal comfort desired; otherwise, the opinion recipient must be made aware of the related risks.

A lawyer should not request an opinion from another lawyer that the requesting lawyer would not be willing to issue in similar circumstances.[21] On the other hand, an opinion giver should not refuse to give an opinion that is customarily given by lawyers in comparable situations, if the opinion giver has the requisite expertise and in its professional judgment is able to render the opinion.[22] Gamesmanship has no place in the relationship between the lawyers representing the various parties to a business transaction.

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20 *See* Business Law Principles, *supra* note 7, at 832 ("opinions . . . are expressions of professional judgment regarding the legal matters addressed and not guarantees that a court will reach any particular result.") *See also Lucas v. Hamm*, 56 Cal. 2d 583, 591-92 (1961), *cert. denied*, 368 U.S. 987 (1962):

> The attorney is not liable for every mistake he may make in his practice; he is not, in the absence of an express agreement, an insurer of the soundness of his opinions or of the validity of an instrument he is engaged to draft; and he is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers . . . . These principles are equally applicable whether the plaintiff's claim is based on tort or breach of contract.

21 *See* Business Law Guidelines, *supra* note 7, at 878. This caveat is the often-cited "golden rule" of opinion practice.

22 *Id.* at §3.1. *See also* ARTHUR NORMAN FIELD, LEGAL OPINIONS IN BUSINESS TRANSACTIONS, § 1.9 PRACTISING LAW INSTITUTE (2nd ed. 2006) (hereinafter "Field"). TriBar 1998 Report, *supra* note 9, at 599. *But see Greyhound Leasing & Fin. Corp. v. Norwest Bank of Jamestown*, 854 F.2d 1122 (8th Cir. 1988).

2. Ethical Considerations

a. Maryland Rules

The subject of opinions in business transactions was not treated (or even mentioned) in the 1969 ABA Model Code of Professional Responsibility. The 1983 ABA Model Rules of Professional Conduct, adopted by the Court of Appeals of Maryland in substantially the same form as the ABA Model Rules[23] (the "Maryland Rules"), addressed written opinions in Rule 2.3 under the oblique title "Evaluation For Use By Third Persons." The Maryland Court of Appeals adopted revisions to the Maryland Rules, including Rule 2.3, which became effective July 1, 2005.[24]

The revised Rule 2.3 of the Maryland Rules provides as follows:

Rule 2.3 Evaluation For Use By Third Parties.

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

An "opinion letter" is included within the term "report of an evaluation" in Rule 2.3; the former term is the one customarily used by the legal community and those who request and rely on opinions.[25]

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23 MARYLAND RULES OF PROF'L. CONDUCT, *reprinted in* MD. CODE ANN., app., vol. 2 (2005).

24 In April 2000, the Maryland Court of Appeals appointed a committee to review and consider changes to the Maryland Rules, based on the recommendations of the Commission on Evaluation of the Rules of Professional Conduct, appointed by the American Bar Association. Revisions to Maryland Rules were adopted, effective as of July 1, 2005, substantially in the form set forth in, *Report of the Select Committee appointed by the Court of Appeals of Maryland to Study the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct, available at* www.mdarchives.state.md.us/msa/mdmanual/29ap/html/com/defunct/sethics.html.

25 MARYLAND RULES OF PROF'L CONDUCT R. 2.3 cmt [1]. (2005). It is important to note that Rule 2.3 does not address the issue of whether a lawyer owes a legal duty to third parties based on conduct covered by the rule. That question is "beyond the scope of the rules" according to comment [3] to Maryland Rule 2.3.

Every opinion giver should be familiar with the "Comment" following Rule 2.3 that is intended to aid lawyers in adhering to the Rule.[26] Rule 1.6 on confidentiality[27] and Rule 4.1 on truthfulness and misrepresentation are also important for a lawyer to consider in representing a party in a business transaction. The Committee also recommends that opinion givers be familiar with the relevant portions of the ABA/BNA Lawyers' Manual on Professional Conduct.[28] No attempt will be made here to condense or duplicate that material, which is invaluable to a lawyer who wishes to gain a full understanding of the subject.

b. Compatibility with Other Aspects of Lawyer-Client Relationship

The threshold inquiry for the opinion giver is to determine whether the giving of the required opinion would be compatible with the opinion giver's relationship with its own client (which is referred to in this Report as the "Company") as required by Maryland Rule 2.3.(a). For example, the opinion giver may have been retained by the company solely to obtain certain zoning variances for a project, and, consequently, the opinion giver might have inadequate knowledge to give the opinions typically required in a business transaction. On the other hand,

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[26] *See generally* MARYLAND RULES OF PROF'L. CONDUCT, "Scope" (instructing Maryland lawyers that the comments "do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules").

[27] Rule 1.6. of the Maryland Rules provides as follows:

> **Rule 1.6. Confidentiality of Information.**
>
> (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
>
> (4) to secure legal advice about the lawyer's compliance with these Rules, a court order or other law;
>
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge, civil claim, or disciplinary complaint against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
>
> (6) to comply with these Rules, a court order or other law.

[28] ABA/BNA Lawyers' Manual on Professional Conduct, 71:701-709, *available at* www.bna.com/products (containing editorial material with respect to legal opinions and evaluations).

the opinion giver may have represented the company for a number of years but may have limited representation to corporate law and may not have extensive knowledge of real estate and financing matters. In either case, the opinion giver may not be in a position, absent substantial additional inquiry, to render some or all of the required opinions due to the limited nature of the representation of the company.

Similarly, the opinion giver should consider all material aspects of the opinion giver's relationship with the company that might impair independence of judgment. If, in the lawyer's judgment, an objective opinion cannot be rendered, the lawyer should decline to render the opinion. As is discussed in Section C.3, "Preliminary Considerations – Procedures" *infra*, a lawyer should opine only as to matters within the opinion giver's area of legal knowledge and competence.

c. Client Consent

Assuming the opinion giver has the requisite knowledge of applicable law, and that representation of the company has been such that the opinion giver either has or can readily obtain adequate knowledge of the relevant facts, the opinion giver must next consider whether the company has consented (either explicitly or by implication) to disclosures about the client before delivering a legal opinion.[29] When the opinion giver knows or reasonably should know that delivery of a legal opinion is likely to affect the company's interests materially and adversely, the opinion giver should not deliver the opinion unless the company gives informed consent. The term "informed consent" is defined in Section 1.0.(f) of the Maryland Rules.

If the company has entered into a letter of intent or another transaction document that contains an express requirement for appropriate opinions from the company's lawyer, the opinion giver may assume that the company has acknowledged the need for and consented to, or at least impliedly authorized, the preparation of the required opinions.[30] In a business transaction where there is no transaction document that expressly requires that the Company's lawyer deliver a legal opinion, the opinion giver must determine the nature and extent of the Company consent that is required by the Maryland Rules. Regardless of whether a legal opinion is expressly required by the transaction documents, the opinion giver must be satisfied that the Company understands the purpose and scope of the opinion and has consented to its issuance. In many cases, where the opinion giver knows the client to be sophisticated and to understand and expect an opinion to be given, the consent may be implicit. The facts and circumstances as to whether an informed consent has been obtained must be evaluated in each case, particularly if the opinions are likely to materially and adversely affect the Company.

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[29] An opinion giver has a professional obligation to protect matters relating to the representation of the client. See MARYLAND RULES OF PROF'L. CONDUCT R. 1.6 (2005).

[30] Absent client instructions or special circumstances that limit that authority, an opinion giver is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. *See* MARYLAND RULES OF PROF'L. CONDUCT R. 1.6 cmt. [5](2005).

Any confidential matters to be disclosed in the opinion should be expressly pointed out to the Company, and the Company must give informed consent to the disclosures. It would appear that the Maryland Rules contemplate giving the Company the opportunity to impose limitations on the opinion giver's authority, if the Company so desires. Consequently, the opinion itself must be a balance between any limitations placed by the Company on its lawyer and a lawyer's overriding duty to be truthful.

d. Truthfulness in Statements to Others

The proposed opinion must next be reviewed in light of the requirements of Maryland Rule 4.1., the first of which is that the opinion cannot contain any false statement of material fact or law. Rule 4.1. of the Maryland Rules is set forth below:

Rule 4.1. Truthfulness in Statements to Others.

(a) In the course of representing a client, a lawyer shall not knowingly:

(1) make a false statement of material fact or law to a third person; or

(2) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

(b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

It is beyond dispute that an opinion giver cannot knowingly misstate a material fact or law in a legal opinion. Such misstatement may not only violate the Maryland Rules, but could also result in the imposition of civil or criminal liability on the opinion giver.[31] A troublesome ethical consideration in the rendering of an opinion also arises out of the second requirement of Rule 4.1: Rule 4.1.(a)(2) provides that a lawyer may not "fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."

In some circumstances, even a factually and legally correct opinion letter could mislead an opinion recipient. To illustrate, assume that the opinion giver is rendering a "no litigation" opinion that is limited to claims made in writing, which is a formulation often accepted by the opinion recipient.[32] Furthermore, assume that the opinion giver is aware that a third party has orally threatened litigation during a formal conference or face-to-face meeting at which a draft complaint was exhibited but not delivered. In such circumstances, it would be unethical for the opinion giver to render a "no litigation" opinion (even if qualified as to litigation overtly threatened in writing) without disclosure of the circumstances to the opinion recipient.[33]

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[31] *See infra* Section C.4, "Liability," for a more thorough discussion on this point.

[32] *See infra* Section D.12, "No Litigation" for a discussion of "no litigation" opinions.

[33] A similar example is included in the TriBar 1998 Report, *supra* note 9, at 602.

On the other hand, an opinion giver with knowledge of litigation threatened in the manner noted above need not disclose the existence of the threatened litigation if a "no litigation" opinion is not part of or included in the opinion giver's form of opinion and where no other legal opinion addresses the presence or absence of the facts underlying the threatened litigation. In this instance, the omission of the threatened litigation is not relevant to the opinions given and could not reasonably be expected to mislead the opinion recipient.[34] In this regard, the comments to Maryland Rule 4.1 provide that although a lawyer is required to be truthful when dealing with others on a client's behalf, a lawyer generally has no affirmative duty disclose facts that may be relevant to third parties.[35]

A related problem arises where the Company gives a certificate as to factual matters and the certificate is false or incomplete in certain material respects known to the opinion giver, but the opinion request allows the opinion giver to opine on such matters based *solely* upon the certificate of the Company. It would not be ethical to give the opinion knowing that it is incorrect in material respects due to the false or incomplete factual certificate of the Company upon which the opinion is based. Such an opinion might violate Rule 4.1(a)(2) because the opinion giver, by failing to disclose a material fact, might be assisting the Company in a fraudulent act. The Committee notes that an opinion given based upon a factual certificate known by the opinion giver to be false differs materially from an express agreement between an opinion giver and an opinion recipient that an opinion giver may assume as true a fact or principle of law known to both to be false or to be a fiction, such as where the opinion giver and opinion recipient agree to assume, for purposes of the opinions given, that one state's law is identical to the law of another state.[36] An opinion of this nature would not, in the Committee's view, violate Rule 4.1.

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[34] *Id.* at 603. *But cf. Roberts v. Ball, Hunt, Hart, Brown & Baerwitz*, 57 Cal. App. 3d 104 (1976).

[35] MARYLAND RULES OF PROF'L. CONDUCT R.401 cmt. [1](2005).

[36] *See infra* Section D.17, "Assumptions, Qualifications and Other Limitations," for a more extensive discussion of this point.

3. Procedures

The following discussion sets forth certain suggested procedures (the "Procedures") that may be followed by lawyers issuing opinions in business transactions. Included with these Procedures are "Suggested Guidelines" for assistance in implementing the Procedures.

a. Competence and Diligence

When it is apparent that a business transaction will require the delivery of a legal opinion, the opinion giver should inquire of the opinion recipient's lawyer as to specific matters to be addressed in the opinion. Frequently, the subject matter of an opinion, or a draft of the desired opinion, is expressly set forth in the transaction documents. If not, the opinion giver should commence negotiations early in the transaction as to the content of the desired opinion.[37]

At this early stage, the opinion giver should then consider two threshold questions. The first is "*Am I (or is my firm) competent to render an opinion on the legal matters involved in the transaction?*" The second question is "*What diligence must be performed to reach the legal conclusion(s) requested or required in the opinion?*" These questions should be considered at the outset to avoid a multitude of problems for the opinion giver, the client and the opinion recipient.

An opinion giver is competent to render an opinion if (i) the opinion giver is experienced in the area of law that is the subject of the opinion and (ii) the opinion giver is familiar with "customary opinion practice."

"The standard of care to which opinion givers are subject is determined by the question: What would a lawyer of reasonable skill and knowledge and similarly situated have done under the circumstances? An opinion giver thus has the responsibility to know customary practice – that is, to know the practice normally followed by lawyers who regularly give opinions and lawyers who regularly advise opinion recipients regarding opinions of the kind involved."[38]

If a lawyer asked to give an opinion is not sufficiently competent to prepare and render an opinion in the relevant area of law, or is not sufficiently familiar with the practice of rendering opinions in business transactions, then the lawyer should consider whether the task of preparing the opinion should be delegated to another lawyer. Failure to competently prepare an opinion letter may expose the opinion giver to liability for malpractice or misrepresentation.

If the opinion giver has determined that the competency requirement has been satisfied, then the opinion giver should next begin a consideration of what investigation or inquiry should be undertaken to confirm or support the opinion to be rendered. Obviously, the scope and depth of the inquiry will depend on the specific opinions requested. The opinion giver should review

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[37] Field, *supra* note 21, § 10.1; Business Law Guidelines, *supra* note 7, at 877.

[38] A.B.A. Comm. on Legal Opinions, Law Office Opinion Practices, 60 BUS. LAW. 327, 328 (November 2004) (hereinafter "Opinion Practices"); RESTATEMENT (SECOND) OF TORTS § 299A cmt. d. (1965); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 51 and 52 (2000).

the materials in Section D. of this Report for a detailed description of customary steps to be taken to render the most common opinions in business transactions.

b. Procedure: Client Consent

Third party legal opinions in business transactions are opinions addressed to a party not the client of the opinion giver. There must be client consent to giving an opinion to a third party after appropriate consultation reasonably sufficient to permit the client to appreciate the significance of the matter in question.[39] In most business transactions, client consent will be implicit because the opinion is typically referred to in the transaction documents. Where, however, the opinion giver is asked to give an opinion not customarily included in such third party legal opinions, or rendering the opinion would result in disclosure of client confidences, the opinion giver should not only consult with the Company about the consequences of delivering the opinion to a nonclient third party, but also obtain some form of approval from the Company prior to delivery of the opinion.[40]

c. Consideration of Conflicts

All material facts in the attorney-client relationship that might impair independence of judgment of the opinion giver must be considered. If the opinion giver believes it is unable to render an objective opinion, the opinion giver should decline to render the opinion. In other situations, the opinion giver may determine that it can maintain its independent judgment but that disclosure of a relationship or fact is appropriate (*e.g.*, if the Company is a corporation and a lawyer in the firm is a director of the Company, disclosure of such fact may be warranted).

d. Review by Second Lawyer

Except in the case of a solo practitioner, the lawyer should have the text of the proposed opinion reviewed by at least one other firm lawyer, perhaps one having no relationship to the transaction.[41] Many firms utilize either an "opinion committee" or a "second lawyer" review process.[42] There is no universally accepted review process by which firms double-check the content of an opinion. Having some review process, however, is important and should be employed by all firms (regardless of size) to ensure accuracy in the matters stated in an opinion and performance of appropriate diligence to support the conclusions reached in the opinion. An opinion review process is also important as a mechanism in consideration of a novel or difficult issue by a person not directly involved with the transaction. Furthermore, a review process is itself a level of diligence that an opinion recipient is entitled to expect in relying on an opinion as being accurate and not misleading. Finally, the review process provides a basis for a firm (including a solo practitioner) to establish consistent practices in issuing opinions.

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39 *See* definition and discussion of client consent in Section C.2, "Ethical Considerations," *supra*.

40 *See* Real Estate Guidelines, *supra* note 8, at 242.

41 *See* Fuld, *supra* note 15, at 918.

42 Opinion Practices, *supra* note 38, at 329-30.

A small firm or solo practitioner faces certain obvious difficulties in establishing, implementing and consistently using an opinion review system or procedure. Those obstacles, however, do not disqualify such lawyers from issuing legal opinions – it only means that the small firm or solo practitioner should establish procedures such as extensive use of checklists, formal or informal consultations with other lawyers, use of reference materials and additional proofreading. Some firms maintain a library of opinions they have given and received that may also serve as a helpful review resource to both the large and the small firm or solo practitioner.

In establishing a review procedure, an opinion giver should also consider when a closing opinion memorandum should be prepared to describe the diligence steps taken by that opinion giver to document or support the conclusions stated in the opinion. The preparation of an opinion memorandum serves a review function and may be particularly valuable when a difficult or questionable issue has been addressed in an opinion.

Suggested Guideline. Except for the solo practitioner, all opinion letters of the firm should be subjected to some type of review to evaluate the soundness of the conclusions reached, the support for such conclusions, and their consistency with similar positions taken by the firm in comparable situations.[43]

Suggested Guideline. The responsible partner should note the name of the reviewing partner(s) and the scope of the review in the file.[44]

e. Execution

The opinion giver should sign the opinion in accordance with the firm's procedures. Generally, the opinion should be signed in the firm's name or by an authorized individual lawyer on behalf of the firm.

f. "How do I know it?"

The opinion giver should always (i) ask the question "*How do I know it?*" with respect to each conclusion expressed in the opinion and (ii) be comfortable with the answer to that question. The subject of "due diligence" to be undertaken before issuing an opinion is discussed throughout Section D. of this Report. The Illustrative Opinions in Section E. of this Report include footnotes that reference sections of this Report describing steps to be taken to confirm or support each specific opinion stated.

Suggested Guideline. The opinion should set forth any qualifications or limitations to the opinion that are not implicit, such as absence of clear authority, contrary decisions, possible

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[43] *See generally* Field, *supra* note 22, § 12.

[44] *Id.*

contrary views of regulatory agencies, limitations as to persons who may rely upon the opinion, assumptions of facts, reliance on other counsel, and reliance on officer certificates.[45]

g. Checklists as Part of Due Diligence

Checklists for steps that should be taken before opinions are rendered are helpful techniques to establish the facts and law necessary for the opinion giver and to demonstrate that "due diligence" was undertaken in the preparation of the opinion. Because of the variety of matters that could conceivably be covered in an opinion, it is impossible to create a "one-size-fits-all" checklist. Checklists are a useful tool but not an infallible guide as to the level and nature of the diligence required in any subsequent transaction to assure a competent and complete inquiry.

h. No Opinion

It is inappropriate to give or to request opinions in the following situations and as to the following matters, among others:

(i) overly broad matters such as "compliance with all federal, state and local laws, rules and regulations";

(ii) financial status of the client;[46]

(iii) factual matters (with certain exceptions);[47] factual matters are not matters on which legal opinions are given, although there are occasions when lawyers are requested to do so; the lawyer should obtain appropriate certificates on which to rely as to factual matters;

(iv) priority of liens on real or personal property;

(v) title to real or personal property;

(vi) environmental status of the property;

(vii) compliance with zoning laws and regulations (with some exceptions);[48]

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45 *See infra* Section D.17, "Assumptions, Qualifications and Other Limitations."

46 Sometimes a lawyer is asked to include in an opinion the statement that there is no litigation pending that would have a material adverse effect on the financial status of his client. The Committee recommends against making such a statement. *See infra* Section D.12, "No Litigation."

47 One area in which it is customary for the lawyer to make representations or certifications as to factual matters is the subject of litigation pending against the client. *See infra* Section D.12, "No Litigation."

48 *See infra* Section D.14, "Zoning, Subdivision and Land Use Opinions and Environmental Matters."

(viii) opinions under the law of a state where the opinion giver is not admitted (with some exceptions, such as Delaware corporate law).[49]

i. Other Counsel

Other counsel should be retained in matters on which the opinion giver lacks sufficient expertise or qualification. This may result in the other lawyer rendering only a part of the opinion requested by the opinion recipient, or the entire task of issuing the requested opinion may be referred to the other lawyer. Sometimes the other lawyer is referred to as "special counsel." The term "special counsel" is used in this Report to indicate that the opinion giver is not the regular or general counsel for the client about which the opinion is requested and is opining as to certain limited matters on a limited or "one time" basis; the use of the term in this Report is not intended to suggest that the "special counsel" has some special expertise in the matters as to which the opinion is directed and, therefore, should be held to a higher standard.[50]

Suggested Guideline. The opinion giver may generally rely on opinions issued by other counsel if satisfied as to the competence of the other lawyer.[51]

Suggested Guideline. If an opinion giver is relying on an opinion of local counsel or special counsel, the opinion letter should identify the other opinion letter and should indicate the division of responsibility for matters covered by the opinions.[52] It is sufficient to state in the primary opinion that the opinion giver has relied upon the opinion of the other lawyer with respect to the topics covered therein. Such a statement indicates that the opinion giver has not investigated independently or otherwise verified the opinion of the other counsel.

Suggested Guideline. Since the phrase "special counsel" is used in this Report to denote a lawyer or firm with only a limited role in representing the client and not to mean that the opinion giver has some special expertise and has assumed a higher standard of care,[53] it may be desirable simply to state the limits of the opinion giver's role in the transaction or with the client. For example, some limiting language such as "we have been engaged by the Company solely for the purposes of this transaction" or "we have been engaged by the Company solely in regard to the Maryland law aspects of this transaction" may more accurately describe the relation of the client and the opinion giver.

Assuming that an opinion of special counsel is required, such opinion may be utilized in numerous ways. Two customary uses are as follows:

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49 *See infra* Section D.3.j, "Local Counsel."

50 *See* RESTATEMENT (SECOND) OF TORTS, §299A (1965).

51 TriBar 1998 Report, *supra* note 9, at 604.

52 Field, *supra* note 21, at §8.12.2.

53 *See* RESTATEMENT (SECOND) OF TORTS, § 299A, cmt. d (1965).

(i) Bifurcation. The opinion of special counsel may be delivered directly to the opinion recipient with no reference to the opinion of special counsel in the opinion of the Maryland opinion giver other than a recognition of such delivery. The following language is suggested as illustrative of such a reference in an opinion: *We refer you to the opinion of [Law Firm] of even date herewith which has been delivered to you with respect to the matters set forth therein. We express no opinion as to any of the matters set forth in that opinion.*

(ii) Pass-Through. The opinion giver may rely upon the opinion of special counsel in rendering its opinion with respect to certain matters. The following language is suggested for use in such an opinion:

Sample Opinion Language:

> *With respect to the matters set forth in paragraph __ of our opinion, we have relied exclusively upon the opinion of [Law Firm] of even date herewith, a copy of which is attached hereto.*

j. Local Counsel

In general, a Maryland lawyer should avoid giving opinions on the law of a foreign jurisdiction in which the lawyer is not admitted. Except for cases where a Maryland opinion giver has determined that it is competent to render an opinion as to a limited issue, the parties to a transaction should seek and obtain the opinion of local counsel on questions of foreign law.

There are certain questions of foreign law on which some Maryland lawyers render opinions. For example, some lawyers experienced in corporate matters are sufficiently familiar with Delaware corporation law to be competent to render an opinion about matters relating to the incorporation and good standing of a Delaware corporation and certain other Delaware corporate matters even though (i) their firm does not have an office in Delaware, and (ii) neither they nor others in their firm are licensed to practice law in Delaware. Another example is a Maryland lawyer issuing opinions relating to the law of a foreign jurisdiction under Articles 8 and 9 of the Uniform Commercial Code. Although there are state-to-state variations in Articles 8 and 9, an experienced business lawyer may decide that he or she is competent to render an opinion in this area because of the substantial uniformity of such laws. The Committee, however, recommends against this practice.[54] The test as to whether a Maryland opinion giver should give a foreign law opinion is whether the opinion giver is competent to render such an opinion because of the subject area of law relevant to the opinion and the legal knowledge, practice and experience of the opinion giver. Admission of the opinion giver or another lawyer in the opinion giver's firm

[54] *See infra* Section D.6, "Creation, Perfection and Priority of Liens on Personal Property."

to the bar of the foreign jurisdiction is not necessarily required.[55] The opinion giver must consider, however, the relevant state's rules and cases on the unauthorized practice of law.[56]

Assuming that an opinion of local counsel is required, such opinion may be utilized in numerous ways. Two customary uses are as follows:

(i) Bifurcation. The opinion of local counsel may be delivered directly to the opinion recipient, with no reference to the opinion of local counsel in the opinion of the Maryland opinion giver other than recognition of such delivery. The following language is suggested as illustrative of such a reference in an opinion: "*We refer you to the opinion of [Law Firm] of even date herewith which has been delivered to you with respect to matters of [Other Jurisdiction] law. We express no opinion as to any of the matters set forth in that opinion.*"

(ii) Pass-Through. The Maryland opinion giver may rely upon the opinion of local counsel in rendering its opinion with respect to certain matters. The following language is suggested for use in such an opinion: "*With respect to matters of [Other Jurisdiction] law, we have relied exclusively upon the opinion of [Law Firm] of even date herewith, a copy of which is attached hereto.*"

Suggested Guideline. The opinion giver may rely on opinions issued by local counsel with respect to the laws of a foreign jurisdiction if satisfied as to the competence of local counsel. If the use of a local counsel opinion is adopted, the Maryland opinion giver should take care to ensure that its opinion is no broader as to substantive matters than those substantive matters addressed in the opinion of local counsel upon which reliance is placed.

Reliance upon or reference to local counsel's opinion does not require the opinion giver to investigate independently or otherwise verify the opinion of local counsel. The opinion recipient should presume that such local counsel's opinion is the sole basis of knowledge of the opinion giver as to the substantive matters covered by the local counsel's opinion unless otherwise specifically stated. Any statement in an opinion that the opinion giver concurs in the opinion of local counsel, or that the opinion of local counsel is satisfactory in form and substance, implies a broader scope of responsibility of the opinion giver to conduct its own

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[55] *See* TriBar 1998 Report, *supra* note 9, at 638-39.

[56] *See, e.g., Birbrower, Montalbano, Condon & Frank v. The Superior Court*, 70 Cal. Rptr. 2d 304 (Cal. Sup. Ct. 1998) (holding that a New York law firm violated California's unauthorized practice of law statute through representation of a California corporation that was an affiliate of the firm's New York corporate client). The significance of the *Birbrower* decision has been narrowed in light of subsequent developments. *See, e.g.*, California Code of Civil Procedure § 1282.4(b).

The subject of unauthorized practice of law is outside the scope of this Report, and we do not purport to address the issue except for the need for a Maryland opinion giver to be competent to render the opinions requested. In considering whether to render an opinion regarding a matter of foreign law, Maryland practitioners should consider the issue of unauthorized practice under the applicable foreign law. *See, e.g., Birbrower, supra.* A lawyer preparing an opinion regarding foreign law is also encouraged to review the coverage provisions of the firm's professional liability insurance policy.

independent investigation or verification as to the matters covered by the opinion of local counsel. This is not recommended or appropriate in most circumstances.

k. Foreign Law

The issue of giving foreign law opinions is encountered frequently because many transactions involve parties in several states or even foreign countries. (In this context, the term "foreign" law means non-Maryland law.) For example, assume (i) a Maryland lawyer represents a Maryland manufacturer (its only business location), (ii) the manufacturer is incorporated in Delaware, (iii) the manufacturer wants to borrow money from a California lender, (iv) the loan is to be secured by personal property located in Maryland and a guarantor's parcel of real estate situated in Pennsylvania, and (v) the proposed transaction documents designate California as the choice of law jurisdiction governing the transaction. If the Maryland lawyer is requested to provide a customary borrower's opinion to the California lender, the Maryland lawyer is faced with numerous issues.

The Maryland opinion giver must consider whether it is competent to render opinions dealing with the corporate status of a Delaware corporation, whether the choice of law designation is binding under California law and will be respected by the courts in the other relevant states, and whether the transaction documents would be valid and enforceable under the laws of Maryland, Delaware, Pennsylvania, and/or California, or a combination thereof. The Maryland opinion giver should recognize immediately that the law to be covered in the required opinion should be considered with the California lender, the lender's counsel, the guarantor and the manufacturer. At least four possible options, as well as variations on these options, are available:

(i) If the size of the loan is small, the parties may agree to eliminate an opinion entirely; the cost of obtaining an opinion may outweigh the benefit to be derived.

(ii) The parties may agree to limit the matters to be addressed in the opinion; for example, the lender may be willing to forego an opinion regarding the validity and enforceability of the mortgage lien on the Pennsylvania real estate and rely exclusively on title insurance.

(iii) The opinion giver may agree to render opinions as to certain issues and seek a local counsel opinion on the remaining issues; for example, the opinion giver may determine that it can competently opine as to any issues involving Delaware corporate law and general Maryland law and seek an opinion from a reputable California opinion giver as to California law issues relating to the loan documentation.

(iv) The lender may permit the Maryland opinion giver to express no opinion as to the enforceability of the choice of law designation in the loan documents and assume that the state law applicable to each issue addressed in the opinion is identical to the substantive law of Maryland.

The decision on which course to pursue will probably be based primarily upon economic considerations and the importance of any specific issue to the lender.

The fourth alternative listed above may be an acceptable resolution and is frequently accepted in multi-state transactions. While assuming that applicable California law is identical to Maryland law is likely erroneous, the opinion recipient does receive certain benefits from such an opinion because, in the transaction example set forth above, litigation over collection of the loan could occur in Maryland and, therefore, the opinion that the loan documents are enforceable in Maryland if Maryland law is applied is valuable. Furthermore, permitting a Maryland lawyer, who is presumably knowledgeable about the manufacturer, to assume in the opinion that Maryland law, or law identical to Maryland law, would apply to the transaction forces the borrower's counsel to engage in a due diligence inquiry, which gives comfort to the lender.

As previously stated, a Maryland opinion giver should refrain from giving foreign law opinions except in limited circumstances where the opinion giver deems itself competent to render such opinions. Delaware corporation law, for example, is an area on which many non-Delaware corporate lawyers are competent to opine. In all other instances, resort should be made to a practicing lawyer in the foreign jurisdiction for a local law opinion, or a lawyer should seek permission from the opinion recipient to assume the laws of the foreign jurisdiction are identical to the laws of Maryland.[57]

l. Dating

The opinion should be dated when complete and all matters set forth therein have been consummated (normally, the date of closing).

[57] *See generally* Field, *supra* note 22, §7.0.

4. Liability

a. Strict Privity Rule

A lawyer issuing an opinion in Maryland should be mindful of the current state of the law with regard to professional liability to third persons. As a general rule, Maryland adheres to the strict privity rule in legal malpractice actions. Where the risk created by a lawyer's negligent conduct is solely one of economic loss, no tort duty may be imposed on the lawyer absent a contractual relationship or its equivalent, between the lawyer and the aggrieved party.[58]

b. Third Party Beneficiary Exception

The Court of Appeals of Maryland has adopted a single limited exception to the strict privity rule: the third party beneficiary exception. The seminal case by the Court of Appeals of Maryland discussing the duty owed by a lawyer to a nonclient third party is *Flaherty v. Weinberg*, 303 Md. 116 (1985). In *Flaherty*, the Court of Appeals traced the development of the strict privity rule from British common law through its application in cases in the United States Supreme Court and in various state courts.[59] The *Flaherty* Court also examined other approaches for determining the liability of lawyers to third parties that had been applied by other jurisdictions.[60] Ultimately, the *Flaherty* Court held that in legal malpractice cases, Maryland follows the strict privity rule, but with the "third party beneficiary" exception to that rule. The Court explained the exception as follows:

> Although this exception is "peculiarly applicable" to contract actions, *Clagett v. Dacy*, . . . [47 Md. App. 26, 28 (1980)], its scope has a broader range. In our view, the scope of duty concept in negligence actions may be analogized to the third party beneficiary concept in the context of attorney malpractice cases. Thus, to establish a duty owed by the attorney to the nonclient the latter must allege and prove that the intent of the client to benefit the nonclient was a direct purpose of the transaction or relationship. In this regard, the test for third party recovery is whether the intent to benefit actually existed, not whether there could have been intent to benefit the third party. If the third party alleges and proves the remaining elements of a negligence cause of action, he can recover against the attorney in negligence.[61]

Since *Flaherty*, Maryland courts have narrowly construed the third party beneficiary exception. The Court of Special Appeals, applying the *Flaherty* exception, held that a nonclient shareholder could not sue a lawyer who had been hired by the company to draft a shareholders'

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[58] *See Ferguson v. Cramer*, 349 Md. 760, 765 (1998) (citing *Noble v. Bruce*, 349 Md. 730, 738 (1998)).

[59] *Flaherty*, 303 Md. at 121-23.

[60] *Id*. at 123-26.

[61] *Id.* at 130-31. *See* Note, *Flaherty v. Weinberg*, 16 U. BALT. L. REV. 354 (1987) (discussing the case).

agreement.[62] The Court concluded that the interests of the company that hired the lawyer were distinctly different from those of the nonclient shareholder, and that it would be inconsistent with the Code of Professional Responsibility to conclude that the lawyer was working for the benefit of the competing interests.[63]

As discussed in "Ethical Considerations" *(supra* Section C.2), a lawyer may issue an opinion to a third party only after consultation with and consent from the opinion giver's client. While *Flaherty* and subsequent cases do not address the issue, it would seem to follow that in business transactions in which a lawyer renders an opinion to a person other than a client "the intent of the client to benefit the nonclient was a direct purpose of the transaction or relationship."[64] If so, a third party addressee of an opinion in a business transaction would probably be able to recover against the opinion giver if the addressee can establish that it reasonably relied on the opinion, that it suffered a loss proximately caused thereby, and that the opinion giver was negligent.[65]

c. Standard of Care

As to the standard of care required of a lawyer, the Court of Appeals held in *Watson v. Calvert Building and Loan Ass'n of Baltimore City*,[66] as follows:

> An attorney at law is liable to his client for the possession of a reasonable degree of skill in his profession as well as for the exercise of a like degree of diligence in the conduct of the transaction about which he is employed. If he fail[s] in either respect he will be responsible to his client for the loss that the latter may sustain therefrom. This responsibility of the attorney, although ordinarily enforced by an action of case for negligence in the discharge of his professional duties, in reality rests upon his employment by the client and is contractual in its nature. Before the attorney can be made liable, it must appear that the loss for which he is sought to be held

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62 *Goerlich v. Courtney Industries, Inc*., 84 Md. App. 660, 663-65 (1990).

63 *Id.* at 665. *See, e.g., Ferguson v. Cramer*, 349 Md. 760 (1998), and *Noble v. Bruce*, 349 Md. 730 (1998) (applying similar reasoning to deny relief to the named beneficiaries of testamentary wills who bring malpractice actions against a lawyer who drafted the document). *See also Walpert, Smullian & Blumenthal, P.A. v. Katz*, 361 Md. 645 (2000), in which the Court of Appeals held that the strict privity rule set forth in *Flaherty v. Weinberg*, is limited to attorney malpractice cases.

64 *Flaherty*, 303 Md. 130-31.

65 *See Kendall v. Rogers*, 181 Md. 606, 611-12 (1943) (quoting *Maryland Casualty Co. v. Price*, 231 F. 397, 401 (4th Cir. 1916), "In a suit against an attorney for negligence, the plaintiff must prove three things in order to recover: (1) The attorney's employment; (2) his neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the client."); *see also Berringer v. Steele*, 133 Md. App. 442, 473 (2000) (citing *Kendall*).

66 *Watson v. Calvert Bldg. & Loan of Baltimore City*, 91 Md. 25, 33 (1900).

> arose from his failure or neglect to discharge some duty that was fairly within the purview of his employment.

This standard of care does not mean that a lawyer warrants the accuracy of all legal conclusions contained in an opinion. After all, what a lawyer renders is merely the expression of opinion, based on facts that should be disclosed, in the exercise of that lawyer's professional judgment.[67]

Furthermore, as noted above, in order to recover in such an action, an opinion recipient must have reasonably relied on the opinion. For example, in *City National Bank of Detroit v. Rodgers & Morgenstern*,[68] the court denied a recovery, in part, because the plaintiff bank had its own legal counsel and copies of the applicable legal documents and was, therefore effectively charged with neglect in failing to determine whether certain partners had the authority to bind the borrowing partnership.

A lawyer should be entitled to presume, without stating the presumption in the opinion, that a statute enacted by an official legislative entity is constitutional and valid. A reported case challenging the particular statute's constitutionality, however, should be mentioned, as should any widespread concern by commentators with respect to constitutionality as such concern is reflected in articles or other commentaries published in bar journals, law reviews, or the legal periodicals that lawyers in Maryland practicing in the areas of law bearing on the opinion routinely consult ("Recognized Local Periodicals"). Similarly, a lawyer may presume, without stating the presumption in the opinion, that a rule or regulation, if issued by an official administrative entity or person pursuant to statutory authority granted to such entity or person, is enforceable and valid. A reported case challenging such enforceability, however, should be mentioned, and it is likewise recommended that a lawyer mention any widespread concern by commentators (as reflected in Recognized Legal Periodicals) as to the enforceability of the rule or regulation. The 1989 Report considered that a decision by a federal or state court would be deemed to be a "reported case" when: (a) the lawyer rendering the opinion in question had actual knowledge of such decision, or (b) if earlier such decision had been reported for a reasonable period of time in the applicable official reporter service ("Official Report"), including any decisions that are published in any advance sheet service published by such Official Report. Given the speed by which cases are now publicized after they are officially reported, the burden has probably been shifted to the opinion giver to demonstrate that it was not reasonable to know of a particular decision when that opinion was rendered.

The standard of care expected of an opinion giver in discovering cases in an Official Report is to undertake such reasonable research as is necessary to render an informed and

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67 *See City Nat'l Bank of Detroit v. Rodgers & Morgenstein*, 399 N.W.2d 505, 508 (Mich. App. 1986). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §95, cmt. c (2000) ("[u]nless otherwise required or permitted under the terms under which the evaluation is given, the lawyer's duty is to provide a fair and objective opinion").

68 *Id*. at 507-8.

intelligent opinion.[69] In conducting such research, the opinion giver should examine the reference works that lawyers in Maryland routinely consult. The opinion giver should not be held accountable for either unreported cases or rulings or those cases or filings that are reported only in private or specialized reports or publications unless the same are routinely available to, or consulted by, the majority of lawyers in Maryland practicing in areas of law bearing on the opinion.

d. Limiting Third Party Reliance

In order to control the risk associated with rendering an opinion, an opinion giver should provide that the opinion may be used only by the addressee and other specified persons. Parties that may desire to use the benefits of an opinion may include participants in a business transaction and assignees of a promissory note, which parties may not be identified to the opinion giver. The rights of participants in a loan transaction are derivative of the rights of the lead lender, and loan participants may not need to be specifically permitted to rely on an opinion. If requested, however, an opinion giver should not object to permitting loan participants to rely on the opinion. Rating agencies often request to be named as permitted beneficiaries of opinions concerning rated loans. While an argument may be raised that, because rating agencies do not have an ownership interest in the loan indebtedness, rating agencies should not be permitted beneficiaries of these legal opinions, they do have an interest in being assured that the loan documents are enforceable and that the other issues addressed by the opinion are in order. There is no strong substantive reason for not permitting rating agencies to rely on such opinions, and, as a practical matter, rated loans will not close without such language in the opinion being given. Similarly, lawyers for the opinion recipients may request to be named as permitted beneficiaries of opinions. They may be giving, either in writing or implicitly, opinions to their clients that all appropriate steps have been taken to permit the transaction to proceed, and they will be relying, to an extent, on the third party opinions from the other lawyers in the transaction to do so. Therefore, the Committee recommends that lawyers for the opinion recipients should also be named as permitted beneficiaries of opinions, if they so request.

There are also several practical reasons for limiting the persons who may rely upon the opinion. First, the opinion giver may be in a conflict situation with the secondary recipient. Second, portions of the opinion could differ depending on the status or identity of the secondary recipient and the addressee *(e.g.*, whether or not exempt from usury issues; whether or not accredited for security issues; whether or not qualified to do business in a particular jurisdiction). Third, the secondary recipient may have knowledge of a matter referred to (or not referred to) in an opinion that, if disclosed, would cause the opinion giver to change the opinion.

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[69] *See, e.g., Attorney Grievance Commission v. Cohen*, 361 Md. 161 (2000) (imposing indefinite suspension on a lawyer whose failure to apply fundamentals of bankruptcy law, and failure to understand the difference between Chapter 7 and Chapter 13, resulted in financial disaster for his clients). *See also Smith v. Lewis*, 118 Cal. Rptr. 621, 627 (1975) (including helpful discussion of baseline level of knowledge lawyers should have prior to advising or taking action on behalf of clients).

D. DISCUSSION OF LEGAL ISSUES IN OPINION LETTERS

1. Existence and Good Standing

Sample Opinion Language:

• *For a Corporation:*	*The Company is a corporation duly incorporated, validly existing and in good standing under the laws of the State of Maryland.*
• *For a Limited Liability Company:*	*The Company is a limited liability company duly formed, validly existing and in good standing under the laws of the State of Maryland.*
• *For a General Partnership:*	*The Company is a [general] partnership validly existing under the laws of the State of Maryland.*
• *For a Limited Partnership:*	*The Company is a limited partnership duly formed, validly existing and in good standing under the laws of the State of Maryland.*
• *For a Limited Liability Partnership:*	*The Company is a limited liability partnership duly formed, validly existing and in good standing under the laws of the State of Maryland.*
• *For a Limited Liability Limited Partnership:*	*The Company is a limited liability limited partnership duly formed, validly existing and in good standing under the laws of the State of Maryland.*
• *For a Real Estate Investment Trust:*	*The Company is a real estate investment trust duly formed, validly existing and in good standing under the laws of the State of Maryland.*
• *For a Business Trust*	*The Company is a business trust duly formed, validly existing and in good standing under the laws of the State of Maryland.*

Discussion:

a. Commentary on Purpose and Sample Language

The opinion as to existence and good standing of the Company as an entity created under Maryland law (i) assures the opinion recipient of the legal character of the entity, which has numerous implications for the liability of the Company's principals, (ii) confirms that the Company has not been dissolved or terminated or undergone any organic change that would affect a company's power or authority to consummate a transaction and (iii) helps to identify any legal disabilities affecting the Company as a result of the failure to comply with statutory requirements or other reasons. This opinion has four component parts. Each has a distinct purpose and involves a separate inquiry before the opinion can be given.

i. (A) "*The Company is a corporation duly incorporated . . . .*"

In order to form a Maryland corporation, articles of incorporation must be signed, acknowledged and filed with the State Department of Assessments and Taxation of Maryland (the "SDAT") and accepted for record by the SDAT.[70] "Except in a proceeding by the State for forfeiture of the corporation's charter, acceptance of articles [of incorporation] for record by the [SDAT] is conclusive evidence of the formation of a corporation."[71] In rendering an opinion that a company has been "duly incorporated," a lawyer may reasonably rely upon any of the following as evidence of the SDAT's acceptance of articles of incorporation: (i) the SDAT's receipt given upon the initial filing, indicating acceptance for record; (ii) a copy of the charter certified by the SDAT or printed from the SDAT's website; or (iii) the SDAT's certificate of status/good standing (discussed below). Note that a corporation must include in its name the words or abbreviations for "Company" (if it is not preceded by the word "and" or the symbol for the word "and"), "Corporation," "Incorporated" or "Limited."[72]

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[70] "When the Department accepts articles of incorporation for record, the proposed corporation becomes a body corporate . . . ." MD. CODE ANN., CORPS & ASS'NS §2-102(b)(1) (1999 & Supp. 2006).

[71] *Id.* §2-102(b)(2).

[72] *Id.* §1-502(a).

An extension of the "due incorporation" opinion is an opinion that the Company is "duly organized," which is a broader opinion encompassing additional actions required after a corporation has been incorporated. It is appropriate to provide a "due organization" opinion, if requested, where the subject corporation was recently organized, where the corporation was formed in connection with a specific transaction or in cases where the opinion giver has historically delivered the opinion since the inception of the corporation. Except in such limited circumstances, however, the opinion giver should not be requested to provide a due organization opinion.[73] Additionally, in connection with other opinions to be provided, such as an opinion as to enforceability of the transaction documents, an opinion giver is entitled to rely on a presumption of regularity, such that, in the absence of any evidence that an organizational meeting was not held, a corporation is deemed to have been duly organized even if the organization cannot be verified in the books and records of the corporation.[74]

In those limited circumstances in which a "due organization" opinion is appropriately requested (as discussed above), additional diligence will be required. In order for a corporation to be "duly organized" under Maryland law, there are certain organizational procedures required to be taken by the directors and stockholders of a corporation beyond those steps discussed above in connection with the formation of the entity. After the articles have been filed, the law mandates that "the directors shall hold an organization meeting of the board of directors, to adopt bylaws, elect officers and transact any other business which may come before the meeting."[75] Evidence of the organizational meeting at which these matters were addressed would provide the requisite diligence to issue a "duly organized" opinion. These actions can be taken at any time after the articles are filed and can be taken at a meeting or by informal action by unanimous written consent of the directors.[76] An opinion giver may issue the opinion even in the absence of evidence of an organizational meeting provided the opinion giver does not have actual knowledge of evidence that the organizational meeting did not take place. In the absence of any evidence as to whether an organizational meeting was actually held, the courts will presume that a proper meeting was held.[77] If no record of the organizational meeting exists and the opinion giver chooses not to rely on the presumption of regularity discussed in the preceding sentences, the stockholders should elect or ratify the election of directors (if not already done),

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73 *See* Glazer and FitzGibbon, *supra* note 11, § 6.4, and TriBar 1998 Report, *supra* note 11, at 643 (noting that recent trend to limit "due organization" opinions since the cost associated with additional diligence for the opinion are outweighed by the marginal benefit to the opinion recipient).

74 *See Freestate Land Corp. v. Bostetter*, 292 Md. 570, 578-81(1982); *see also* Business Law Guidelines, *supra* note 7, § 3.3 (stating the opinion giver may rely on the presumption of regularity assuming the opinion is not inconsistent with existing records).

75 MD. CODE ANN., CORPS & ASS'NS § 2-109(a)(1) (1999 & Supp. 2006).

76 *Id.* § 2-408(c).

77 *See Freestate Land Corp. v. Bostetter*, 292 Md. 570, 578-81 (1982); *but see Bostetter v. Freestate Land Corp.*, 48 Md. App. 142, 150-51 (1981) (indicating that if no organizational meeting is held, all actions taken by or on behalf of the entity may be void as lacking corporate authority).

and the directors should ratify the adoption of bylaws and election of officers, in each case either at a meeting or by written consent.[78]

(B) *"The Company is a limited liability company duly formed . . . ."*

The formation of a limited liability company ("LLC") under Maryland law is accomplished by executing and filing with the SDAT articles of organization in substantial compliance with statutory requirements.[79] A certified copy of the articles of organization from the SDAT is a reasonable basis for a legal opinion as to formation, absent knowledge of facts indicating a failure to meet statutory requirements. Note that an LLC must include in its name the words "limited liability company," "L.L.C.," "LLC," "L.C.," or "LC."[80]

The SDAT gives evidence of its "acceptance" of articles of organization in several ways, any of which is acceptable for determining formation: (i) a receipt given upon filing of the articles; (ii) a copy of the filed certificate which is certified by the SDAT or printed from the SDAT's website or (iii) a certificate of status/good standing.[81]

(C) *"The Company is a (general) partnership . . . ."*

A general partnership may be formed under Maryland law by many means: by oral or written agreement or by any acts or circumstances sufficient to establish an intention to form a general partnership.[82] There are no filing or registration procedures required in forming a

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78 An opinion that a corporation is "duly organized" does not include an opinion that the corporate stock was properly issued or fully paid. If either of these opinions is required, the opinion recipient should specifically request an opinion on these points.

79 MD. CODE ANN., CORPS & ASS'NS § 4A-204 (1999 & Supp. 2006).

80 *Id*. § 1-502(b).

81 With respect to LLCs, limited partnerships, limited liability partnerships, limited liability limited partnerships, real estate investment trusts and business trusts formed under Maryland law, there are no essential organizational steps required on behalf of the entity other than those steps discussed above that evidence the formation of the entity. There are no formal steps necessary to form a general partnership. Unlike the statute governing corporations, none of the statutes governing these entities provide for an organizational meeting or actions to be taken at such a meeting or otherwise. Thus, once the issue of formation has been reviewed, no separate investigation or evidence need or can be obtained by the opinion giver. For this reason, an opinion on the due organization of these entities should not be requested or given since it implies that additional steps need to be, and have been, taken. As a technical matter, the statement "duly formed" is redundant of the opinion that the company is an LLC, general partnership, limited partnership, limited liability partnership, limited liability limited partnership, real estate investment trust or business trust. For this reason, the Committee considered deleting the reference to "due formation" from these opinions. In light of customary practice, however, and the fact that the Committee did not believe that the additional phrasing created ambiguity, the language was retained.

82 *Madison Nat'l Bank v. Newrath*, 261 Md. 321 (1971).

general partnership.[83] As a result, the lawyer must inquire of the persons or entities comprising the partnership to determine whether reasonable evidence of the formation of the partnership exists. If such evidence is not written, the Committee recommends that the opinion giver obtain a written certificate signed by each of the partners confirming the formation and continued existence of the company as a Maryland general partnership. Note that a "general partnership" is referred to as simply a "partnership" under the Maryland Revised Uniform Partnership Act, Title 9A of the Corporations and Associations Article of the Maryland Code ("MRUPA").[84] Joint ventures are generally understood to be a type of general partnership.[85]

(D) *"The Company is a limited partnership duly formed . . . ."*

The formation of a limited partnership under Maryland law is accomplished by executing and filing with the SDAT a certificate of limited partnership in substantial compliance with statutory requirements.[86] The SDAT is prohibited from accepting any certificate that does not meet statutory requirements and is required to certify that a certificate of limited partnership has been accepted for record.[87] Although no statute raises a certificate from the SDAT to the status of "conclusive evidence" of formation, a certificate from the SDAT is a reasonable basis for a legal opinion as to formation, absent actual knowledge of facts indicating a failure to meet statutory requirements.[88] Note that a limited partnership must include in its name the words or letters "limited partnership," "L.P.," or "LP."[89]

The SDAT gives evidence of its "acceptance" of certificates of limited partnership in several ways, any of which is acceptable for determining formation: (a) a receipt given upon filing of the certificate; (b) a copy of the filed certificate which is certified by the SDAT or printed from the SDAT's website or (c) a certificate of status/good standing (discussed below).

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83 MD. CODE ANN., CORPS & ASS'NS § 9A-303 (1999 & Supp. 2006) allows for the filing of a "Statement of Partnership Authority" with SDAT which lists individuals who are authorized to execute instruments transferring real property in the name of the partnership and may state the authority or limitations on the authority of some or all of the partners to enter into transactions on behalf of the partnership in other matters; such statement is not an organizational document, however.

84 MD. CODE ANN., CORPS & ASS'NS § 9A-101(i) (1999 & Supp. 2006).

85 *See Herrin v. Offutt*, 266 Md. 593, 596-97 (1972). *See also Madison Nat'l Bank v. Newrath*, 261 Md. at 327.

86 MD. CODE ANN., CORPS & ASS'NS § 10-201 (1999 & Supp. 2006). *See* discussion in note 12.

87 *Id.* § 10-206(a) and (b).

88 This is true with respect to certificates from the SDAT concerning other types of entities as well.

89 *Id.* § 1-502(d).

(E) *"The Company is a limited liability partnership duly formed . . .."*

A limited liability partnership ("LLP") is a general partnership that has elected to limit the liability of its partners by filing a certificate of limited liability partnership with the SDAT.[90] While the filing of the certificate is necessary to establish the partnership's status as an LLP, the filing of the certificate does not in and of itself result in or evidence the formation of the enterprise as a partnership, which, in order to constitute a partnership, must be formed in the same way that any general partnership is formed. Therefore, just as in the case of the general partnership, the opinion giver must inquire of the persons or entities comprising the company to determine whether there is reasonable evidence of the formation of the partnership. If that evidence is not written, it is recommended that the lawyer obtain a written certificate signed by each of the partners confirming the formation and continued existence of the company as a Maryland general partnership. The lawyer also should obtain a certificate from the SDAT confirming that the partnership has elected to be and continues to qualify as an LLP. Note that an LLP must include in its name the words or letters "limited liability partnership," "L.L.P.," or "LLP."[91]

(F) *"The Company is a limited liability limited partnership duly formed . . .."*

A limited liability limited partnership ("LLLP") is a limited partnership that has elected to limit the liability of its partners by making the same election with the SDAT that may be made by a general partnership that desires to be an LLP.[92] The election may be made by the limited partnership either in its originally-filed certificate of limited partnership or in an amendment to its certificate of limited partnership. Therefore, the process of forming the LLLP is the same process followed in forming a limited partnership, with the addition of the requirement that the LLLP's certificate of limited partnership must contain or must be amended to contain the same information required by Section 9A-1001(a) of MRUPA.[93] Note that an LLLP must include in its name the words or letters "limited liability limited partnership," "L.L.L.P.," or "LLLP."[94]

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90 *Id.* § 9A-1001; s*ee supra* note 12

91 *Id.* § 1-502(c).

92 *Id.* § 10-805. *See* discussion in note 12.

93 *Id.*

94 *Id.* § 1-502(e).

(G) "*The Company is a real estate investment trust duly formed . . .*"

A real estate investment trust ("REIT") must file with the SDAT its declaration of trust, which must contain certain statutorily required items.[95] In rendering an opinion on the formation of a Maryland REIT, a lawyer may reasonably rely upon any of the following as evidence of the SDAT's acceptance of the declaration of trust: (i) the SDAT's receipt given upon the initial filing, indicating acceptance for record; (ii) a copy of the declaration of trust certified by the SDAT or printed from the SDAT's website or (iii) the SDAT's certificate of status/good standing.

(H) "*The Company is a business trust duly formed . . .*"

The formation of a business trust under Maryland law is accomplished by executing and filing with the SDAT a certificate of trust in substantial compliance with statutory requirements.[96] A certified copy of the certificate of trust from the SDAT is a reasonable basis for a legal opinion as to formation, absent actual knowledge of facts indicating a failure to meet statutory requirements.

The SDAT gives evidence of its "acceptance" of a certificate of trust in several ways, any of which is acceptable for determining formation: (i) a receipt given upon filing of the certificate; (ii) a copy of the filed certificate that is certified by the SDAT or printed from the SDAT's website or (iii) a certificate of status/good standing.

ii. (A) "*The Company is a corporation . . . validly existing . . . .*"

The test of whether a corporation is "validly existing" as distinguished from being in "good standing" is whether it has not been voluntarily or involuntarily dissolved or whether any stated term limiting the duration of the corporation has expired. Both forms of dissolution are evidenced in the corporate records of the SDAT, either by articles of dissolution or by a certification to the SDAT from the clerk of any court entering an order of involuntary dissolution.[97] Any time limit on a corporation's existence will be disclosed in its charter.

To assure that a corporation is "validly existing," the lawyer should check all filings made with the SDAT with respect to the corporation to confirm that it has not been dissolved and that its term of existence, if limited, has not expired.

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95 *Id.* § 8-201. *See* discussion in note 12.

96 *Id.* § 12-204(a)(2). *See* discussion in note 12.

97 As to voluntary dissolution, *see* MD. CODE ANN., CORPS & ASS'NS § 3-401 (1999 & Supp. 2006) *et seq.*; as to involuntary dissolution, *see id.* § 3-413 *et seq*. Technically speaking, a corporation does not cease to exist immediately upon dissolution. Its powers, however, are circumscribed to such an extent that it is not "validly existing" as a normal non-liquidating corporation.

(B) *"The Company is a limited liability company . . . validly existing . . .."*

An LLC may cease to be validly existing at the time or on the happening of the events specified in its articles of organization or operating agreement, at the time specified by the unanimous consent of its members, at the time of the entry of a decree of judicial dissolution or if the LLC ceases to have any members for a specified period of time.[98]

As in the case of a partnership, dissolution of an LLC can occur due to the existence of facts or states of mind that may not be reflected in any central registry such as that maintained by the SDAT for corporations.

Therefore, in giving an opinion that an LLC is "validly existing," the opinion giver should review the company's articles of organization and operating agreement and should make a reasonable factual inquiry of the members and those persons managing the company. A conservative procedure would be to (a) obtain a certificate signed by all the members confirming the present existence of the LLC and intention to continue its existence and (b) certifying that no decree of judicial dissolution has been entered and that no action regarding dissolution is pending.

(C) *"The Company is a [general] partnership . . . validly existing . . ."*

A general partnership may fail to be "validly existing" as a result of the expiration of its term of existence, a result of any of several causes of dissolution stated in the partnership agreement or by law, or simply by the choice of any partner. In addition, a court may decree a dissolution under certain circumstances.[99] Unlike the case of a corporation, dissolution of a general partnership can occur due to the existence of facts or states of mind that may not be reflected in any central registry such as that maintained by the SDAT for corporations.

Therefore, in giving an opinion that a general partnership is "validly existing," the opinion giver should make a reasonable factual inquiry of the partners, similar to that required to conclude that the partnership was initially formed. A conservative procedure would be (a) to obtain a certificate signed by all the partners (i) confirming the present existence of the partnership and intention to continue its existence and (ii) certifying that no decree of judicial dissolution has been entered and that no actions regarding dissolution is pending. It would not be possible to rely on a judgment search to assure that a decree of judicial dissolution has not been entered because any court with jurisdiction over the partnership or a partner could issue such a decree.[100]

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98 *Id.* § 4A-902.

99 *Id.* § 9A-802 ("Events Causing Dissolution and Winding Up of Partnership Business").

100 *Id.* §9-603.

(D) *"The Company is a limited partnership . . . validly existing . . . "*

A limited partnership may be dissolved and not be "validly existing" as a result of any of several events or circumstances set forth in the Maryland Revised Uniform Limited Partnership Act ("MRULPA"), including the occurrence of an event specified in the limited partnership certificate or the entry of a judicial decree.[101] As distinguished from the case of a general partnership, there is a filing process that is intended to give notice of dissolution of a limited partnership.[102] Nonetheless, the lawyer giving an opinion as to the valid existence of a limited partnership should still make a reasonable factual inquiry to determine whether any circumstances exist that would trigger dissolution under (a) the limited partnership agreement, (b) the certificate of limited partnership, or (c) the events of dissolution set forth in Section 10-801 of MRULPA, including an "event of withdrawal" of a general partner.[103] This inquiry should include a review of all amendments and other filings with the SDAT under the limited partnership's name.

Because the events of dissolution for a limited partnership primarily involve determining the occurrence or absence of certain facts, a certificate from a general partner is suggested in rendering the opinion.

(E) *"The Company is a limited liability partnership . . . validly existing . . ."*

An LLP will fail to exist as a partnership for the same reasons that a general partnership will fail to exist as a partnership. Therefore, the lawyer should make the same factual inquiry that the lawyer would make in the case of any general partnership. In addition, a partnership that was formed as or subsequently became an LLP may fail to exist as an LLP, even though it may continue to exist as a partnership, if it withdraws its registration with the SDAT as an LLP. Therefore, in addition to the inquiry that the lawyer should make as to partnership status in general, the lawyer should review the SDAT website and obtain a certificate of status from the SDAT confirming that the partnership is an LLP.

(F) *"The Company is a limited liability limited partnership . . .validly existing . . ."*

An LLLP will fail to exist as a limited partnership for the same reasons that any limited partnership will fail to exist as a limited partnership. Therefore, the lawyer should make the same factual inquiry that the lawyer would make in the case of any limited partnership. In addition, a limited partnership that was formed as or subsequently became an LLLP may fail to exist as an LLLP, even though it may continue to exist as a limited partnership, if it withdraws its

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101 *Id.* §§ 10-801 and 10-802.

102 *Id.* § 10-203. A certificate of cancellation is required to be filed with the SDAT upon the dissolution of a limited partnership and the commencement of winding up.

103 *Id.* §§ 10-402 and 10-801.

registration with the SDAT as an LLLP. Therefore, in addition to the inquiry that the lawyer should make as to limited partnership status in general, the lawyer should review the SDAT website and obtain a certificate of status from the SDAT to assure that limited liability limited partnership status has not been withdrawn.

(G) *"The Company is a real estate investment trust . . . validly existing . . ."*

As with a corporation, the test of whether a REIT is "validly existing" as distinguished from being in "good standing" is whether it has not been terminated by voluntary dissolution or involuntarily dissolved in a proceeding initiated by the Attorney General[104] or whether any stated term limiting the duration of the REIT has expired. Both forms of dissolution are evidenced in the records of the SDAT, either by the notification provided by the company with regard to the effective date of the voluntary liquidation or by a certification to the SDAT from the clerk of any court entering an order of involuntary dissolution.[105] Any time limit on existence will be disclosed in its declaration of trust.

(H) *"The Company is a business trust . . . validly existing . . ."*

Similarly, a business trust will no longer be "validly existing" if it is terminated by voluntary dissolution or involuntarily dissolved in a proceeding initiated by the Attorney General or whether any stated term limiting the duration of the business trust has expired.[106] Both forms of dissolution are evidenced in the records of the SDAT, either by a certificate of cancellation or by a certification to the SDAT from the clerk of any court entering an order of involuntary dissolution.[107] Any time limit on existence will be disclosed in the trust document.

iii. (A) *"The Company is a corporation . . . in good standing . . ."*

The "good standing" of a corporation in Maryland is viewed as a measure of its status in relation to the State of Maryland. For a corporation to be "in good standing" or "in good standing with the State of Maryland," it must "be in good standing with the SDAT," which requires that a corporation be in compliance with the regulations set forth in the Code of Maryland Regulations ("COMAR"), Section 18.04.03.01 ('Criteria to Maintain Good Standing

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104 *Id.* § 8-502.

105 *Id.* (referring to § 3-501 *et seq*. with regard to involuntary dissolution resulting from forfeiture).

106 *Id.* §§ 12-202 and 12-801.

107 *Id.*

with the Department').[108] That section provides, with respect to Maryland corporations, as follows:

> A. In order to be in good standing with the [SDAT, the following] requirements . . . shall be met . .
>
> (1) Articles of Incorporation shall be on file with the Department.
>
> (2) The name and address of a resident agent for the corporation shall be on file with the Department.
>
> (3) The corporation shall have filed all annual reports required by Tax-Property Article, Section 11-101, Annotated Code of Maryland.
>
> (4) The corporation shall have paid all penalties imposed under Tax-Property Article, Section 14-704, Annotated Code of Maryland.
>
> (5) The charter of the corporation may not be forfeited.
>
> (6) The corporation may not be dissolved.
>
> (7) The corporation may not have merged out of existence or consolidated.

Most frequently, the reason a corporation is not in "good standing" is due to the failure to file its annual personal property report with the SDAT by April 15th of each year.[109] Shortly after April 15th, the Department determines that a corporation that has not filed its personal property return or filed an extension will no longer be in good standing. Once this occurs, and prior to the corporation's charter being forfeited, as discussed below, the corporation may file its personal property return and pay the requisite filing fee to again be in good standing. At some point, however, after the filing of the late return, the corporation will be assessed penalties under Section 14-704 of the Tax-Property Article of the Annotated Code of Maryland. Once imposed, this penalty must be paid or the corporation will again cease to be in good standing. During the interim period after the filing of a late return and prior to assessment of a penalty, it is appropriate to issue a good standing opinion for a corporation, assuming that the corporation meets all of the other requirements for good standing. Immediately after September 30th of each year, the SDAT and the State Comptroller are required to list every Maryland corporation that has not filed its annual personal property report or paid any State taxes owed, after which the SDAT publishes a proclamation declaring that the charters of the listed

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[108] A taxpayer that is current with respect to all taxes due to the State of Maryland may be able to obtain a letter that states that it has a "good standing certificate" issued by the Maryland State Comptroller. The use of this phrase in that context, however, has a different meaning from that relating to an entity that has met the requirements set forth above and is eligible to do business in Maryland.

[109] MD. CODE ANN., TAX-PROP. §§ 11-101, 11-102 (1999 & Supp. 2006).

corporations are repealed, annulled and forfeited, and the powers conferred by law on the corporations are inoperative, null and void as of the date of the first publication of the proclamation, without proceedings of any kind either at law or in equity.[110]

The other basis for forfeiture of a Maryland corporation's charter is a judicial proceeding by the Attorney General, upon the authorization of the SDAT, alleging that a corporation has "abused, misused, or failed to use its powers and franchises in a manner which would make proper the forfeiture of its charter."[111] This is a remote possibility, but it would be reflected on the status/good standing certificate issued by the SDAT.

The SDAT will issue a status certificate, upon request and payment of a fee, stating that a Maryland corporation is in good standing (or, if not in good standing, such other status).[112] A status/good standing certificate obtained within the 30 days preceding the date of the opinion, indicating that the corporation is in good standing, is a reasonable basis for rendering the "good standing" opinion unless the opinion giver has actual knowledge of any circumstance inconsistent with such status. In the weeks immediately following April 15th of each year, because of the normal administrative delay at the SDAT in updating its records as to corporate filings, the opinion giver may consider obtaining a more recent status/good standing certificate, reviewing the SDAT's website to confirm that all personal property returns have been filed or that an extension has been filed, or ask the corporation's officers for evidence that the corporation has filed its personal property report and paid its taxes.

(B) (D) (E) and (F) *"The Company is a [limited liability company] [limited partnership] [limited liability partnership] [limited liability limited partnership]. . . in good standing . . . ."*

As with Maryland corporations, the SDAT has established the following criteria for determining whether a Maryland limited liability company, limited partnership, limited liability partnership or limited liability limited partnership is in good standing under Maryland law in COMAR 18.04.03.01 (note that although COMAR 18.04.03.01 does not mention LLLPs by name, an LLLP is simply a limited partnership that has registered with the SDAT as an LLLP):[113]

> (1) A certificate of limited partnership, a certificate of limited liability partnership, or articles of organization, respectively, shall be on file with the SDAT.

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110 MD. CODE ANN., CORPS & ASS'NS § 3-503(d) (1999 & Supp. 2006).

111 *Id.* § 3-513(a).

112 In 1987, the statutory fee schedule for SDAT certificates was amended and the term "certificate of good standing" was changed to "certificate of status." Ch. 62, Laws of Maryland 1987; *see* MD. CODE ANN., CORPS & ASS'NS § 1-203(5) (1999 & Supp. 2006). On June 30, 1987, the SDAT announced that a request for a certificate of good standing would result in issuance of a certificate of status even if the entity is not in good standing.

113 *Id.* § 10-805.

(2) The name and address of a resident agent shall be on file with the SDAT.

(3) The entity shall have filed all annual reports required by Tax Property Article, Section 11-101, Annotated Code of Maryland.

(4) The entity shall have paid all late filing penalties imposed under Tax-Property Article, Section 14-704, Annotated Code of Maryland.

(5) The entity's right to use its name and do business in Maryland may not have been forfeited.

(6) The entity may not have filed a certificate of cancellation, a withdrawal notice or articles of cancellation, respectively.

(7) The entity may not have merged out of existence.[114]

As in the case of a corporation, a lawyer giving a "good standing" opinion with respect to a limited partnership may reasonably rely upon the certificate issued by the SDAT less than 30 days prior to the date of the opinion, provided that the lawyer has no actual knowledge of facts to the contrary and provided that the limited partnership, if formed before July 1, 1982, has filed an election to be governed by MRULPA in the original or an amended certificate of limited partnership.[115] A limited partnership that has not filed an election may be in "good standing" under SDAT's regulations, but it may not convey or accept title to real or personal property or maintain a suit in State of Maryland courts.[116] Because many commercial transactions involve the conveyance of title to real and/or personal property, whether in fee or as security, the RULPA election by limited partnerships formed before July 1, 1982, should be considered an essential component to the "good standing" opinion with respect to a limited partnership.

(C) "*The Company is a [general] partnership . . .*"

Because the "good standing" status is understood to refer to an approving view by the State (as it does in the case of corporations and limited partnerships), it has no application to general partnerships. There are no equivalent filing requirements applicable to general partnerships,[117] and the State has no direct way of knowing when such partnerships are formed, dissolved, or terminated. The State does not issue any sort of status or good standing certificate for general partnerships.

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114 COMAR 18.04.03.01 does not list this item as a requirement for good standing for an LLP.

115 MD. CODE ANN., CORPS & ASS'NS § 10-1104(4) (1999 & Supp. 2006).

116 *Id.* § 10-1105(b)(2).

117 *See id.* § 9A-202.

The Committee recommends that an opinion given in connection with a general partnership not include the phrase "in good standing," and, therefore, the form of opinion provided above does not include the phrase.

(G) and (H) *"The Company is a real estate investment [business] trust . . . in good standing . . ."*

The SDAT has not set official criteria for determining whether a REIT or business trust is in "good standing" under Maryland law. In practice, however, the SDAT applies the same criteria for good standing to REITs and business trusts as it does for corporations. An opinion giver may reasonably provide a "good standing" opinion provided that the REIT or business trust satisfies the requirements for a corporation to be in good standing discussed above and provided in COMAR Section 18.04.03.01.

b. Due Diligence

The following checklists are offered to assist the opinion giver in preparing to render an opinion as to the existence, due incorporation or formation, and good standing of an entity under Maryland law.

- For a corporation —

  i. Obtain a short form status/good standing certificate from the SDAT.

  ii. Review the SDAT's website to confirm the list of documents affecting the corporation's charter that have not been superseded and (a) print copies of such documents directly from the SDAT's Website, (b) rely on existing copies of such documents that have previously been certified or have the SDAT's stamped filing notice or (c) obtain from the SDAT certified copies of such documents; also, have an officer of the corporation certify as to the last document filed affecting the charter of the corporation.

  iii. Review all filed corporate documents for (a) a time limit on the corporation's existence and (b) articles of dissolution, merger, or transfer.

  iv. Consider whether the corporation has designated the name and address of a registered agent on the records of the SDAT.

  v. Be sure to have a status/good standing certificate not more than 30 days prior to the date of the opinion. In the weeks following April 15th, consider reviewing SDAT's website or requesting evidence from the corporation's officers that the corporation has filed its annual personal property report and paid any State taxes owed.

  vi. Obtain a certificate from an officer of the corporation stating that a judicial decree of dissolution has not been entered with respect to the Company.

vii. Consider whether the entity's name complies with Section 1-502(a) or (f) and the Articles comply with Section 2-104 of the Corporations and Associations Article of the Maryland Code. See also Section 2-102(b)(2).

viii. If a "duly organized" opinion is to be rendered, confirm that an initial meeting of the corporation's board of directors was held at which by-laws were adopted and officers were elected or determine that there is no evidence that such a meeting was not held.

- For an LLC —

  i. Obtain a current short form status/good standing certificate

  ii. Review the SDAT's website to confirm the Articles of Organization of the Company have not been superseded and (a) print copies of such documents directly from SDAT's website, (b) rely on existing copies of such documents that have been previously certified or have SDAT's stamped filing notice, or (c) obtain from the SDAT certified copies of such documents; also have members or managers of the company certify as to the last document filed affecting the Articles of Organization of the Company and whether any circumstances exist that would trigger a dissolution.

  iii. Consider whether SDAT filings include a designation of a resident agent and the resident agent's address.

  iv. Obtain a certificate from a member or manager stating that a judicial decree of dissolution has not been entered with respect to the Company.

  v. Consider whether the entity's name complies with Section 1-502(b) and the Articles comply with Section 2-102(b)(2) of the Corporations and Associations Article of the Maryland Code.

- For a general partnership —

  i. 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.

  ii. 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 MRUPA. 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.

- For an LLP —

  Follow the same procedure as outlined for a general partnership and, in addition, obtain certification from the SDAT that the partnership has registered as an LLP and has not withdrawn that registration. Consider whether the LLP's name complies with Section 1-502(c) of the Corporations and Associations Article of the Maryland Code.

- For a limited partnership —

  i. Obtain a current short form status/good standing certificate from the SDAT.

  ii. Review the SDAT's website to confirm the list of documents affecting the limited partnership's certificate of limited partnership, which have not been superseded, and obtain from the SDAT certified copies of such documents; also, have a general partner of the limited partnership certify as to the last document filed affecting the certificate of limited partnership.

  iii. Make a reasonable factual inquiry (perhaps obtain a certificate of one or more of the general partners similar to the one described above with respect to general partnerships) to determine whether any circumstances exist that would trigger a dissolution (a) under the certificate or agreement of limited partnership or (b) under the RULPA. Review SDAT filings for a certificate of dissolution or cancellation.

  iv. Consider whether SDAT filings include a designation of a resident agent and the resident agent's address and, if the limited partnership was formed before July 1, 1982, an election to be governed by the RULPA.

  v. Consider whether the LP's name complies with Section 1-502(d) of the Corporations and Associations Article of the Maryland Code.

- For an LLLP —

  Follow the same procedure as outlined for a limited partnership and, in addition, obtain certification from the SDAT that the partnership has registered as an LLP and has not withdrawn that registration. Consider whether the LLLP's name complies with Section 1-502(e) of the Corporations and Associations Article of the Maryland Code.

- For a REIT —

  Follow the same procedure as outlined for a corporation, but search for documents affecting the declaration of trust filed with the SDAT.

- For a business trust —

  Follow the same procedure as outlined for a corporation, but search for documents affecting the certificate of trust. In addition, obtain a copy of the current declaration of trust or other organizational document certified by an officer of the trust.

2. Qualification to Transact Business

Sample Opinion Language (In Maryland):

The Company is qualified [registered] to transact business as a foreign corporation [limited partnership] [limited liability partnership] [limited liability limited partnership] [limited liability company] [REIT] [business trust] in the State of Maryland.

Discussion:

a. Commentary on Purpose and Sample Language

The purpose of the opinion as to the company's qualification or registration to transact business in Maryland is to provide assurance to the addressee of the opinion that the company is qualified to transact business in Maryland because of the adverse consequences of a failure to qualify or register when required to do so.[118]

i. Qualification to Transact Business in Maryland

Before doing any *intrastate* business in the State of Maryland, a foreign corporation is required to "qualify" to do intrastate business with the SDAT.[119] Before doing any *interstate* or foreign business in the State of Maryland, a foreign corporation is required to "register" with the SDAT (unless it is already qualified to do business).[120] A foreign corporation that owns income-producing real property or tangible personal property in the State of Maryland is also required to register with the SDAT to do interstate business.[121]

An opinion that an entity organized or created under the laws of a jurisdiction other than the State of Maryland is qualified or registered to transact business in the State of Maryland means that the entity has received governmental authorization to do business in the State of Maryland, which authorization has not been terminated or, if terminated, has been revived. Foreign limited liability companies, foreign LLPs and foreign limited partnerships are required to register with the SDAT to transact interstate, intrastate or foreign business in the State of Maryland.[122]

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118 If a foreign corporation, foreign limited liability company, foreign limited partnership or foreign LLP fails to register or qualify to do business in the State of Maryland when required to do so, the entity may be prohibited from bringing suit in Maryland courts. *Id.* §§ 4A-1007, 7-301, 9A-1106 and 10-907. In addition, the foreign entity may be subject to fines, may be subject to a misdemeanor and may be subject to injunctive action to cease doing business by the Maryland Attorney General. *Id.*

119 *Id.* § 7-203(a).

120 *Id.* § 7-202.

121 *Id.* § 7-202.1.

122 *Id.* §§ 4A-1002, 9A-1101, and 10-902.

Foreign general partnerships and joint ventures are not required to register or qualify with the SDAT to transact interstate, intrastate, or foreign business in the State of Maryland.[123]

On or before April 15th of each year, a foreign entity registered or qualified to do business in the State of Maryland (a) which is doing business or which in the preceding taxable year did business in the State of Maryland and (b) which owns, or which during the preceding calendar year owned, property in the State of Maryland, that is subject to property tax, must file a report on its personal property with the SDAT.[124] If a foreign entity fails to file the report on personal property within the time required by law, the SDAT may forfeit a foreign entity's right to do business in the State of Maryland. In addition, the SDAT may forfeit a foreign entity's right to do business in the State of Maryland if the entity fails to file with the SDAT any other report or fails to pay any late filing penalties required by law within 30 days after the SDAT makes a written demand of the delinquent report or late filing penalties.[125]

Confirmation as to a foreign entity's qualification or registration to transact business in the State of Maryland is accomplished by obtaining a status/good standing certificate from the SDAT. It is customary to rely upon a status/good standing certificate that is dated 30 days or fewer before the date of the opinion and not to require another certificate or search as of the date of the opinion (sometimes called a "bring-down" certificate). As a result of the possible revocation by the SDAT of the qualification of a foreign entity (as discussed above), however, consideration should be given by the opinion giver to conducting an inquiry at the SDAT as to the qualification status as of the date of the opinion.

Unless otherwise specifically stated in the opinion, the opinion recipient should presume that the opinion giver (a) has no actual knowledge of any circumstances inconsistent with the qualification to transact business, (b) has relied solely upon the status/good standing certificate from the SDAT dated 30 days or fewer before the date of the opinion, (c) has not investigated any other factors that may result in the forfeiture of a foreign entity's right to do intrastate business in the State of Maryland, (d) has not investigated the procedure and documents by which the foreign entity has qualified or registered to do business in Maryland to determine whether such procedure and documents were in compliance with Maryland law in effect at the time of such qualification or registration, and (e) has not made any additional inquiries or obtained any "bring-down" certificates.

ii. Qualification to Transact Business in Foreign Jurisdictions

An opinion that a Maryland entity is qualified to transact business in a jurisdiction other than the State of Maryland means that the entity has received governmental authorization

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123 The opinion giver should consider whether a foreign corporation or a foreign limited partnership acting as a general partner of a foreign general partnership or as a joint venture is required to register or qualify to transact interstate, intrastate, or foreign business in the State of Maryland. There is no Maryland statute directly on this point, and there are divided views as to whether any registration or qualification is required.

124 MD. CODE ANN., TAX -PROP. § 11-101 (2001).

125 MD. CODE ANN., CORPS & ASS'NS §§ 4A-1013; 7-304(a), 9A-1111 and 10-913 (1999 & Supp. 2006).

(as necessary) to do business in that jurisdiction, which authorization has not been terminated or, if terminated, has been revived. While such an opinion may be requested, particularly with respect to specified jurisdictions, it is generally not appropriate. In giving such an opinion, the Maryland lawyer who is not admitted in such foreign jurisdiction, either expressly in the opinion or as a matter of due diligence, is issuing the opinion based solely on a certificate from a state official or agency from the foreign jurisdiction. The Maryland lawyer is not in a position to independently verify the legal requirements for a Maryland entity to be qualified in a foreign jurisdiction. Therefore, since the opinion adds no independent legal analysis, the certificate should be sufficient.[126] It is not appropriate for a Maryland lawyer to opine that a Maryland entity is qualified in all jurisdictions where its property or business activities require qualification.[127]

b. Due Diligence

Before rendering an opinion concerning the qualification to transact business in the State of Maryland of a foreign entity, the opinion giver should obtain a status/good standing certificate from the SDAT that will not be more than 30 days old as of the date of the opinion. In the period following April 15th each year, consideration should be given to obtaining a more recent certificate, reviewing the SDAT's website or requesting evidence from the entity's officers, members, partners, trustees or managers that the entity has filed its annual personal property report and paid any Maryland taxes owed.

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126 *See* Business Law Guidelines, *supra* note 7, § I.C(2) (stating that since such opinions add nothing to the certificate, the certificate should be sufficient); TriBar 1998 Report, *supra* note 9, at 647 (stating that the opinion process could be streamlined without meaningful detriment if the opinion recipient relied directly on the certificate in lieu of an opinion); and Glazer and FitzGibbon, *supra* note 11, §§ 7.1.2 and 7.1.3 (discussing trend away from such opinions in opinion practice).

127 *See* Business Law Guidelines, *supra* note 7, § I.B(4), and TriBar 1998 Report, *supra* note 9, at 646.

3. Power

Sample Opinion Language:

The Company has the corporate [limited liability company] [limited partnership] [limited liability partnership] [limited liability limited partnership] [trust] power to enter into and perform its obligations under the Transaction Documents [and to own its current properties and conduct its business as described under the heading [heading name] in the [applicable document describing business and properties].

Discussion:

a. Commentary on Purpose and Sample Language

The purpose of the "power" opinion is to assure one party that the other party is permitted to enter into and perform the particular transaction under its organizational documents and the laws defining its basic powers. If appropriate, the opinion may also include assurances that the company has the authority to own its properties and conduct its businesses, where those matters are relevant to the transaction. The related issue of whether a particular transaction has been duly authorized is discussed below in Section D.4, "Authorization, Execution, Validity and Enforceability."

As used in the sample opinion language above, "corporate power" means, with respect to a corporation, that the corporation is authorized by its charter and bylaws and by statute to enter into a particular transaction, to own its properties, or to conduct its business, depending upon the scope of the opinion. In other words, it means that the action addressed is not *ultra vires*. In the context of other entities, the sample language has similar import, referring to the relevant organizational documents and law governing the entity.

The sample opinion language should not be understood to address the Company's title to its properties, possession of governmental licenses or approvals; shareholder, director, partner, member, manager or trustee authorization;[128] or qualification or registration to do business in foreign jurisdictions. These matters are more properly considered in other paragraphs of the opinion, if at all.

Frequently, the phrase "power and authority" is used, implying that the words "power" and "authority" may have different meanings in the context of this opinion. Some lawyers take

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[128] *See* Babb, Barnes, Gordon, and Kjellenberg, *Legal Opinions to Third Parties in Corporate Transactions*, 32 BUS. LAW. 533, 560 (1977). The authors of this article also indicate that the laws of foreign states in which the corporation is (or should be) qualified to do business are relevant to the "*ultra vires*" opinion. The Committee believes that issues of foreign law are generally more appropriately considered under the "Qualification to Transact Business" and "No Consents and Approvals" provisions of the opinion. On these topics, *see* Sections D.2, "Qualification to Transact Business," *supra*, and D.11, "No Consents and Approvals," *infra*. In any event, the opinion giver needs to be sensitive to the possibility that foreign law may limit the activities of the corporation or partnership in the particular state, and the opinion giver may need to address any such limitation in the opinion.

the view that reference to the "power" of a company means that the company is also empowered by whatever other sources are necessary, such as governmental approvals, to authorize the action described in the opinion. The latter issues are more appropriately encompassed in the

"No Consents and Approvals" subpart of the opinion.[129] Some other lawyers view the word "power" when used with the word "authority" to address the ability of the company to perform an act even without a legal right to do so.

The Committee concluded that the terms "power" and "authority" are synonymous in the context of the power opinion. The Committee has limited the sample opinion language to the word "power" on the premise that the additional word "authority" is unnecessary[130] and, in any event, gives rise to potential confusion with the "Authorization, Execution, Validity and Enforceability" opinion discussed below in Section D.4. Moreover, the Committee has utilized the phrase "corporate power" (or words of similar import in the case of other entities) in the belief that the phrase is the most descriptive language for an opinion with respect to whether the Company's acts are *ultra vires*, which is the generally understood and appropriate function of the "power" opinion.

If the opinion giver is requested to opine on the Company's broader power to conduct its business and own its properties, it is important to identify specifically the Company's business activities and properties to which the lawyer is referring. This can be accomplished by referencing a description of the Company's business and properties set forth in a specific document, such as a recent Securities Exchange Act filing, a private placement memo, another disclosure document, a transaction document or a certificate of an officer of the company. In the absence of an unusual restriction in a corporate charter, the breadth of Maryland corporation law with respect to general corporate powers[131] should eliminate most *ultra vires* questions about Maryland corporations. Matters relating to purchase or redemption of corporate stock or matters governed by federal law (such as various federal laws relating to banking or securities) may be exceptions to this rule in a corporate setting.

In the case of a general partnership, limited liability partnership, limited partnership, limited liability limited partnership, limited liability company, REIT, or business trust, an opinion that the Company has the "power" to enter into and perform the particular transaction is considered to mean that (i) entering into the transaction or taking the action is permitted by MRUPA, MRULPA, the Maryland Limited Liability Company Act, the Maryland REIT Law or the Maryland Business Trust Act, as the case may be, and (ii) the Company has the power under its organizational documents to enter into and perform the particular transaction.[132]

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129 *See infra* Section D.11, "No Consents and Approvals."

130 *See* North Carolina Report, *supra* note 10, § 8.0; TriBar 1998 Report, *supra* note 9, at 668, and 672; Pennsylvania Report, *supra* note 10, at 25, 27; and Georgia Report, *supra* note 10, § 6.02G.

131 MD. CODE ANN., CORPS & ASS'NS § 2-103 (1999 & Supp. 2006).

132 *See* Percival, *Status, Power and Authorization Opinions Relating to Unincorporated Entities*, Section of Business Law Materials, American Bar Association 2004 Spring Meeting 8 (hereinafter "Percival").

With regard to the Company's power under applicable enabling legislation, MRUPA does not grant any specific powers to a Maryland general partnership or LLP. MRUPA, however, also does not limit the powers of a general partnership or LLP, as the case may be, except in very limited circumstances. Therefore, the Committee believes that the opinion giver may take the position that, as a matter of statute, RUPA does not limit the power of a general partnership or LLP to enter into or perform particular transactions.

With regard to limited partnerships, LLLPs, LLCs, REITs and business trusts, MRULPA, the Maryland Limited Liability Company Act ("MLLCA"), the Maryland REIT Law and the Maryland Business Trust Act grant these types of entities broad powers to carry on most types of businesses and activities, subject, however, to specific prohibitions on the conduct of certain types of businesses.[133]

With regard to power under the Company's organizational documents,[134] the opinion giver should review the articles of organization and operating agreement of an LLC, the certificate of limited partnership and limited partnership agreement of a limited partnership or LLLP, the partnership agreement of a general partnership or LLP, the declaration of trust of a REIT and the certificate of trust and other trust agreement of a business trust. In reviewing those documents, the opinion giver should be aware that the documents may contain an outright prohibition on certain actions by the Company. In addition, even if the Company has a written partnership agreement, limited partnership agreement, operating agreement or declaration of trust, as the case may be, it may not be clear that the transaction in question falls within the scope of the Company's business, so the opinion giver may wish to obtain certificates from the partners, members, managers, trustees or other persons in control that the proposed action falls within the Company's intended purposes.

Finally, just as in the case of an opinion with regard to a Company's valid existence, the opinion giver rendering a "power" opinion must pay attention to whether the Company has dissolved. A general partnership, LLP, limited partnership, LLLP or LLC will continue to exist following dissolution, but only for the purpose of winding up its business and affairs. Therefore, after dissolution, it will lack the power to conduct its business in the usual way. Consequently, unless the transaction to which a "power" opinion relates is undertaken solely as part of the winding-up process, the opinion giver should confirm (by obtaining appropriate certificates from the managers, members, general partners or other responsible persons) that the entity has not been dissolved. If the entity has been dissolved, the opinion giver may want to qualify the opinion to state that no opinion is given as to whether the contemplated action exceeds the power of a dissolved entity to take only those actions necessary to wind up its affairs.[135]

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133 MD. CODE ANN., CORPS & ASS'NS §§ 4A-101 through 4A-1103 (1999 & Supp. 2006). *Id.* §§ 4A-203; 8-301, 10-106 and 12-201 (1999 & Supp. 2006).

134 Percival, *supra* note 132, at 9.

135 *Id.*

b. Due Diligence

When the Company is a corporation, the power opinion should be supported by the opinion giver's examination of the corporation's charter and bylaws to verify that the corporation has the authority to perform all of its obligations under the transaction documents. The opinion giver should also examine the Corporations and Associations Article of the Maryland Code (and any relevant federal law) regarding express and implied corporate power, including any relevant laws dealing with the powers of special purpose corporations such as professional corporations and financial institutions. Special attention should be paid to activities likely to raise particular problems, such as transactions involving a purchase or redemption by the Company of its own stock, for which a corporation's power[136] is constrained by Section 2-311 of the Corporations and Associations Article of the Maryland Code.

Opinions encompassing the redemption or purchase of the Company's stock should be supported by a certificate of an officer of the Company confirming that, after giving effect to the distribution, the Company satisfies the balance sheet and solvency tests required under Section 2-311 of the Corporations and Associations Article of the Maryland Code.[137]

When the Company is another form of entity, the lawyer should conduct an examination of the organizational documents and applicable law, as described in Subsection a. of this Section.

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136 MD. CODE ANN., CORPS & ASS'NS § 2-103(10) (1999 & Supp. 2006).

137 *Id*. §§ 2-301 and 2-311(a). Distributions, redemptions, or purchases of interests of other entity types may be governed by specific provisions of those entities' governing documents, and the opinion giver must carefully review those provisions. These types of transactions may also implicate the need to consider solvency issues under the Bankruptcy Code.

4. Authorization, Execution, Validity and Enforceability

Sample Opinion Language:

A. All necessary [corporate/partnership/limited liability company /trust] action has been taken to authorize the execution, delivery, and performance of the Transaction Documents by the Company.

B. The Transaction Documents have been duly executed and delivered by the Company.

C. The Transaction Documents constitute the valid and binding obligations of the Company, enforceable against the Company in accordance with their terms.

Discussion:

a. Commentary on Purpose and Sample Language

The purpose of opinions concerning authorization, execution, validity, and enforceability is to provide assurance to the opinion recipient that the Company has the legal ability to be bound, has taken the necessary preliminary steps so that it will be bound, has properly executed the documents so that it will be bound, and will, in fact, be bound by the transaction documents. The purpose of these opinions is also to advise the opinion recipient that it may enforce against the Company the provisions contained in the transaction documents, subject to stated and implicit qualifications and assumptions. These opinions provide that a contract has been formed and that there exists a remedy to enforce the contract.[138] These opinions, however, do not provide that the transaction documents will be enforceable for reasons outside of the control of the parties to them, if, for example, there is a governmental approval that is required that has not been obtained or if the transaction documents violate a court order. Other opinions are needed to provide the opinion recipient assurances on those points.[139]

The Company's lawyer is in a unique position to consider and opine about matters concerning authorization and execution of the transaction documents by the Company, and the Company's lawyer generally should give such an opinion upon request. There is some controversy, however, about the propriety of the Company's lawyer opining as to the validity and enforceability of the transaction documents, especially when those documents have been prepared by the opinion recipient's lawyer who is admitted to practice in the state or states, the laws of which are to govern the transaction, and who is likely to have a high degree of expertise in the specialized areas of law pertaining to the subject transaction. Implicitly or in writing, the opinion recipient's lawyer is giving its client an opinion that the transaction documents are

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138 *See* the Inclusive Opinion Report, *supra* note 6; Section A, "Introduction and History of the Project," and TriBar 1998 Report, *supra* note 9, § 10(a)(i).

139 *See supra* Section C.3, "Procedures"; *see also infra* Section D.9, "No Violations," and Section D.10, "No Consents and Approvals."

enforceable, subject to the normal caveats, or it should specifically advise the opinion recipient to the contrary. The opinion recipient and its lawyer are entitled to know that the Company's lawyer agrees that the documents are enforceable, and the Committee, therefore, concluded that it is generally appropriate for such an opinion also to be requested from, and provided by, the Company's lawyer.[140] In a situation in which the opinion recipient's lawyer is of the opinion that all or part of the transaction documents are not enforceable, it is inappropriate to request that the company's lawyer opine that such documents (or portions of them) are enforceable.[141]

Because an opinion recipient will ordinarily anticipate that an opinion from the company's lawyer will address enforceability, so as to avoid last minute misunderstandings and potential delay of the transaction, the Company's lawyer, promptly after learning of the need for an opinion letter, should advise the opinion recipient's lawyer if the Company's lawyer feels that providing such an opinion is inappropriate.

i. Commentary on Paragraph A of Sample Opinion Language

The words "corporate," "partnership," "limited liability company," or "trust" within the brackets in paragraph A of the Sample Opinion Language in this Subpart 4. are included to make it clear that these opinions concern action of the Company and/or its partners, members, managers, shareholders, board of directors, or board of trustees rather than action of any governmental or regulatory authority. The opinion on governmental and/or regulatory authority is dealt with in Section D.10., "No Consents and Approvals," *infra*. If the Company is an entity that is not a corporation, partnership (including a limited partnership, limited liability limited partnership or limited liability partnership), limited liability company, or trust, including a REIT or a business trust, a different word or words would be used instead of "corporation," "partnership," "limited liability company," or "trust." If the Company is an individual, paragraph *A* would not be necessary and should be excluded from the opinion.

ii. Commentary on Paragraph B of Sample Opinion Language

Execution and delivery are formal requisites of contract formation,[142] and the opinion giver should ensure that both execution and delivery have occurred before rendering this opinion. The opinion giver may assume that the persons signing the transaction documents have the legal capacity to do so and that the signatures are genuine.[143]

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140 *But see* Real Estate Guidelines, *supra* note 8, § 1.2, which provides in part:

> In particular, opinions from the opinion giver in intrastate transactions (or in a multistate transaction for which the opinion recipient has retained its own local counsel for the purposes of advising it) with respect to the enforceability of loan documents prepared by the opinion recipient normally should not be necessary and may not be cost justified.

141 *See id*. § 3.1.

142 *See* the Inclusive Opinion Report, *supra* note 6, § 2.3, and the Accord, *supra* note 4, commentary § 10.4(i).

143 In dismissing an action against a lawyer who rendered an opinion that a guaranty was a legally binding and enforceable obligation, the Supreme Court of Alabama held that the opinion did not certify that the

The opinions set forth in paragraphs A and B of the Sample Opinion Language are subsumed within the opinion set forth in paragraph C thereof. Therefore, the opinions set forth in paragraphs A and B are not technically necessary if the paragraph C opinion is given. The opinions set forth in paragraphs A and B, however, are typically given in loan and other transactions, and the Committee considers them appropriate to be included in the Illustrative Opinion Letters.

iii. Commentary on Paragraph C of Sample Opinion Language

The word "legally" is sometimes included in a formulation of paragraph C of the Sample Opinion Language, but the Committee considered it to be superfluous since it is not intended to differentiate between "legally binding" and "equitably binding," and it is not intended to contrast with "morally binding." The word "enforceable," standing by itself, has the same meaning as "enforceable in accordance with their terms." The latter is used in the Sample Opinion Language and the Illustrative Opinion Letters to resolve any ambiguity. Moreover, in this context, the words "valid," "legal," "binding," and "enforceable" have comparable meanings, and any or a combination of them could be used to express the same opinion.[144]

There are situations in which the legal relationships of the parties may differ for certain purposes from the relationships that the documents purport to create. For example, what may appear to be a lease may be a financing device, and entities that are really partners may have called themselves "borrower" and "lender" in the documents. The opinion regarding enforceability does not encompass an opinion that the documents will be enforced in all cases in a manner consistent with the legal relationships which they purport to create. To the extent that remedies set forth in the documents are dependent upon a characterization of the relationship between the parties, however, an opinion concerning enforceability of those remedies necessarily includes an opinion that such relationship does exist. It may be necessary in certain instances for the opinion giver to deal specifically with issues such as these when they are presented in particular transactions. Note that an enforceability opinion encompasses a usury opinion.[145]

b. Three Qualifications to the Sample Opinion Language

D. The opinion set forth in [paragraph C. above] is subject to the following:

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signatory to the guaranty (which later was found to be a forger) was genuine. *Voyager Guar. Ins. Co. v. Brown*, 631 So. 2d 848 (Ala. 1993). As the court observed, if the lender had wanted the opinion giver "to advise it regarding the authority of the signatures. . . it could have expressly asked him to do so." 631 So. 2d at 850. The decision does not refer to an express assumption regarding the authenticity of signatories, presumably because no such presumption appeared in the opinion letter. Because an opinion that an agreement is binding and enforceable could not be rendered if the agreement was not properly executed (*see infra* Section D.9, "No Violations"), the case supports the position that an assumption that signatories are genuine is implicit in closing opinions that contain an enforceability opinion.

144 *See* Glazer and FitzGibbon, *supra* note 11.

145 *See* Section D.15.2, " Usury Matters," *infra.*

(i) applicable bankruptcy, insolvency, reorganization, moratorium, and other laws affecting the rights of creditors generally;

(ii) the exercise of judicial discretion in accordance with general principles of equity;

(iii) in addition to the qualifications set forth in subparts D (i) and (ii) and to the other qualifications set forth in this opinion letter, certain [remedies, waivers, and other] provisions of the Transaction Documents may not be enforceable for other reasons (the "Other Reasons"); nevertheless, the unenforceability of provisions of the Transaction Documents for Other Reasons will not render the Transaction Documents invalid as a whole or preclude (a) the judicial enforcement of the obligation of the Company to repay the principal, together with interest thereon (to the extent not deemed a penalty) as provided in the Note, (b) the acceleration of the obligation of the Company to repay such principal, together with such interest, upon a material default by the Company in the payment of such principal or interest or upon a material default in any other material provision of the Transaction Documents,[146] *and (c) the foreclosure in accordance with applicable Law of the lien on and security interest in the collateral described in and created by the Transaction Documents upon maturity or upon acceleration pursuant to clause (b) above.*[147]

c. Commentary on Bankruptcy and Equitable Principles Qualifications

The Committee concluded that the bankruptcy and equitable principles qualifications as set forth in subparts D.(i) and (ii) of the sample opinion are sufficiently broad in scope to include other specific qualifications that are often set forth in opinion letters. For example, subsumed within subpart D.(ii) are concerns about the enforceability of self-help or other non-judicial remedies in a loan transaction, including a lender's right, after the occurrence of an event of

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146 The addition of comfort that a loan can be accelerated for a material breach of a material provision is described in Paragraph 11.A of the Inclusive Opinion Report, *supra* note 6, as a compromise. While endorsing this language, the Committee recognizes that some argue that this phrase can be a trap for the unwary and that such material provisions should be specifically identified by including in the opinion letter a list of the provisions that the opinion recipient has identified as significant. On the other hand, others would respond that to do so would just replace one laundry list, the provisions that may not be enforceable (prepared by the opinion giver), with another laundry list, the provisions important enough to merit specific treatment in the opinion (prepared by the opinion recipient).

147 This qualification is based on the generic qualification in the Inclusive Opinion Report, *supra* note 6.

default, without judicial process, to enter upon, to take possession of, to collect, retain, use, and enjoy rents, issues, and profits from, and to manage property described in loan documents, as well as concerns about provisions in loan documents that entitle a lender, as a matter of right, to the appointment of a receiver after the occurrence of an event of default. The sample opinion language of subpart D.(ii) is intended to be broad in scope and cover the entire field of non-enforceability due to a court's application of equitable principles. The Committee concluded that, rather than attempt to list all possible equitable, bankruptcy, insolvency, or constitutional limitations on enforceability, it is acceptable in an opinion letter to include only the more general qualifications. Of course, all of the implied qualifications referred to in Subsection D.17, "Assumption, Qualifications, and other Limitations," *infra,* are deemed to be incorporated into opinion letters even though not specifically set forth therein. Additionally, there may be particular portions of transaction documents that raise additional concerns about enforceability in the context of specific transactions, and, in such cases, additional qualifications would be in order.

With respect to the specific language of subpart D.(i), the words "reorganization" and "moratorium" are frequently omitted from the formulation, and the words "receivership" and "conservatorship" might be added. All of the words within quotation marks in the prior sentence should be understood to fall within the meaning of the subpart (i) qualification even if those words are not specifically stated.

The Committee intends that the word "laws" in subpart D.(i) should be interpreted broadly to include constitutional provisions, ordinances, regulations, and rules. The word "similar" has not been included before "laws" because subpart D.(i) is intended to have a relatively expansive meaning. For example, the qualification would exclude the enforceability of a waiver of notice clause from the scope of a remedies opinion in light of a constitutional or statutory requirement of notice applicable to creditors generally; accordingly, the opinion giver would not be rendering such an opinion by using the sample opinion language above. The use of the word "generally" is not intended to exclude application of the qualification to any law, rule, or regulation that may be applicable to only a limited number of creditors or to specific transactions.

The Committee intends that, by using the general qualification expressed in subpart D. (i), all specific bankruptcy and insolvency risks, such as preferences, fraudulent conveyances, fraudulent transfers, and automatic stays, are excluded from the scope of the opinion; all such specific qualifications are subsumed within the use of the general qualification set forth in subpart D.(i). The use of the general qualification set forth in subpart D.(i), however, does not preclude the opinion giver from also including a specific reference in the opinion to a situation that is subsumed within the general qualification if thought to be appropriate under the circumstances.

Also, many opinion givers expressly list a number of assumptions and qualifications, some of which may be covered by the bankruptcy and equitable principles limitation, and others of which may be an addition to them. If the opinion does not make reference to a report such as this one, the inclusion of specific assumptions and qualifications may be particularly helpful to set forth the understandings of the parties.

If the opinion recipient is not satisfied to receive an opinion with the general qualifications set forth in subpart (i), because the opinion is presumed to include the qualifications as set forth in the preceding paragraphs, then the recipient should specifically request to have included in the opinion such additional language as may be reasonably expected to be given under the circumstances. For example, if the opinion recipient does not believe that there should be a fraudulent conveyance qualification (which is implicit in the subpart D.(i) qualification), the recipient may request appropriate alternate language expanding the opinion in this area. It must be remembered, however, that it is not reasonable to ask for, or to expect to receive, any opinion in this regard if the opinion recipient or its lawyer would not itself render the same opinion.[148]

In some opinions (unlike the language of subpart D.), the bankruptcy and equitable principles qualifications refer only to the "enforceability of the remedies contained in the transaction documents." In such opinions, the qualifications would only qualify the remedies set forth in the transaction documents, and there would be no qualifications about the validity or enforceability of the documents themselves. The Committee does not recommend this approach. In contrast, the qualifications set forth in subparts D. (i) and (ii) in the sample opinion language above make no specific reference to the remedies provisions or even to enforceability, and, therefore, they are intended to extend to all aspects of the transaction documents, including whether the transaction documents may be held to be void or voidable.

An opinion regarding enforceability, as in the case of all other aspects of an opinion, only addresses the facts, law, authorizations, and circumstances existing as of the date of the opinion, regardless of whether this limitation is specifically stated. A change in law after the opinion is given may render a particular part of the transaction documents unenforceable. In addition, performance under certain transaction documents (such as a provision for future advances) may specifically require or be subject to future action by the board of directors or other authorizing body of the company. Also, the behavior of the opinion recipient, such as the repeated waiver of certain provisions of the transaction documents, may prohibit the opinion recipient from thereafter availing itself of certain remedies.[149] Furthermore, the actions of the parties, their future course of conduct, and their oral agreements may alter other portions of the transaction documents, notwithstanding a clause to the contrary in the transaction documents. The opinion giver typically does not undertake to keep the addressee advised as to changes in law or the effect of the parties' subsequent actions on the transaction documents. Assumptions, qualifications, or other specific reference to these matters in an opinion letter are not necessary even though they are often included.

Additionally, it is typically unstated in opinion letters that the opinion giver is not able to assure the opinion recipient that the opinion recipient will be able to enforce the documents according to their terms if, among other things, a court concludes that a breach is not material, or that a breach does not adversely affect the opinion recipient, or that it would be unreasonable or

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148 *See* Real Estate Guidelines, *supra* note 8, § 3.1.

149 *See, e.g., Gould v. Transamerican Assoc.*, 224 Md. 285 (1961); *Battista v. Savings Bank of Baltimore*, 67 Md. App. 257 (1986); and *Walker v. Ford Motor Credit Co.*, 484 So. 2d 61 (Fla. App. 1 Dist. 1986).

unconscionable to enforce the documents. The Committee believes that it is not necessary that opinion letters include language with respect to these matters as they are implicit.[150]

Furthermore, the bankruptcy and equitable principles limitations are so fundamental to opinion practice that they would be implied in any opinion letter, even if not stated. No opinion recipient can in good faith expect that an opinion giver can give the opinion recipient comfort that supersedes the effects of bankruptcy (and related) laws or principles of equity as applied by a court of competent jurisdiction. On the other hand, it is customary practice to explicitly include limitations in the opinion such as subparts D.(i) and (ii).

d. Commentary on Generic Qualification

For real estate secured transactions, subpart D.(iii) is a formulation of the generic qualification contained in Section 3.6 of the ABA/ACREL Inclusive Opinion.[151] This qualification sets forth the limitation that, in addition to the qualifications stated in subparts D.(i) and (ii), or in other portions of the opinion letter, not everything in the transaction documents is enforceable (in contradistinction to the language in subpart C: ". . . the Transaction Documents . . . [are] enforceable in accordance with their terms."). Subpart D(iii), however, then adds the comfort that the opinion recipient can accelerate and foreclose if there is a material default of a material provision. Again, this language must be understood as being subject to the qualifications stated in subparts D.(i) and (ii), *e.g.*, an opinion giver cannot give the assurance to the opinion recipient that if the Company is the subject of a bankruptcy case, the opinion recipient will be able to foreclose. The inclusion of the generic qualification in an opinion is an alternative to the inclusion by the opinion giver of a long list of qualifications and limitations to the enforceability opinion (sometimes referred to as the "laundry list."). Problems with the use of a laundry list are that the list may become lengthy and cumbersome, the qualifications listed may not be inclusive enough to cover all of the concerns that an opinion giver should have about a particular opinion letter, and laundry lists are often the subject of extensive and time-consuming debate and negotiation between an opinion giver and the lawyer for an opinion recipient.[152]

e. Laundry List of Qualifications

The advantage of a laundry list of qualifications is that, if it is complete, it sets forth with specificity the concerns that an opinion giver has with respect to the enforceability of the transaction documents. If such a list is incorporated into an opinion by reference to an external source, it may itemize the issues that an opinion giver has without greatly lengthening an opinion letter and without being the subject of long discussions between the lawyers. Section D.12 of this Report includes a list of qualifications that are deemed to be included in any opinion that

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150 *See infra* Section D.17, "Assumptions, Qualifications, and other Limitations," which lists various qualifications that the Committee deemed to be implicit in the Illustrative Opinion Letters even though not specifically stated therein.

151 *See* 1994 ABA/ACREL Report, *supra* note 5.

152 *See* Real Estate Guidelines, *supra* note 8.

incorporates this Report by reference. Some opinion givers include the laundry list in their opinions so that there is no misunderstanding about the limitations to their opinions, and the list of implicit qualifications set forth in Section D.12 of this Report may be used for this purpose. In this regard, it is the view of the Committee that qualifications listed in Section D.12 that are applicable in all opinion letters are indeed applicable in all Maryland third party opinions in business transactions even if reference is not made to this Report, unless there is an explicit reference to the contrary. The Committee believes that except in limited circumstances, these qualifications are appropriate to reflect the state of the law in Maryland, are not controversial, and should be accepted if suggested to a lawyer for an opinion recipient who is familiar with opinion practice in Maryland.

f. "Practical Realization" Language

Opinion recipients sometimes request that opinions contain "practical realization" language that is intended to provide a measure of comfort to the opinion recipient, even as the opinion recipient is advised that not every provision of the transaction documents will be enforced or that enforceability of the transaction documents may be limited in certain circumstances. Many lawyers are justifiably unwilling to opine that the opinion recipient will be able to obtain the benefits it expects in light of the caveats set forth in the bankruptcy and equitable principles limitations and in the other qualifications, and many bar associations, committees, and commentators have questioned the inclusion of practical realization assurance in an opinion.[153] The Committee, therefore, recommends against the use of practical realization language in an opinion.

If a "practical realization" provision must be included in an opinion, it needs to be carefully drafted with sensitivity to such concerns. The following language might be used if a

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[153] *Id*. *See also* the 1994 ABA/ACREL Report, *supra* note 5, which noted that "there are no universally accepted definitions" of several critical terms used in the practical realization assurance. Note 34 of the Inclusive Opinion, *supra* note 6, provides in part as follows:

> An alternative to the comfort in [the generic qualification] is what is known as the practical realization approach, for example: such unenforceability does not make the Transaction Documents legally inadequate for the [practical] realization of the principal benefits or security [intended to be] provided thereby, [subject to the economic consequences of any delay which may result from applicable law, rules, or judicial decisions.] While this approach is sometimes referred to as the traditional approach, its use has been heavily criticized for, among other things, its apparent ambiguity and subjectivity . . . and it has fallen into disfavor in many quarters.

On the other hand, the practical realization approach has been included in model forms developed in two recent bar reports, the TriBar 1998 Report, *supra* note 9, and *1998 Mortgage Loan Opinion Report*, Association of the Bar of the City of New York, Committee on Real Property Law, Subcommittee on Mortgage Loan Opinions, and the New York State Bar Association, Real Property Law Section, Attorney Opinion Letters Committee (the "1998 Mortgage Loan Opinion Report").

The Note to the Inclusive Opinion concluded with a reference to the 1989 Report. *See also* Laurence G. Preble, *The Remedies Opinion Revisited: A Primer for Real Estate Lawyers*, 33 REAL PROP. PROB. & TR. J. 63 (1998).

"practical realization" clause is required and if the opinion giver is satisfied that it can be rendered:

Sample Opinion Language:

> *E. Subject to (i) applicable bankruptcy, insolvency, reorganization, moratorium and other laws affecting the rights of creditors generally, [and] (ii) the exercise of judicial discretion in accordance with general principles of equity, [and (iii) other matters relating to the transaction documents that are of particular concern to the opinion giver],*[154] *the matters that are the subject of the qualifications set forth [above][below] do not render the Transaction Documents invalid as a whole, and, despite such matters, there exist, in the Transaction Documents or pursuant to applicable law, legally adequate remedies for the realization of the principal benefits intended to be provided by the Transaction Documents, subject to the economic consequences of any delay that may result from applicable law, rules, or judicial decisions.*

As noted above, when using the sample opinion language set forth at the beginning of this section, the opinion giver is not opining that the transaction will not be held to be void or voidable. Use of "practical realization" language implies that, while not identifying which specific remedy or remedies will be available, there does exist in the opinion giver's opinion some legally adequate remedy for realization of the principal benefits and/or security intended to be provided by the transaction documents, subject to any economic consequences of a delay in enforcement of such remedy. For example, in a real estate loan context the opinion that the remedy of foreclosure, as described in the loan documents, or a similar remedy, exists may be subsumed within "practical realization" language although such language does not include an opinion that the opinion recipient will be repaid any particular amount of money upon exercise of such remedy.

Importantly, the sample opinion language above does not purport to cover all possible situations. Accordingly, each transaction must be individually and carefully considered.

As stated above, the Committee recommends against the use of practical realization language. If a practical realization opinion is given, it would replace the generic qualification and accompanying comfort contained in the sample opinion in subpart D.(iii) above.

g. Due Diligence

The due diligence required with respect to the organization, existence, and good standing of the Company and the general power paragraph of the opinion are all relevant to the opinions concerning the authorization, execution, validity, and enforceability of the Transaction

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[154] Items (i) and (ii) are contained in the 1989 Report. Item (iii) was suggested by the Real Estate Guidelines, *supra* note 8, § 4.0.

Documents. Reference is made to such other sections of this Report for a description of the suggested due diligence in those areas.

In order to provide the opinions on authorization, execution, validity, and enforceability, the opinion giver should review the organic documents of the applicable entity, which generally will be the charter and bylaws of a corporation, the partnership agreement for any partnership, the certificate of limited partnership for a limited partnership, the certificate of a limited liability partnership or limited liability limited partnership for a limited liability partnership and a limited liability limited partnership, respectively, the articles of organization and operating agreement for a limited liability company, and the declaration of trust for a REIT or Business Trust. Copies of these documents as in effect during the relevant periods should be reviewed. The purpose of this review will be to determine what action is necessary under the constituent documents in order for the Company to authorize the execution, delivery, and performance of the transaction documents. Consideration also must be given to the law governing the specific type of entity. Moreover, careful review of the applicable transaction documents and the transactions contemplated thereby is necessary in order to determine whether any special approvals or authorizations are required, as in the case of a transfer of substantially all of the assets of a corporation.

Once the opinion giver has determined what action is required under the constituent documents and applicable law to authorize the execution, delivery, and performance of the transaction documents, the opinion giver will need to obtain evidence that such action has been taken and has not been rescinded or revoked. This gathering of information could involve review of the Company's minute books or other entity records. In most cases, however, due diligence by the opinion giver will be sufficient if the opinion giver obtains and relies 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; a partner of a partnership; a member, manager or officer of a limited liability company; or an officer or trustee of a trust.

With respect to the opinion that the transaction documents have been duly executed and delivered, it will be necessary for the opinion giver to receive some evidence that the documents have been executed by a person authorized under the applicable authorizing documents. Typically, an incumbency certificate including sample signatures should be provided for this purpose.

With respect to the opinion that the transaction documents constitute the valid and legally binding obligations of the Company, enforceable against the Company in accordance with their terms, subject to the stated exceptions, the opinion giver should carefully consider the transaction documents, to determine all actions that may be required to be performed by the Company thereunder, and all remedies that the opinion recipient may have, and should also consider applicable law to determine whether such opinion can be given or whether additional exceptions are necessary. No specific procedures for what may be necessary in this area can be set forth, and the degree of review required by the opinion giver will depend upon the opinion giver's knowledge of the various areas of law that could affect the validity and enforceability of the Transaction Documents and the assumptions and qualifications to which the opinions are subject.

Sections 3-101 and 3-104 of the Real Property Article of the Maryland Code provide that every deed of trust or mortgage must be recorded in every county where the land affected by them lies in order to "take effect." Although many of the contractual provisions in a deed of trust may actually be enforceable even if the deed of trust is not recorded, deeds of trust must be recorded before foreclosure proceedings may be instituted. Therefore, in giving an enforceability opinion the opinion giver is entitled to assume implicitly that the deed of trust has been or will be properly recorded.[155]

[155] The Court of Appeals has held that documents must be properly indexed in order to achieve a priority position against innocent third parties. *See Waicker v. Banegura*, 357 Md. 450 (2000). Proper indexing of a document, however, should not affect the enforceability of the deed of trust between the parties thereto. The opinion giver, therefore, need not assume that the deed of trust has been properly indexed in order to give an enforceability opinion. *See* Section D.7.b. "Qualifications and Assumptions," *infra* for an additional discussion regarding this point.

5. Equity Issuances

SAMPLE OPINION LANGUAGE:

FOR A CORPORATION:

- *Basic Opinion:* *The issuance of the Stock has been duly authorized, and the Stock is validly issued, fully paid and nonassessable.*

- *Basic Capitalization Opinion:* *The authorized stock of the Company consists of [_____] shares of Common Stock, par value $[_____] per share.*

- *No Preemptive Rights Opinion:* *There are no preemptive rights with respect to the Stock under the Maryland General Corporation Law, the Charter or the bylaws.*

- *Opinion Regarding Stock Certificates:* *The stock certificates representing the Stock comply in all material respects with the Maryland General Corporation Law, the Charter and the bylaws.*

FOR A LIMITED LIABILITY COMPANY:

- *Basic Opinion:* *The issuance of the [Interests] [Units] has been duly authorized, and the [Interests] [Units] are validly issued, fully paid and nonassessable.*

- *No Preemptive Rights Opinion:* *There are no preemptive rights with respect to the [Interests] [Units] under the Maryland Limited Liability Company Act or the Company's articles of organization or operating agreement.*

FOR A PARTNERSHIP OR LIMITED LIABILITY PARTNERSHIP:

- *Basic Opinion:* *The issuance of the Interests has been duly authorized, and the Interests are validly issued, fully paid and nonassessable.*

- *No Preemptive Rights Opinion:* *There are no preemptive rights with respect to the Interests under MRUPA or the Company's partnership agreement.*

FOR A LIMITED PARTNERSHIP OR LIMITED LIABILITY LIMITED PARTNERSHIP:

- *Basic Opinion:* — *The issuance of the Interests has been duly authorized, and the Interests are validly issued, fully paid and nonassessable.*

- *No Preemptive Rights Opinion:* — *There are no preemptive rights with respect to the Interests under the Maryland Revised Uniform Limited Partnership Act or the Company's limited partnership agreement [or limited liability limited partnership agreement].*

FOR A REAL ESTATE INVESTMENT TRUST:

- *Basic Opinion:* — *The issuance of the shares of beneficial interest of the Real Estate Investment Trust has been duly authorized and the Shares are validly issued, fully paid and nonassessable.*

- *Basic Capitalization Opinion:* — *The authorized shares of the REIT consists of [_____] common shares of beneficial interest, par value $[_____] per share.*

- *No Preemptive Rights Opinion:* — *There are no preemptive rights with respect to the Shares under the Maryland REIT Law, the Declaration of Trust or the Bylaws.*

- *Opinion Regarding Share Certificates:* — *The certificates evidencing the Shares comply in all material respects with the Maryland REIT Law, the Declaration of Trust and the Bylaws.*

FOR A BUSINESS TRUST:

- *Basic Opinion:* — *The issuance of beneficial interests in the Business Trust has been duly authorized, and the beneficial interests in the Business Trust are validly issued, fully paid and nonassessable.*

- *No Preemptive Rights Opinion:* — *There are no preemptive rights with respect to the beneficial interests in the Business Trust under Maryland Business Trust Act, the Certificate of Trust or the Governing Instrument.*

5.1 CORPORATION

Basic Opinion: *"The issuance of the Stock has been duly authorized, and the Stock is validly issued, fully paid and nonassessable."*[156]

Discussion:

Commentary on Purpose and Sample Language

The opinion that the issuance of stock has been duly authorized and that the stock is validly issued, fully paid and nonassessable assures the opinion recipient that the acquired stock will entitle the holder thereof (and its successors and assigns) to all the rights of a stockholder under the Maryland General Corporation Law (the "MGCL") and the Company's charter and bylaws.[157] This opinion has two component parts. Each part has a separate purpose and involves a separate inquiry by the opinion giver before the opinion can be given.

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156 When giving the contingent opinion in a transaction in which there is likely to be a delay between the issuance of the opinion and the issuance of the Stock (for example, in connection with a Shelf Registration transaction), an opinion giver might give the following contingent opinion:

> [T]he issuance of the Stock has been duly authorized, and the Stock, when issued and delivered against payment of the consideration in accordance with the terms of the [Registration Statement] [Underwriting Agreement] [Stock Purchase Agreement], will be validly issued, fully paid and nonassessable.

In general, the opinion giver should conduct the same due diligence set forth in this Section. Notwithstanding that the opinion is phrased in the future tense, "[i]f sufficient authorized shares are available on the date of the opinion letter, the opinion may be based on the unstated assumption that sufficient authorized shares will continue to be available when the shares are issued." Glazer and FitzGibbon, *supra* note 11, § 10.1. An opinion giver, however, may also include the following (or similar) assumptions in addition to the standard assumptions:

> (i) there will be no changes in applicable law, the Charter or the Bylaws between the date of this opinion and any date of issuance or delivery of the Stock; (ii) at the time of delivery of the Stock, all contemplated additional actions shall have been taken and the authorization of the issuance of the Stock will not have been modified or rescinded; and (iii) the aggregate number of shares of Stock of the corporation that would be outstanding after the issuance of any of the Stock and any other contemporaneously issued Stock, together with the number of shares of Stock previously issued and outstanding, does not exceed the number of then-authorized shares of the Company.

157 *See* Glazer and FitzGibbon, *supra* note 11, § 10.1. The references to "the Stock" or "the Shares" (in the case of the REIT or business trust) in the sample opinions generally are intended to refer to certain specific shares of stock or beneficial interest being issued in connection with the transaction pursuant to which the opinion is being delivered. Typically, the Stock would be defined early in the body of the opinion, often in the introductory paragraph. Occasionally, opinion recipients will request the following opinion: "The issuance of *all of the outstanding stock* of the corporation has been duly authorized and *all of the outstanding stock* of the corporation is validly issued, fully paid and nonassessable." Giving such an opinion should be avoided in most circumstances, and requesting such an opinion is discouraged. In most cases, the opinion giver has not participated in many of the prior transactions in which the other stock of the corporation was issued and, thus, is not in a good position to opine as to those other transactions. Furthermore, even if an opinion giver or the opinion giver's firm was involved in some or all of the prior

The opinion described in the preceding paragraph covers only the MGCL. This opinion does not address (i) federal or state securities laws[158] (ii) compliance with disclosure requirements associated with the applicable transaction,[159] and (iii) whether the board of directors (which approved the issuance) acted in accordance with the standard of conduct as required under Section 2-405.1 of the MGCL.[160] In addition, the opinion does not address preemptive rights of stockholders, as that issue would be covered by a different opinion.[161]

a. "The issuance of the Stock has been duly authorized. . . ."

i. Commentary

In order for an issuance of stock to be "duly authorized," it must have been created in accordance with the MGCL and the Company's current charter and bylaws.[162]

Specifically, this opinion means that (a) the provisions of the charter designating the stock comply with the MGCL, (b) the MGCL permits stock with the characteristics contained in the charter, and (c) there are a sufficient number of authorized but unissued shares of stock available for issuance.[163] In addition, if stock was authorized pursuant to an amendment to the original charter or articles supplementary, the opinion means that the amendment or articles supplementary were properly approved in accordance with the MGCL and the charter and bylaws of the Company.[164]

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issuances, the expense of performing the due diligence that would be required to confirm all prior issuances (assuming all of the documentation was available to review) would generally outweigh the value in giving such an opinion.

158 TriBar 1998 Report, *supra* note 9, § 6.2.1.

159 *Id.*

160 *See* Glazer and FitzGibbon, *supra* note 11, § 10.2.2 (there is an unstated assumption that the body that approved the creation of the stock acted in accordance with its duties). *See also* TriBar 1998 Report, *supra* note 9, § 6.2.2.

161 *See infra* text accompanying notes 207-212.

162 Glazer and FitzGibbon, *supra* note 11, § 10.4.2 and TriBar 1998 Report, *supra* note 9, § 6.2.1. The concept of issued stock that is "duly authorized" should not be confused with the term "authorized capital," which refers to the number of shares of stock that the corporation may issue in accordance with its charter.

163 *Id.*

164 *Id.* (*e.g.*, stock would not be duly authorized if its creation would violate a provision in the charter which prohibits the creation of a new class of preferred stock having rights senior to an existing class of preferred stock). *See also* MD. CODE ANN., CORPS & ASS'NS § 1-206(c) (1999 & Supp. 2006):

A certified copy of the articles of incorporation, certificate of incorporation, or other instrument by which a corporation was formed, from the records of the Department or the Secretary of State, is evidence of the existence of the corporation *and of its right to exercise the powers mentioned in the document. A certified copy of any other charter document from these records is evidence of the facts and corporate action required to be stated in the document*. (emphasis added)

ii. Due Diligence

The opinion giver should confirm that the description of the stock in the charter complies with the MGCL; hence, the opinion giver should review the applicable provisions of the MGCL, as well as the charter.[165] At a minimum, the charter must set forth (a) the total number of shares of stock of all classes which the corporation has authority to issue, (b) the number of shares of stock of each class, (c) the par value of the shares of stock of each class (or a statement that the shares are without par value); and (d) if there is any stock with par value, the aggregate par value of all the shares of all classes."[166]

The opinion giver should determine whether the MGCL permits the characteristics of the stock contained in the charter.[167] The opinion giver should also confirm that any charter documents being adopted and filed in connection with the current transaction were properly approved for filing.[168]

The opinion giver should confirm that the issuance was duly authorized by the board of directors and, if required, the stockholders. Pursuant to the MGCL, the board of directors may adopt a resolution authorizing the issuance of stock without the approval of stockholders if the charter grants this power to the board of directors.[169] Alternatively, if the charter does not contain that provision, the board of directors may approve the issuance of stock without stockholder approval (if the charter does not otherwise require stockholder approval for the issuance) "if the actual value of the consideration to be received by the corporation. . . is at least equal to: (a) the par value of the stock to be issued; (b) in the case of stock without par value, the stated capital per share of the shares of the same class then outstanding; or (c) in the case of convertible securities, the par value or the stated capital per share, as the case may be, of the stock into which the convertible securities are convertible, if greater than the par value, the stated capital per share of stock, or principal amount of the convertible securities."[170]

Unless the opinion giver has reason to believe that some irregularity exists, the opinion giver is entitled to rely on the presumption of regularity in performing due diligence and to assume that all charter documents prior to any charter documents being adopted and filed in connection with the current transaction (pursuant to which the current stock is being issued) were properly approved for filing. If the opinion giver has reason to believe some irregularity exists, the need for further inquiry may depend on the facts and circumstances of each situation.

165 Specifically, the opinion giver should carefully review MD. CODE ANN., CORPS & ASS'NS §§ 2-104, 2-105 and 2-201 (1999 & Supp. 2006)

166 MD. CODE ANN., CORPS & ASS'NS § 2-104 (1999 & Supp. 2006).

167 At a minimum, the opinion giver should review § 2-105 of the MGCL, which sets forth the permitted provisions relating to the stock that may be included in the charter.

168 *See also supra* note 165 and accompanying text.

169 MD. CODE ANN., CORPS & ASS'NS § 2-204 (b)(1) (1999 & Supp. 2006).

170 *Id.* § 2-204 (b)(2).

Accordingly, if the issuance has not been authorized by the stockholders, the opinion giver should confirm that the charter grants the directors the authority to issue stock, or, if that provision is not contained in the charter, the price for the stock should be in compliance with the above provisions. If the charter does not grant the right to issue stock to the board of directors and another exception does not apply, the issuance should be approved by the stockholders.

The opinion giver should confirm that (a) in authorizing the issuance of stock, the board of directors acted at a properly called and held meeting (or by an informal action, as permitted by Section 2-408(c) of the MGCL) and (b) the authorizing resolution received the requisite votes in accordance with the MGCL, the charter and the bylaws.[171]

The opinion giver should also examine the board resolution to confirm that it (a) authorized the issuance, (b) set the minimum price or value of consideration for the stock, and (c) fairly described the consideration (if not money).[172]

Since the authorization of the issuance of stock by the board of directors is similar to the authorization of any action by the board of directors (*e.g.*, the authorization to enter into a contract), the opinion giver may also wish to consider the relevant sections relating to due diligence regarding the "authorization" of contracts.[173]

If certain aspects of the issuance of stock are delegated to a committee of the board of directors, the opinion giver should also ensure that the authority delegated to the committee was permitted under Section 2-411 of the MGCL, and that the committee properly acted within that authority.[174] The opinion giver must also verify that any actions taken by the committee with respect to the issuance of stock were authorized in accordance with the MGCL and the Company's charter and bylaws.[175]

If stock is issued pursuant to the exercise or conversion of a security that is exercisable or convertible into stock, the issuance of that stock is duly authorized if the issuance

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171 TriBar 1998 Report, *supra* note 3, § 6.2.2. It is important to note that § 2-505 of the MGCL now permits fewer than all of the stockholders to take action with an informal action under certain circumstances. Unless the opinion giver has reason to believe that some irregularity exists, the opinion giver is entitled to rely on the presumption of regularity in performing its due diligence and to assume that the Company complied with the formalities relating to a board of directors meeting (*e.g.*, the meeting was properly called and that a quorum existed), if an officer certifies that the resolutions were duly adopted.

172 MD. CODE ANN., CORPS & ASS'NS § 2-203(a) (1999 & Supp. 2006).

173 *See supra* Section D. 4 "Authorization, Execution, Validity and Enforceability."

174 Glazer and FitzGibbon § 10.5, *supra* note 11, § 10.5; TriBar 1998 Report, *supra* note 9, § 10.6.4.1.

175 *See* MD. CODE ANN., CORPS & ASS'NS § 2-411 (1999 & Supp. 2006) (the board of directors may delegate the power to issue stock to a committee, if the board of directors has given general authorization for the issuance of stock providing for or establishing a method or procedure for determining the maximum number of shares of stock to be issued).

of the convertible security that is exercisable or convertible into stock was originally duly authorized.[176]

b. ". . . the Stock is validly issued, fully paid and nonassessable."[177]

i. Commentary

(A) Compliance with Charter, bylaws and resolutions

In order for stock to be "validly issued," the issuance of that stock must have been "duly authorized"[178] and the stock must have been issued in accordance with the MGCL, as well as the Company's charter and bylaws.[179] In addition, for stock to be "validly issued," its issuance must comply in all material respects with any requirements or conditions imposed by the authorizing resolutions.[180]

(B) Indicia of Ownership

In connection with the issuance of stock, the Company must take some further action to evidence the ownership of stock.[181] The time-honored method to evidence ownership of stock is to deliver stock certificates to each new holder and to record the stockholders' names in the Company's stock records.[182] Today, however, stock is often issued without certificates as permitted by the MFCL.[183] If certificates are not issued, some additional action to indicate that the stock is issued, such as updating the stock ledger, should occur. The opinion that stock is "validly issued," however, should be read to include an implicit assumption

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176 MD. CODE ANN., CORPS & ASS'NS § 2-204(d) (1999 & Supp. 2006).

177 While the "validly issued," "fully paid," and "nonassessable" phrases may be treated differently by opinion commentators (*see, e.g.,* Glazer and FitzGibbon, *supra* note 11) under Maryland law today, these three opinion phrases are so intertwined that they are almost always given together. As a result, there is no longer any practical distinction to be drawn among them. For brevity, we refer to them collectively as the "validly issued" opinion.

178 The duly authorized opinion and the validly issued opinion are also almost always given together. Indeed, one cannot give a validly issued opinion without being satisfied substantively that the issuance of the stock was duly authorized.

179 Glazer and FitzGibbon *supra* note 11 and TriBar 1998 Report, *supra* note 9 § 6.2.2.

180 *See* Glazer and FitzGibbon *supra* note 11,§ 10.6.5.

181 *Id.* § 10.6.6.

182 *See id*.

183 MD. CODE ANN., CORPS & ASS'NS § 2-210(c) (1999 & Supp. 2006).

that the Company has taken or will take or has caused or will cause to be taken the necessary actions to evidence the ownership of the stock that the Company issues.[184]

(C) Consideration

In order for stock to be "validly issued" it must have been issued for the consideration determined by the board of directors in the authorizing resolutions[185] and otherwise in accordance with the MGCL. The MGCL provides that stock is fully paid and non-assessable if "the corporation receives the consideration for which stock or convertible securities are to be issued. . ."[186] Section 2-206 of the MGCL provides that consideration may consist (in whole or in part) of: "(i) money; (ii) tangible or intangible property; (iii) labor or services actually performed for the corporation; (iv) a promissory note or other obligation for future payment in money; or (v) contracts for labor or services to be performed."[187] The MGCL further provides, "in the absence of actual fraud in the transaction, the minimum consideration stated in the charter or determined by the board of directors in its resolution is conclusive for all purposes."[188] Hence, if the consideration is not cash, the opinion giver may rely upon the authorizing resolutions because the directors are authorized to set a value for that consideration.[189]

The opinion requires receipt by the Company of all the consideration called for by the resolution approving the issuance of the stock and the compliance with any requirements relating to consideration for newly issued stock in the Company's charter or bylaws (if applicable).

Although, historically, the consideration per share had to be at least as much as the par value per share, the MGCL now permits the price per share to be less than the par value of the stock.[190] Moreover, a corporation can issue stock without consideration if the stock is issued as a charitable contribution.[191] The requirement that a corporation receive

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184 The opinion giver might also consider an express assumption or a certification from an officer that additional action was taken to effect the issuance, such as the issuance of stock certificates or a notation in the stock ledger.

185 MD. CODE ANN., CORPS & ASS'NS § 2-203(a) (1999 & Supp. 2006).

186 *Id.* § 2-206(c).

187 *Id.* § 2-206(a).

188 *Id.* § 2-203(b).

189 *See* Glazer and FitzGibbon, *supra*, note 11, § 10.8.2.2.

190 MD. CODE ANN., CORPS & ASS'NS §2-203(e) (1999 & Supp. 2006). Historically, "fully paid" stock meant that the consideration received by the Company per share had a value at least equal to the par value of each share of stock (*See* Glazer and FitzGibbon, *supra* note 11, § 10.8.2.1.) As a result of § 2-203(e) of the MGCL, however, stock may be "fully paid" even if the consideration per share is less than the par value per share.

191 MD. CODE ANN., CORPS & ASS'NS § 2-203(f) (1999 & Supp. 2006).

consideration for an issuance of stock is not applicable for stock issued as a result of a stock split or a stock dividend.[192]

(D) Nonassessable

Historically, an opinion that stock is "nonassessable" meant that the Company did not have the right to require stockholders to pay any additional amounts in addition to the original issuance price.[193]

Practically speaking, "fully paid" and "nonassessable" have identical meanings. It is theoretically possible (although highly unusual), however, for stock to be "fully paid" but "assessable" if the stockholder has an additional capital contribution obligation (*e.g.*, if such an obligation was included in the applicable subscription agreement). Accordingly, the opinion giver should review the authorizing resolutions, the charter and the applicable purchase or subscription agreement to confirm that there is no further payment obligation.[194]

ii. Due Diligence

(A) Compliance with Charter, Bylaws and Resolutions

The opinion giver should review the charter and bylaws to confirm that the Company has complied with all applicable restrictions and prohibitions in connection with the issuance of the stock.

The opinion giver should confirm that the resolutions approving the issuance are still in effect at the time the stock is issued, as resolutions can be amended or rescinded.[195] A certificate from an appropriate officer of the Company that the resolutions are in full force and effect and that the resolutions have not been amended or rescinded is sufficient evidence.

The "validly issued" opinion also requires the opinion giver to conduct a review of the stock ledger and minutes of the Company (or otherwise obtain confirmation) to determine whether, on the date of the stock issuance, there are a sufficient number of authorized but unissued shares of stock.[196] If there are not enough authorized but

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192 *Id.* §§ 2-203(c); 2-309(c)(2).

193 TriBar 1998 Report, *supra* note 9, § 6.2.4.

194 *See also* MD. CODE ANN., CORPS & ASS'NS § 2-206(c) (1999 & Supp. 2006) (if the stockholder pays with a promissory note, the stock would be fully paid and nonassessable).

195 *Id.* § 10.6.4.1.

196 *See* Glazer and FitzGibbon, *supra* note 11, § 10.4.5. Where the Company uses a transfer agent, the opinion giver may rely on reasonable evidence provided by the transfer agent as to the number of shares of stock then outstanding. Depending on how current that information is, the opinion giver may also need to obtain a factual certificate from an officer of the Company as to any more recent issuances. In addition, Glazer

unissued shares of stock, those shares of stock that the Company attempts to issue in excess of the available shares of stock may be void.[197] For example, the issuance of stock upon exercise of a stock option would not be duly authorized if all the authorized stock had previously been issued (even though enough stock was available when the option was actually granted).[198] In addition, Section 2-310 of the MGCL provides that stock redeemed by a corporation constitutes authorized but unissued stock; thus re-acquired stock is not "treasury stock."

If the issuance is the result of a stock dividend, the opinion giver should verify that the Company has complied with all charter provisions establishing the terms of a class of stock or any limitation upon the issuance of stock dividends.[199] If the issuance violated preemptive rights provisions of the charter, the opinion giver should exercise caution in opining that the stock is "validly issued."[200]

(B) Consideration

The opinion giver should verify that the Company actually received the consideration set forth in the authorizing resolution, which may be done by relying

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and FitzGibbon suggests that shares of stock may not be "validly issued" if the number of shares of stock proposed to be issued in the current transaction plus the number of shares of stock previously issued and reserved for issuance exceeds the corporation's authorized capital. *Id.* § 161 of the Delaware General Corporation Law, however, provides that a board of directors may only take subscriptions for additional shares of stock if such shares of stock "have not been issued, subscribed for, or otherwise committed to be issued." The MGCL does not contain such a restriction. Accordingly, in Maryland it is unclear whether stock issued by the Company is "validly issued" if the number of shares of stock proposed to be issued in the current transaction exceed the authorized capital due to other shares of stock having been "reserved" by the Board of Directors for other purposes. The opinion giver should exercise caution in giving an opinion that the stock in the current transaction is "validly issued" in these circumstances. The opinion giver should also consider whether if a purchase agreement (pursuant to which the stock was reserved) requires the Company to maintain a certain number of available shares of stock in reserve for the future exercise of options, the current issuance may cause a breach or default of a contract which would require a qualification to the "no violation of contracts" opinion. On a related note, an opinion giver should not render an opinion as to a Maryland corporation that stock has been "duly reserved" or "validly reserved," as the MGCL does not provide a mechanism for reserving stock. A Maryland opinion giver may, however, render an opinion that the board of directors (if a resolution was adopted reserving the stock) duly adopted such a resolution.

197 *Larkin v. Maclellan*, 140 Md. 570, 590 (1922). *Compare Larkin* with MD. CODE ANN., CORPS & ASS'NS § 2-208(e) (1999 & Supp. 2006) ("[t] he stock issued by a corporation prior to the time the articles supplementary with respect to the stock are effective shall cease to be voidable as a result of the failure to file the articles supplementary at the time the articles supplementary become effective.") and MD. CODE ANN., MD. CODE ANN., COM. LAW I § 8-210(a) (1999 & Supp. 2006) ("appropriate action" cures an overissuance).

198 Glazer and FitzGibbon, *supra* note 11, § 10.4.5, *supra* note 3, § 10.4.5.

199 TriBar 1998 Report, *supra* note 9, § 6.2.2

200 *Id.* Under the MGCL, stockholders may have preemptive rights if the charter includes a provision granting preemptive rights to stockholders. MD. CODE ANN., CORPS & ASS'NS § 2-205 (1999 & Supp. 2006). *See also infra* at text accompanying notes 207-212 ("No Preemptive Rights" opinion).

on a factual certificate from an officer of the Company that states that the Company received the appropriate consideration.[201]

Basic Capitalization Opinion: *"The authorized stock of the Company consists of [_____] shares of common stock, par value $[_____] per share."*

Discussion:

a. Commentary on Purpose and Sample Language

The term "authorized stock" refers to the total number of shares of stock of all classes that the Company has authority to issue pursuant to its charter. Sometimes the formulation of this opinion refers to "authorized capital stock" which is not inappropriate, although the MGCL generally uses the term "stock" and not "capital stock."

If the Company's stock is divided into classes, further description will be needed in the opinion. For example, a reference in the opinion to "[_____] shares of preferred stock, par value $[_____] per share, of which [_____] shares have been classified as Series A Convertible Non-Voting Preferred Stock" may be required. Where the charter gives a title to a specific class of stock, the opinion may identify it by name and need not further identify the characteristics of the stock (*e.g.*, preferences, conversion or other rights, voting powers, *etc.*). If the class is not given a specific title, the opinion may identify it by any designation set forth in the charter, any distinguishing feature and the par value (*e.g.*, "Class A redeemable preferred stock, par value $[_____] per share").

Section 2-104(a) of MGCL provides that a Maryland corporation's articles of incorporation shall include, among other things, (i) the total number of shares of stock of all classes that the corporation has authority to issue; (ii) the number of shares of stock of each class; (iii) the par value of the shares of stock of each class or a statement that the shares are without par value; and (iv) if there are any shares of stock with par value, the aggregate par value of all the shares of all classes. Section 2-105 of the MGCL permits a Maryland corporation to have more than one class of stock in its charter. Any alteration of the information set forth in the original articles of incorporation regarding authorized stock must be reflected in articles of amendment or articles supplementary, as permitted by the MGCL.

b. Due Diligence

The opinion giver should confirm the number of shares of the Company's authorized stock, the class or classes of the shares and the par value, if any, of the shares by examining a copy of the Company's charter. If the charter includes articles of amendment or articles supplementary that purport to alter the authorized stock, then the opinion giver should consider the adequacy as to form of the articles under the MGCL and the manner of the Company's approval of the articles under its charter and bylaws and the MGCL in effect at the time the articles became effective, in order to conclude that the articles properly alter the Company's

[201] TriBar 1998 Report, *supra* note 9, § 6.2.3 n.136.

authorized stock.[202] Unless the opinion giver is aware of circumstances giving rise to concern about the Company's approval, the opinion giver may rely on the statement set forth in the articles that they were approved in accordance with the Company's charter and bylaws and the MGCL.[203]

c. Other Issues

Sometimes the opinion giver is asked to supplement the sample opinion set forth above with a statement as to the number of issued and outstanding shares. For example, the words "_____ of which shares are issued and outstanding of record as of the date of this letter" may be appended to the sample language set forth above. That opinion is purely factual in nature and should be avoided.[204] The opinion recipient should be capable of reviewing documentation that would support the factual conclusion. In some instances, a transfer agent's certificate could be provided. In a closely-held corporation, the stock ledger or stock transfer book could be produced for examination. Alternatively, a representation of the Company or a certificate of a Company officer should be satisfactory evidence.[205]

Similarly, the opinion giver is sometimes asked to provide negative assurance as to the non-existence of contract rights requiring the Company to issue additional shares of stock. Those contract rights are often in the form of options, warrants, subscriptions or convertible or exchangeable securities. Such opinions are also factual in nature and should be avoided in most circumstances. The opinion recipient should be capable of inquiring of the Company as to the accuracy of factual statements.[206] If required to give this opinion, the opinion giver should

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202 *See supra note 164.*

203 *Id.*

204 TriBar 1998 Report, *supra* note 9, § 6.2.5.

205 If these opinions are given, the opinion giver should rely on any one or more of these factual foundations.

206 The negative assurances that are requested often go beyond the existence of options, warrants or convertible securities. One formulation of such an opinion is as follows:

> *Based on a certificate of the Company and our knowledge: (a) the Company has not issued any option, warrants, rights, calls, commitments, subscriptions or convertible or exchangeable securities pursuant to which the Company may be compelled to issue stock; (b) there are no outstanding contracts or other agreements of the Company to purchase, redeem or otherwise acquire any stock or securities or obligations of any kind convertible into stock; (c) there are no dividends which have accrued or have been declared on the Stock but are unpaid; (d) there are no voting trusts, stockholder agreements, proxies or other agreements or understandings in effect with respect to the voting or transfer of any stock; and (e) there are no authorized or outstanding stock appreciation, phantom stock, stock plans or similar rights with respect to the Company.*

Another formulation of such an opinion is as follows:

> *Based on a certificate of the Company and our knowledge, except as described above or in the [Schedule of Exceptions to the] Stock Purchase Agreement, there are no other presently outstanding preemptive rights, options, warrants, conversion privileges or*

require that an appropriate officer of the Company provide a certificate as to this matter (and the opinion could be based solely on that certificate).

No Preemptive Rights Opinion: *"There are no preemptive rights with respect to the Stock under the Maryland General Corporation Law, the Charter or the Bylaws."*

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rights to purchase from the Company any of the authorized but unissued stock of the Company other than [_____].

Discussion:

a. Commentary on Purpose and Sample Language

A preemptive right is the right of existing stockholders of a Company to maintain their percentage ownership of the Company by buying a proportional number of shares of any future issuance of stock. This means that if the Company issues new stock, the existing stockholders with preemptive rights have the right, but not the obligation, to purchase as many shares of the newly issued stock as necessary to maintain their proportional ownership interest in the Company before the Company sells the shares to persons outside of the stockholder group that holds the preemptive rights.

Prior to October 1, 1995, preemptive rights were recognized as part of the corporation law of Maryland.[207] The stockholders of a Maryland corporation had a common law right to subscribe *pro rata* for newly issued stock. Section 2-105(a)(10) of the 1994 MGCL provided that the charter of a corporation *may* define, limit or deny the preemptive right of a stockholder to acquire additional stock in the corporation.[208] Section 2-205 further provided specific circumstances in which preemptive rights did not accrue,[209] but the prior statute did not affirmatively limit or deny preemptive rights. Absent a charter provision expressly denying preemptive rights and except with respect to an issuance that fell within one of the exceptions, by virtue of simply owning shares of stock, stockholders of a Maryland corporation had a preemptive right to maintain their existing proportionate stock ownership in the corporation.

In 1995, amendments to Sections 2-105 and 2-205 of the MGCL reversed the common law doctrine and denied stockholders the preemptive right to subscribe for additional issuances of stock or any securities convertible into stock, unless the right is expressly provided

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207 *See Poole v. Miller*, 211 Md. 448 (1957); *Real Estate Trust Co. v. Bird*, 90 Md. 229 (1899).

208 *See* MD. CODE ANN., CORPS & ASS'NS § 2-105(a)(10)(1994), *amended by* 1995 Md. Laws ch. 449.

209 MD. CODE ANN., CORPS & ASS'NS § 2-205(a)(1994), *amended by* 1995 Md. Laws ch. 449, provided that, unless the charter provided otherwise, a stockholder did not have preemptive rights with respect to:

(1) Stock issued to obtain any of the capital required to initiate the corporate enterprise;

(2) Stock issued for at least its fair value in exchange of consideration other than money;

(3) Stock remaining unsubscribed for after being offered to stockholders;

(4) Treasury stock sold for at least its fair value;

(5) Stock issued or issuable under articles of merger;

(6) Stock which is not presently entitled to be voted in the election of directors issued for at least its fair value;

(7) Stock, including treasury stock, issued to an officer or other employee of the corporation or its subsidiary on terms and conditions approved by the stockholders by the affirmative vote of two-thirds of all the votes entitled to be cast on the matter; and

(8) Any other issuance of shares if the applicability of preemptive rights is impracticable.

for in the charter.[210] This is commonly referred to as the statutory "opt-in" approach to preemptive rights. The opt-in approach recognizes that preemptive rights may be inconvenient and severely impair a Company's ability to raise capital through future equity issuances.

The 1995 amendments, however, did not terminate then existing preemptive rights of stockholders of corporations that were incorporated prior to October 1, 1995.[211] Their preemptive rights can only be eliminated by amending the corporation's charter to expressly deny preemptive rights. Section 2 of the 1995 legislation, which is not part of the MGCL but is part of Maryland law, provides:

> [T]his Act shall be construed only prospectively and may not be applied or interpreted to have any effect on or application to any preemptive rights in existence before October 1, 1995. Such preemptive rights shall remain in existence unaffected by this Act unless and until expressly changed or terminated by a charter amendment.

Regardless of whether a corporation grants or denies preemptive rights in its charter and regardless of whether a stockholder has or does not have common law preemptive rights, a corporation may, by contract or otherwise, grant a stockholder the equivalent of preemptive rights or some other right to purchase stock from the corporation. This sample opinion does not cover contractual rights, except in the unusual situation where those rights appear in the bylaws.[212]

b. Due Diligence

When issuing the sample opinion, the opinion giver should review the Company's charter and bylaws.

i. Corporation Incorporated Prior to October 1, 1995

If the Company was incorporated prior to October 1, 1995, the opinion giver must review the Company's charter to ascertain if it denies preemptive rights to stockholders.

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210 1995 Md. Laws ch. 449.

211 JAMES J. HANKS, JR., MARYLAND CORPORATION LAW § 4.5 [a] (2000 Supp.) (hereinafter "Hanks").

212 *See supra* note 205 and accompanying text (includes a discussion of other forms of opinions that do cover contractual rights).

If the Company's charter does not specifically provide that it denies preemptive rights, the opinion giver should ascertain whether the stock issuance in question falls within one of the exceptions in the pre-1995 version of Section 2-205(a) of the MGCL.[213]

If no exception is applicable, the opinion giver should determine if any stockholders waived their preemptive rights. Because current Section 2-205(b), which statutorily provides for the waiver of preemptive rights, does not apply to corporations incorporated prior to October 1, 1995, a waiver must be noted on the stockholders' stock certificates to be effective.[214] If all stockholders with statutory preemptive rights have not waived them, the opinion should not be given.

After conducting the foregoing inquiry, the opinion giver should determine whether the bylaws grant preemptive rights to the Company's stockholders. If the bylaws grant preemptive rights, the opinion cannot be given. Depending on the terms of the bylaws, the Company may be able to amend its bylaws to eliminate any preemptive rights contained in the bylaws.

ii. Corporation Incorporated on or After October 1, 1995

If the Company was incorporated on or after October 1, 1995, the opinion giver must review the Company's charter to ascertain if it grants preemptive rights to stockholders.

If the Company's charter grants preemptive rights to stockholders, the opinion giver should ascertain whether the stock issuance in question falls within the grant contained in the charter.

If the stock issuance falls within the preemptive rights grant contained in the charter, the opinion giver should determine if any stockholders waived their preemptive rights. Pursuant to Section 2-205(b) of the MGCL, "[a] stockholder to whom a preemptive right has been granted may waive the preemptive right," and such a waiver is irrevocable. If all stockholders with preemptive rights have not waived them, the opinion should not be given.

After conducting the foregoing inquiry, the opinion giver should determine whether the bylaws grant preemptive rights to the Company's stockholders. If the bylaws grant preemptive rights, the opinion should not be given. The Company may be able to amend its bylaws to eliminate any preemptive rights contained in the bylaws.

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213 *See supra* note 209. In this circumstance, generally, opinion givers should not rely upon the pre-1995 version of § 2-205(a)(8) ("Any other issuance of shares if the applicability of preemptive rights is impracticable.") *But see Poole v. Miller*, 211 Md. 448 (1957).

214 *See Real Estate Trust Co. v. Bird*, 90 Md. 229, 247 (1899).

c. Other Issues

In certain circumstances, the opinion giver may be asked to provide the preemptive rights opinion along with the negative assurances opinion.[215] As discussed above, the negative assurances opinion should be avoided in most circumstances.

Opinion Regarding Stock Certificates: *"The stock certificates representing the Stock comply in all material respects with the Maryland General Corporation Law, the Charter and the Bylaws."*

Discussion:

a. Commentary on Purpose and Sample Language

The certificate must include on its face the name of the issuing corporation, the name of the person to whom the shares are issued and the class of stock and number of shares it represents.[216] The certificate must also include language relating to (i) the preferences, conversion and other rights, voting powers, restrictions, limitations as to dividends qualifications, and terms and conditions of redemption of each class of stock that the Company has authority to issue, (ii) if the Company is authorized to issue any preferred or special class of stock, the differences in the relative rights and preferences between the shares and the authority of the board to set the terms of any subsequent series of stock and (iii) any restrictions on transferability of stock.[217]

Section 2-212 of the MGCL provides a list of the officers of a corporation who may execute[218] and countersign[219] stock certificates, which signatures may be either manual or facsimile signatures. Section 2-212 also provides that each stock certificate may be sealed with the actual or a facsimile corporate seal.

b. Due Diligence

In order to confirm that stock certificates representing the shares comply in all material respects with the MGCL, the opinion giver should review Section 2-211 of the MGCL for the required contents of a stock certificate and should compare those requirements with the stock

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215 *See supra* note 206 and accompanying text.

216 MD CODE ANN., CORPS & ASS'NS § 2-211(a) (1999 & Supp. 2006).

217 *Id.* § 2-211(b). Alternatively, the stock certificate may state that the Company will furnish a full statement of the information required by § 2-211(b) to any stockholder on request and without charge.

218 *I.e.*, President, Vice President, Chief Executive Officer, Chief Financial Officer and Chairman or Vice Chairman of the Board.

219 Secretary, Assistant Secretary, Treasurer or Assistant Treasurer; provided, however, that the individual countersigning a stock certificate may not be the same individual as is executing it. MD. CODE ANN., CORPS & ASS'NS § 2-415 (1999 & Supp. 2006).

certificates. The opinion giver may find it more efficient to review a "form" stock certificate and add an assumption to the opinion that all stock certificates representing the shares will be in substantially the same form as the identified form certificate.

In order to confirm that stock certificates representing the stock comply in all material respects with the charter and bylaws of the Company, the opinion giver should review the charter and bylaws to ensure that the certificate complies with any additional requirements set forth therein, including any required legend regarding restrictions on transferability and ownership of shares or any other restrictions or any special requirements as to which officers may execute and countersign the certificate (provided that such officers are permitted signatories under the MGCL as discussed above).[220]

c. Uncertificated Stock

It has become increasingly common for stock to be issued without certificates. Section 2-210 of the MGCL permits a board of directors to "authorize the issue of some or all of the shares of any or all of [the corporation's] classes or series [of stock] without certificates." If shares are issued without certificates, the Company is "required to send the stockholder a written statement of the information required on [stock] certificates . . . ."[221] In the case of a Company that has decided to issue shares without certificates, it may be appropriate for an opinion giver, if requested, to opine that "the notice of uncertificated shares of stock complies in all material respects with the MGCL, the charter and the bylaws." If requested, the opinion giver should confirm that the notice contains the items discussed above as required to be on a certificate.[222] No particular signature requirements exist for the notice.

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220 This opinion does not address legends that may be required by contract or by federal or state securities laws.

221 MD. CODE ANN., CORPS & ASS'NS § 2-210(c) (1999 & Supp. 2006).

222 The opinion giver may assume that the notice will be delivered to the initial purchasers. *See also supra* notes 183 and 184 and accompanying text.

5.2 LIMITED LIABILITY COMPANY

Basic Opinion: *"The issuance of the [Interests] [Units][223] has been duly authorized, and the [Interests] [Units] are validly issued, fully paid and nonassessable."*

Discussion:

Commentary on Purpose and Sample Language

Because the phrase "duly authorized . . . validly issued, fully paid and nonassessable" is most commonly associated with corporate stock, this terminology seems out of place in the LLC arena. Nonetheless, this opinion is often requested in connection with transactions involving LLC interests and is intended to assure the recipient that the LLC has complied with the MLLCA[224] and the Company's governing documents in connection with the creation and issuance of the interests. The opinion has two component parts, each of which has a separate purpose and involves a separate inquiry by the opinion giver before the opinion should be given.

The opinion only covers MLLCA. It does not address federal or state securities laws or compliance with disclosure requirements associated with the applicable transaction. The opinion also is not intended to address whether those persons who approved the issuance acted in accordance with any particular standard of conduct. In addition, the opinion does not address preemptive rights of members.

a. "The issuance of the [Interests] [Units] has been duly authorized. . . ."

The term "duly authorized," in this context, is intended to provide assurance that (a) all necessary action has been taken to create the interests in question and (b) all necessary action has been taken to authorize the issuance of the interests in question and the admission of the interest holder as a member of the Company.

In order to give this opinion, the opinion giver should (i) determine from MLLCA and the Company's governing documents the procedure to be followed in creating the particular class of interests; (ii) determine whether this procedure has been followed in creating the class of interests; (iii) determine the procedure to be followed in authorizing the issuance of

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223 Ownership interests in LLCs are commonly referred to as "interests" and expressed as percentages, but are increasingly being referred to by other names, such as "units." Reference to a "unit," which is used in the same sense as a "share of stock," avoids the necessity of recalculating percentages every time there is an ownership change and may provide other benefits in connection with the drafting of LLC documents.

224 MD CODE ANN, CORPS & ASS'NS § 4A-101 through 4A-1003 (1999 & Supp. 2006).

the interests; and (iv) determine whether this procedure has been followed in authorizing the issuance of the interests.[225]

If the Company has only one class of interests that has been unmodified since the Company's formation,[226] there should be little difficulty in assuring that the above criteria have been satisfied. If the Company has created an additional class or classes of interests since its formation, however, the opinion giver should determine whether the proper procedures were followed in creating the particular type of interests. Depending upon the terms of the Company's governing documents, creation of the class may require the unanimous vote of the members;[227] may require a lesser vote of the members; or may require the approval of some other governing body, person or persons.

Assuming that the class of interests was properly created, the opinion giver should then determine whether the proper procedures were followed in authorizing the issuance of the interests and the admission of the interest holder as a member of the Company. These procedures may or may not be the same procedures that were required to be followed in creating the class of interests. In all cases, the opinion giver should assure that there are no conflicting provisions in the Company's governing documents that may affect the authority of those acting.[228] It is important to note that MLLCA provides that, unless an LLC's operating agreement provides otherwise, a person becomes a member of an LLC only if the existing members unanimously consent.

A due authorization opinion with regard to LLC interests is not an assurance of any rights with respect to the interests except that there is no defense to the enforcement of the holder's rights on account of the failure to observe formalities in creating or issuing the interests. The opinion does not, for example, assure that there are no conflicts between the rights of different classes of interests, that the class has any greater or lesser rights under the Company's governing documents than any other class, or that the rights of the interests are clear and unambiguous.

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225 MLLCA is a flexible statute which contains no restrictions with regard to the characteristics of LLC interests. The current statute, in fact, even permits the creation of interests that have no economic rights in the LLC.

226 An LLC, like a corporation, may have different types of interests, such as nonvoting interests and preferred interests. Those different types of interests are referred to as "classes" in this Section of this Report.

227 While MLLCA addresses voting requirements, it does not set forth a procedure for calling and holding meetings or for taking votes. However, the Company's articles or operating agreement may do so, and the opinion giver should obtain assurance that those procedures were followed.

228 For example, the authorization of a particular class may be addressed in the voting provisions of the Company's operating agreement and, at the same time, may constitute an amendment of the operating agreement, which is subject to a different voting requirement.

The issuance of an LLC interest pursuant to the exercise of conversion rights granted in a convertible security is not presumptively authorized simply because the issuance of the convertible security was duly authorized.[229]

b. ". . . the [Interests] [Units] are validly issued, fully paid and nonassessable."

i. Commentary

As in the case of corporate stock, in order for an LLC interest to be "validly issued," it must be "duly authorized,"[230] as indicated in Subsection a. of this Section.

The opinion giver should confirm that the action taken to approve the issuance is still in effect at the time the interest is issued and has not been amended or rescinded. Accordingly, the opinion giver should obtain a certificate from an appropriate member, manager or other person with knowledge and authority that the resolutions or other form of approval are in full force and effect and have not been amended or rescinded.

If the interests are expressed as a percentage interest in the Company, the opinion giver also may want to determine whether all other percentage interests in the Company have been appropriately adjusted so that after the new interest is created, the aggregate outstanding interests in the Company total one hundred percent (100%).

As in the case of corporate stock, an LLC interest may be evidenced by a certificate. MLLCA permits, but does not require, the issuance of certificates.[231] Confirmation of the issuance, either by updating the Company's operating agreement, the execution and delivery of a joinder agreement or similar agreement, or the preparation of an updated schedule or record of members, should be completed in order for the interest to be deemed to be "validly issued." The step or steps to be taken will depend upon the terms of the Company's governing documents.

There is no requirement that an interest be issued for any consideration in order for the interest to be "validly issued."[232] Nonetheless, in most cases, the payment or

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229 *Compare* MD. CODE ANN., CORPS & ASS'NS § 2-204(d) (1999 & Supp. 2006).

230 As in the case of corporate stock, the "duly authorized" opinion and the "validly issued" opinion are almost always given together. The due authorization opinion is inherent in the validly issued opinion. As indicated in this Report's discussion with regard to corporate stock, one cannot give a validly issued opinion without being satisfied that the interest was duly authorized.

231 MD. CODE ANN., CORPS & ASS'NS § 4A-402(A)(5) (1999 & Supp. 2006). Even if the Company's governing documents require the issuance of a certificate, evidence of the preparation of the certificate in the form prescribed by the Company's governing documents and the due execution and delivery of the certificate should not be necessary in order to give an opinion that the interest has been validly issued, provided that the Company's operating agreement indicates that the person owns the interest in question.

232 *Id.* § 4A-601(c).

delivery of consideration for the interest will be required. Therefore, evidence should be obtained of receipt by the Company of all consideration called for by the resolution or other action approving the issuance of the interest.[233]

Accordingly, the opinion giver must verify that the Company actually received the purported consideration set forth in organizational documents or authorizing resolution. Typically, the opinion giver will rely upon a factual certificate from an authorized person of the Company that states that the Company received the appropriate consideration.

As indicated, in the case of a corporation, an opinion that stock is "nonassessable" means that the corporation does not have the right to require stockholders to pay any additional amounts on account of their stock in addition to the original issuance price. While it is unusual for corporate stock to be assessable, this requirement is not uncommon in the case of an LLC interest. Members of an LLC frequently are required under the LLC's organizational documents to pay additional amounts on account of their membership interests, thus making their interests assessable. Accordingly, the opinion giver should review MLLCA,[234] the Company's organizational documents, any authorizing resolutions and the applicable purchase or subscription agreement to confirm whether there is any further payment obligation on the part of the interest holder. If such an obligation exists, the nonassessable opinion should not be given.

No Preemptive Rights Opinion: *"There are no preemptive rights with respect to the [Interests] [Units] under the Maryland Limited Liability Company Act or the Company's articles of organization or operating agreement."*

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233 MLLCA permits consideration to be in virtually any form. *See* MD. CODE ANN., CORPS & ASS'NS § 4A-501 (1999 & Supp. 2006).

234 MD. CODE ANN., CORPS & ASS'NS § 4A-502 (1999 & Supp. 2006).

Discussion:

Commentary on Purpose and Sample Language

A preemptive right in the case of an LLC is no different than a preemptive right in the case of a corporation. It is the right of existing members to maintain their proportionate ownership of the Company by buying a corresponding share of any newly issued interests. This means that if the Company were to issue additional interests, existing members with preemptive rights would have the right, but not the obligation, to purchase that proportion of the newly issued interests which is necessary for them to maintain, after the issuance, the same proportionate ownership interest in the Company that they possessed before the issuance of interests.

MLLCA does not address preemptive rights, and there appear to be no published court opinions in Maryland or elsewhere dealing with this issue in the case of an LLC.[235] The concept of preemptive rights is a common law concept that is founded on the objective of avoiding a perceived risk of abuse by directors in authorizing the issuance of stock;[236] however, it is possible

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[235] MLLCA provides, as a default rule, that a person may not be admitted as a member without the unanimous consent of the existing members. While this rule may obviate the need for preemptive rights in some cases, it does not offer protection in cases where the operating agreement alters the unanimity requirement.

[236] Preemptive rights arose in the corporate arena as a matter of common law for the purpose of protecting stockholders from abuse by directors in issuing stock. In *Gray v. The Portland Bank*, 3 Mass. 364, 1807 WL 789 (Mass. 1807), the court stated:

> Viewing a corporation of this kind as a copartnership, a power of increasing their stock . . . is a beneficial interest vested in each partner, to which no stranger can be made a party, but by the consent of each subsisting partner; and it is a power which the subsisting partners must exercise proportionally, and according to their interest in the original stock.

Similarly, in *Eideman v. Bowman*, 58 Ill. 444, 1871 WL 7950 (Ill. 1871), the court stated:

> *When this corporation was organized, the charter, and all of its franchises and privileges, vested in the shareholders, and the directors became their trustees for its management. The right to the remainder of the stock, when it should be issued, vested in the original stockholders, in proportion to the amount each held of the original stock, if they would paid for it and was as fully theirs as was the stock already held, and for which they had paid . . . .*
>
> *When the company determine [sic] to increase their capital stock within the limits of their charter, each of the previous shareholders has the right to a proportionate number of the new shares, or a proportionate amount of the new stock, if it should be added to the old shares . . . .*
>
> *It would be a dangerous power to entrust to directors to increase the stock of the company at pleasure, and to sell it to whom they might choose. Such a power would be liable to great abuse; it would enable directors to perpetuate their official position almost indefinitely . . .; it would enable them, at pleasure, to depress the price of the stock in market; it would deprive the original shareholders their just and legal right to dividends, if the new stock were issued to persons not already members of the corporation. Other injustice and wrong could be perpetrated . . . .. The power is such, that we will not infer its existence in a charter, unless clearly expressed . . . .*

that a court could find that members of an LLC, under appropriate circumstances, are entitled to the same kind of protection as stockholders were under principles of common law.[237]

Accordingly, because there is neither statutory nor case law at this time on this subject with respect to LLCs, it is not appropriate for one to request or to give an opinion that there are no preemptive rights under Maryland law. It might be appropriate, however, for one to opine that there are no preemptive rights under MLLCA and that there are no preemptive rights granted under the Company's articles of organization or written operating agreement. Such an opinion should not be interpreted to be an opinion with respect to the common law generally.

The due diligence required in order to give this opinion would include a review of MLLCA to confirm that preemptive rights have not been added by amendment and a review of the Company's articles of organization and operating agreement to confirm that they do not grant preemptive rights.

If an opinion is being given that there are no preemptive rights under an LLC's operating agreement, the opinion giver should take care to define the term "operating agreement" because the concept of "operating agreement" is very broad and may encompass other documents and even oral agreements, in addition to documents specifically labeled "operating agreements."[238] The opinion giver is advised to limit the meaning of this term to a specific written document of a specific date and any specified amendments to that document.

As in the case of an opinion concerning corporate preemptive rights, an opinion concerning LLC preemptive rights should not be construed to be an opinion that there are no other rights to purchase from the Company any interests in the Company. Thus, the opinion is not intended to be an opinion with respect to buy/sell rights, options, warrants, conversion privileges or other rights to purchase interests from the Company. Such an opinion, if requested, would be separately given.[239]

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237 This Report does not take a position with regard to the question of whether the issuance of units without offering them to existing members is, in any circumstance, a breach of a duty or whether there should or should not be preemptive rights in the case of an LLC, limited partnership, LLLP, general partnership or LLP. The Committee notes, however, that under modern corporate law, preemptive rights are disfavored. In fact, the law with respect to corporations has evolved from the common law presumption that preemptive rights exist to a statutory presumption that they do not exist unless the corporation provides otherwise.

238 MD. CODE ANN., CORPS & ASS'NS § 4A-101(o) (1999 & Supp. 2006).

239 *See* text accompanying notes 207-212.

5.3 PARTNERSHIP OR LIMITED LIABILITY PARTNERSHIP

Basic Opinion: *"The issuance of the Interests has been duly authorized, and the Interests are validly issued, fully paid and nonassessable."*

Discussion:

Commentary on Purpose and Sample Language

The opinion "duly authorized. . . validly issued, fully paid and nonassessable," when given in connection with the issuance of partnership or limited liability partnership (LLP) interests, is intended to assure the recipient that the partnership has complied with the MRUPA and the Company's partnership agreement in connection with the creation and issuance of the interests.[240] Just as when given in connection with other forms of entities, the opinion has two component parts, each of which has a separate purpose and involves a separate inquiry by the opinion giver before the opinion should be given.

The opinion only covers MRUPA. It does not address federal or state securities laws or compliance with disclosure requirements associated with the applicable transaction. The opinion also is not intended to address whether those persons who approved the issuance acted in accordance with any standard of conduct. In addition, the opinion does not address preemptive rights of partners.

a. *"The issuance of the Interests has been duly authorized. . . ."*

Just as when given in connection with other forms of entities, the term "duly authorized" is intended to provide assurance that (a) all necessary action has been taken to create the interests and (b) all necessary action has been taken to authorize the issuance of the interests and the admission of the person as a partner.

In order to give this opinion, the opinion giver should (i) determine from the MRUPA and the agreement the procedure to be followed in creating the particular class of interests; (ii) determine whether this procedure has been followed in creating the class of interests; (iii) determine the procedure to be followed in authorizing the issuance of the interests; and (iv) determine whether this procedure has been followed in authorizing the issuance of the interests.[241]

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[240] For purposes of this section, the word "partnership" is intended to refer to either a general partnership or a limited liability partnership.

[241] Like MLLCA, MRUPA is a flexible statute which contains no restrictions with regard to the characteristics of partnership interests. The opinion giver, however, should always check the statute to ensure that there have been no amendments that would affect the Company's ability to create interests.

If the Company has only one class of interests, which has been unmodified since the Company's organization,[242] there should be little difficulty in assuring that the above criteria have been satisfied. However, if the Company has created an additional class or classes of interests since its formation, the opinion giver should determine whether the proper procedures were followed in creating the particular type of interests. Depending upon the terms of the Company's partnership agreement, creation of the class may require the unanimous vote of the partners,[243] may require a lesser vote of the partners or may require the approval of some other governing body, person or persons.

Assuming that the class of interests was properly created, the opinion giver should then determine whether the proper procedures were followed in authorizing the issuance of the interests and the admission of the person as a partner of the partnership. These procedures may or may not be the same procedures that were required to be followed in creating the class of interests. In all cases, the opinion giver should determine that there are no conflicting provisions in the partnership agreement that may affect the authority of those acting.[244] It is important to note that MRUPA provides that, unless the partnership agreement provides otherwise, a person becomes a partner only if the existing partners unanimously consent.

A due authorization opinion with regard to partnership interests is not an assurance of any rights with respect to the interests except that there is no defense to the enforcement of the partner's rights on account of the failure to observe formalities in creating or issuing the interests. The opinion does not, for example, assure that there are no conflicts between the rights of different classes of interests, that the class has any greater or lesser rights under the partnership agreement than any other class, or that the rights of the interests are clear and unambiguous.

The issuance of a partnership interest pursuant to the exercise of conversion rights granted in a convertible instrument is not presumptively authorized solely because the issuance of the convertible instrument was duly authorized.[245]

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242 Like other forms of entities, a partnership may have different types of interests, such as nonvoting interests and preferred interests. Those different types of interests are referred to as "classes" in this Section of this Report.

243 While MRUPA addresses voting requirements, it does not set forth a procedure for calling and holding meetings or for taking votes. The partnership agreement, however, may do so, and the opinion giver should obtain assurance that those procedures were followed.

244 For example, the authorization of a particular class may be addressed in the voting provisions of the partnership agreement and, at the same time, may constitute an amendment of the partnership agreement, which is subject to a different voting requirement.

245 *Compare* MD. CODE ANN., CORPS & ASS'NS § 2-204(d) (1999 & Supp. 2006).

b. *". . . the Interests are validly issued, fully paid and nonassessable."*

As in the case of interests in other forms of entities, in order for a partnership interest to be "validly issued," it must be "duly authorized,"[246] as indicated in Subsection a. of this Section.

The opinion giver should confirm that the action taken to approve the issuance is still in effect at the time the interest is issued and has not been amended or rescinded. Accordingly, the opinion giver should obtain a certificate from an appropriate partner or other person with knowledge and authority that the resolutions or other form of approval are in full force and effect and have not been amended or rescinded.

If the interests are expressed as a percentage interest in the partnership, the opinion giver also may want to determine whether all other percentage interests in the Company have been appropriately adjusted so that after the new interest is created, the aggregate outstanding interests in the Company total one hundred percent (100%).

MRUPA does not address the issuance of certificates as evidence of partnership interests. In fact, certificated partnership interests are unusual. Confirmation of the issuance, either by updating the partnership agreement, executing and delivering a joinder agreement or similar agreement, or preparing an updated schedule or record of partners, should be completed in order for the interest to be deemed to be "validly issued." The step or steps to be taken ordinarily would depend upon the terms of the partnership agreement.

There is no requirement in the MRUPA that an interest be issued for consideration in order to be "validly issued." Nonetheless, in most cases, the payment or delivery of consideration for the interest will be required. Therefore, evidence should be obtained of receipt by the Company of all consideration called for by the resolution or other action approving the issuance of the interest.

Accordingly, the opinion giver must verify that the Company actually received the purported consideration set forth in organizational documents or authorizing resolution. Typically, the opinion giver can rely upon a factual certificate from a partner that states that the Company received the appropriate consideration.

As indicated, assessability refers to the right of an enterprise to require its owners, after their ownership interests have been issued, to pay additional amounts on account of their ownership of interests. Under this definition, interests in partnerships that are not LLPs would, by statute, be assessable.[247] In addition, partners may agree, by contract, that their interests are assessable. In either event, the Committee does not believe that a nonassessable opinion, as

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246 As in the case of corporate stock, the duly authorized opinion and the validly issued opinion are almost always given together. The due authorization opinion is inherent in the validly issued opinion. As indicated in this Report's discussion with regard to corporate stock, one cannot give a validly issued opinion without being satisfied that the interest was duly authorized.

247 MD. CODE ANN., CORPS & ASS'NS § 9A-807(b) (1999 & Supp. 2006).

commonly given with respect to other entities, should be given in the case of general partnerships.

By contrast, interests in LLPs are not assessable as a matter of statute, but they may be assessable as a result of the parties' agreement. Accordingly, the opinion giver should review the Company's governing documents, any authorizing resolutions and the applicable purchase or subscription agreement to confirm whether there is any further payment obligation on the part of the partner to make additional capital contributions or pay additional amounts on account of the interest and to determine if a nonassessable opinion is appropriate.

No Preemptive Rights Opinion: "There are no preemptive rights with respect to the Interests under the Maryland Revised Uniform Partnership Act or the Company's partnership agreement."

Discussion:

Commentary on Purpose and Sample Language

MRUPA provides, as a default rule, that a person may become a partner only with the consent of all of the partners,[248] but it does not address preemptive rights. The requirement of unanimous consent protects partners, including partners of an LLP, from dilution in the cases where unanimity remains the rule. That requirement, however, does not provide that kind of protection in the case of partnerships in which the partnership agreement alters the unanimity rule. Just as in the case of an LLC, the risk exists that a Maryland court would conclude that partners, including partners of an LLP, have preemptive rights to purchase partnership interests to prevent dilution of their interests.

As in the case of an LLC, there appear to be no published court opinions in Maryland or elsewhere dealing with this issue in the case of a partnership.

For this reason, it is not appropriate for one to request or to give an opinion that there are no preemptive rights under Maryland law with regard to partnership interests or LLP interests. It might be appropriate, however, for one to opine that there are no preemptive rights under MRUPA, and that there are no preemptive rights granted under the Company's written partnership agreement. For these reasons, such an opinion should not be interpreted to cover the common law generally.

The due diligence required in order to give this opinion, in the case of either an ordinary partnership or an LLP, would include a review of MRUPA to confirm that preemptive rights have not been added by amendment and a review of the partnership agreement to confirm that it does not grant preemptive rights.

As in the case of an LLC, if an opinion is being given that there are no preemptive rights under a partnership agreement, the opinion giver should take care to define the term "partnership

[248] *Id.* § 9A-401(i).

agreement." The opinion giver is advised to limit the meaning of this term to a specific written document of a specific date. If there are amendments to that document, they should be specifically defined as well.

As in the case of an opinion concerning preemptive rights in the case of other Maryland entities, an opinion concerning partnership preemptive rights should not be construed to be an opinion that there are no other rights to purchase from the partnership any interests in the Company. Thus, the opinion is not intended to be an opinion with respect to buy/sell rights, options, warrants, conversion privileges or other rights to purchase interests in the Company. Such an opinion, if requested, would be separately given.[249]

[249] *See, e.g., supra* note 206.

5.4 LIMITED PARTNERSHIP OR LIMITED LIABILITY LIMITED PARTNERSHIP

Basic Opinion: *"The issuance of the Interests has been duly authorized, and the Interests are validly issued, fully paid and nonassessable."*

Discussion:

Commentary On Purpose And Sample Language

The opinion "duly authorized. . . validly issued, fully paid and nonassessable," when given in connection with the issuance of limited partnership or limited liability limited partnership (LLLP) interests, is intended to assure the recipient that the limited partnership has complied with the Maryland Revised Uniform Limited Partnership Act (MRULPA) and the limited partnership agreement in connection with the creation and issuance of the interests.[250] Just as when given in connection with other forms of entities, the opinion has two component parts, each of which has a separate purpose and involves a separate inquiry by the opinion giver before the opinion should be given.

The opinion only covers MRULPA. It does not address federal or state securities laws or compliance with disclosure requirements associated with the transaction. The opinion also is not intended to address whether those persons who approved the issuance acted in accordance with any standard of conduct. In addition, the opinion does not address preemptive rights of partners.

a. ***"The issuance of the Interests has been duly authorized. . . ."***

Just as when given in connection with other forms of entities, the term "duly authorized" is intended to provide assurance that (a) all necessary action has been taken to create the interests, and (b) all necessary action has been taken to authorize the issuance of the interests and the admission of the person as a partner.

In order to give this opinion, the opinion giver should (i) determine from MRULPA and the limited partnership agreement the procedure to be followed in creating the particular class of interests; (ii) determine whether this procedure has been followed in creating the class of interests; (iii) determine the procedure to be followed in authorizing the issuance of the interests; and (iv) determine whether this procedure has been followed in authorizing the issuance of the interests.[251]

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250 For purposes of this section, the words "limited partnership" are intended to refer to either a limited partnership or a limited liability limited partnership.

251 MRULPA is a flexible statute which contains no restrictions with regard to the characteristics of limited partnership interests, save and except that an interest of a limited partner which carries with it the right to control of the business may subject the limited partner to liability for debts of the business. MD. CODE ANN., CORPS & ASS'NS § 10-303 (1999 & Supp. 2006). The opinion giver, however, should always check the statute to ensure that there have been no amendments that would affect the Company's ability to create interests.

If the limited partnership has only one class of general partnership interests and one class of limited partnership interests, which have been unmodified since the limited partnership's organization,[252] there should be little difficulty in assuring that the above criteria have been satisfied. If, however, the Company has created an additional class or classes of interests since its formation, the opinion giver should determine whether the proper procedures were followed in creating the particular type of interests. Depending upon the terms of the limited partnership agreement, creation of the class may require the unanimous vote of the general partners,[253] may require a lesser vote of the general partners, may require approval of the limited partners or may require some other level of approval.

Assuming that the class of interests was properly created, the opinion giver should then determine whether the proper procedures were followed in authorizing the issuance of the interests and the admission of the person as a partner of the limited partnership. These procedures may or may not be the same procedures that were required to be followed in creating the class of interests. In all cases, the opinion giver should determine that there are no conflicting provisions in the limited partnership agreement that may affect the authority of those acting.[254] It is important to note that MRULPA provides that, unless the limited partnership agreement provides otherwise, a person becomes a general partner after formation only with the consent of all general partners and a majority in interest of the limited partners, and a person becomes a limited partner after formation only if all partners consent.[255]

A due authorization opinion with regard to interests in a limited partnership is not an assurance of any rights with respect to the interests except that there is no defense to the enforcement of the partner's rights on account of the failure to observe formalities in creating or issuing the interests. The opinion does not, for example, assure that there are no conflicts between the rights of different classes of interests, that the class has any greater or lesser rights under the limited partnership agreement than any other class, or that the rights of the interests are clear and unambiguous.

The issuance of a limited partnership interest pursuant to the exercise of conversion rights granted in a convertible instrument is not presumptively authorized simply because the issuance of the convertible instrument was duly authorized.[256]

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252 Like other forms of entities, a limited partnership may have different types of limited partnership interests, such as nonvoting interests and preferred interests. It also may have different types of general partner interests. Those different types of interests are referred to as "classes" in this Section of this Report.

253 While MRULPA addresses certain voting requirements, it does not set forth a procedure for calling and holding meetings or for taking votes. The limited partnership agreement, however, may do so, and the opinion giver should obtain assurance that those procedures were followed.

254 For example, the authorization of a particular class may be addressed in the voting provisions of the limited partnership agreement and, at the same time, may constitute an amendment of the limited partnership agreement, which is subject to a different voting requirement.

255 MD. CODE ANN., CORPS & ASS'NS § 9a-408(i) (1999 & Supp. 2006).

256 *Id.* § 2-204(d).

b. ***". . . the Interests are validly issued, fully paid and nonassessable."***

As in the case of interests in other forms of entities, in order for an interest in a limited partnership to be "validly issued," it must be "duly authorized,"[257] as indicated in Subsection a. of this Section.

The opinion giver should confirm that the action taken to approve the issuance is still in effect at the time the interest is issued and has not been amended or rescinded. Accordingly, the opinion giver should obtain a certificate from an appropriate general partner with knowledge and authority that the resolutions or other form of approval are in full force and effect and have not been amended or rescinded.

If the interests are expressed as a percentage interest in the limited partnership, the opinion giver also may want to determine whether all other percentage interests in the Company have been appropriately adjusted so that after the new interest is created, the aggregate outstanding interests in the Company total one hundred percent (100%).

MRULPA permits, but does not require, the issuance of certificates as evidence of limited partnership interests.[258] Confirmation of the issuance, either by updating the limited partnership agreement, executing and delivering a joinder agreement or similar agreement, or the preparing an updated schedule or record of partners should be completed in order for the interest to be deemed to be "validly issued." The step or steps to be taken ordinarily would depend upon the terms of the limited partnership agreement.

There is no requirement in MRULPA that, in order for an interest to be "validly issued," it must have been issued for any consideration.[259] Nonetheless, in most cases, the payment or delivery of consideration for the interest will be required. Therefore, evidence should be obtained of receipt by the Company of all consideration called for by the resolution or other action approving the issuance of the interest.

Accordingly, the opinion giver must verify that the Company actually received the purported consideration set forth in its governing documents or authorizing resolution. Typically, the opinion giver can rely upon a factual certificate from a general partner that states that the Company received the appropriate consideration.

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257 As in the case of corporate stock, the duly authorized opinion and the validly issued opinion are also almost always given together. The due authorization opinion is inherent in the validly issued opinion. As indicated in this Report's discussion with regard to corporate stock, one cannot give a validly issued opinion without being satisfied substantively that the interest was duly authorized.

258 MD. CODE ANN., CORPS & ASS'NS § 10-706 (1999 & Supp. 2006). Even though the limited partnership agreement may require the issuance of a certificate, evidence of the preparation of the certificate in the form prescribed by the agreement and the due execution and delivery of the certificate, in accordance with the limited partnership agreement, should not be necessary in order to give an opinion that the interest has been validly issued, provided that the agreement indicates that the person owns the interest in question.

259 *Id.* §§ 10-404 and 10-501.

General partner interests in limited partnerships that are not LLLPs are, by their nature, assessable. General partner interests in LLLPs may or may not be assessable. Accordingly, if the Company is an LLLP, the opinion giver should review the Company's governing documents, any authorizing resolutions and the applicable purchase or subscription agreement to confirm whether there is any obligation on the part of a general partner to make additional capital contributions or pay additional amounts on account of the general partner's interest and to determine if a nonassessable opinion is appropriate.

Similarly, limited partner interests in LLLPs and limited partner interests in limited partnerships that are not LLLPs may or may not be assessable. Accordingly, with respect to limited partner interests, the opinion giver should review the Company's governing documents, any authorizing resolutions and the applicable purchase or subscription agreement to confirm whether there is any obligation on the part of a limited partner to make additional capital contributions or pay additional amounts on account of the limited partner's interest and to determine if a nonassessable opinion is appropriate.

No Preemptive Rights Opinion: *"There are no preemptive rights with respect to the Interests under the Maryland Revised Uniform Limited Partnership Act or the Company's limited partnership agreement [or limited liability limited partnership agreement]."*

Discussion:

Commentary on Purpose and Sample Language

MRUPA does not address preemptive rights in the case of general partners or limited partners.[260]

Unless the limited partnership agreement provides otherwise, a person may be admitted as a general partner of a limited partnership or LLLP only with the consent of all general partners and a majority in interest of the limited partners;[261] and a person may be admitted as a limited partner only with the consent of all general partners.[262] While this protects a general partner from dilution, it does not protect a limited partner from dilution. Moreover, if the limited partnership agreement provides for less than unanimous general partner consent to the admission of additional general partners, this would not protect general partners from dilution, either.

As in the case of an LLC, [263] for a general partnership or LLP, there is no case law addressing the issue of preemptive rights; and, as in the case of these other entities, because the

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260 The analysis set forth in this Section applies to both limited partnerships and limited liability limited partnerships.

261 MD. CODE ANN., CORPS & ASS'NS § 10-401 (1999 & Supp. 2006).

262 *Id.* § 10-301(b).

263 *See supra* text accompanying notes 235.

doctrine of preemptive rights is based on the concept of avoiding abuse, it is possible that a court could find that general partners and limited partners of a limited partnership or LLLP, under appropriate circumstances, are entitled to the same kind of protection from dilution as corporate stockholders were entitled to under principles of common law.

Accordingly, it is not appropriate for one to request or to give an opinion that there are no preemptive rights in the case of a limited partnership or LLLP. It might be appropriate, however, for one to opine that there are no preemptive rights under MRULPA, and that there are no preemptive rights granted under the Company's written limited partnership agreement. For these reasons, such an opinion should not be interpreted to cover the common law generally.

The due diligence required in order to give this opinion would include a review of MRULPA to confirm that preemptive rights have not been added by amendment and a review of the Company's limited partnership agreement to confirm that it does not grant preemptive rights.

If an opinion is being given that there are no preemptive rights under the Company's limited partnership agreement, the opinion giver should take care to define the term "limited partnership agreement." The opinion giver is advised to limit the meaning of this term to a specific written document of a specific date. If there are amendments to that document, they should be specifically defined as well.

As in the case of an opinion concerning preemptive rights of other Maryland entities, an opinion concerning limited partnership or LLLP preemptive rights should not be construed to be an opinion that there are no other rights to purchase from the limited partnership or LLLP any interests in the Company. Thus, the opinion is not intended to be an opinion with respect to buy/sell rights, options, warrants, conversion privileges or other rights to purchase interests in the Company. Such an opinion, if requested, would be separately given.[264]

[264] *See, e.g., supra* note 206.

5.5 REAL ESTATE INVESTMENT TRUST

Basic Opinion: *"The issuance of the Shares has been duly authorized, and the Shares are validly issued, fully paid and nonassessable."*

Discussion:

Commentary on Purpose and Sample Language

The opinion that the issuance of shares of beneficial interest in the REIT[265] has been duly authorized, and shares are validly issued, fully paid and nonassessable assures the opinion recipient that the acquired shares will enable the holder (and its successors and assigns) to all the rights of a shareholder under the Maryland REIT Law, the Company's declaration of trust and the bylaws. This opinion has two component parts, each of which has a separate purpose and involves a separate inquiry by the opinion giver before the opinion can be given.

The opinion described in the preceding paragraph covers only the Maryland REIT Law and the MGCL, where applicable.[266] The opinion does not address (i) federal or state securities laws,(ii) ,[267] (ii) compliance with disclosure requirements associated with the applicable transaction,[268] and (iii) whether the trustees of the REIT (who approved the issuance) acted in accordance with the appropriate standard of conduct.[269] In addition, the opinion does not address preemptive rights of shareholders, as that would be covered by a different opinion.[270]

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265 The phrase "Real Estate Investment Trust" generally refers to a federal tax status of an entity, whether a corporation, a trust or another form of entity. Maryland has a statute, however, the Maryland REIT Law, which permits the formation of a special business trust known as a Maryland real estate investment trust. MD. CODE ANN., CORPS & ASS'NS § 8-101 (1999 & Supp. 2006), *et seq*. (the "Maryland REIT Law"). For purposes of this Section of the Report, the reference to a REIT is intended to refer to a Maryland real estate investment trust formed under the Maryland REIT Law, which may, but is not required to, elect to be taxed as a REIT for federal income tax purposes.

266 As discussed below, matters of governance of Maryland real estate investment trusts are commonly addressed by reference or analogy to Maryland corporate law.

267 TriBar 1998 Report, *supra* note 9, § 6.2.1.

268 *Id.*

269 Unless the declaration of trust provides otherwise, the standards of conduct for trustees of a REIT are similar to the standards of directors of a Maryland corporation. Hanks, *supra* note 211, § 17.16.

270 *See supra* text accompanying notes 207-212.

a. *"The issuance of the Shares has been duly authorized. . . ."*

i. Commentary

In order for an issuance of shares to be "duly authorized," the shares must have been created in accordance with the Maryland REIT Law and the Company's declaration of trust and bylaws (and, typically, approved by resolution of the board of trustees).[271]

Specifically, this opinion means that (a) the provisions of the declaration of trust relating to the authorized shares comply with the Maryland REIT Law, (b) the Maryland REIT Law permits shares with the characteristics contained in the declaration of trust, (c) there are a sufficient number of authorized but unissued shares available for issuance, and (d) the necessary action required by the REIT (*e.g.*, approval from the board of trustees or, if required, the shareholders) has been taken.[272] In addition, if shares were authorized pursuant to an amendment or articles supplementary to the original declaration of trust, the opinion means that the amendment or the articles were properly approved in accordance with the Maryland REIT Law, the declaration of trust and the bylaws of the REIT.[273]

ii. Due Diligence

The opinion giver should confirm that the description of the shares in the declaration of trust complies with the applicable sections of the Maryland REIT Law; hence, a thorough review of Subsections 8-202 and 8-203 of the Maryland REIT Law, as well as the declaration of trust, is required. At a minimum, the declaration of trust must set forth (a) the total number of shares, which the REIT has, authority to issue; and (b) if there are multiple classes of shares, a description of each class.[274]

The opinion giver should confirm that the Maryland REIT Law permits the characteristics of the shares contained in the declaration of trust.[275] The opinion giver should

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271 *See* Glazer and FitzGibbon, *supra* note 11, §10.4.2; TriBar 1998 Report, *supra* note 9, § 6.2.1 (in connection with the authorization of shares of a corporation).

272 *Id.*

273 *Id.* Unless the opinion giver has reason to believe that some irregularity exists, the opinion giver is entitled to rely on the presumption of regularity in performing due diligence and to assume that all declaration of trust documents filed prior to any declaration of trust documents being adopted and filed in connection with the current transaction (pursuant to which the current shares are being issued) were properly approved for filing. If the opinion giver has reason to believe some irregularity exists, the need for further inquiry may depend on the facts and circumstances of each situation. Unless the opinion giver is aware of circumstances giving rise to concern about the REIT's approval, the opinion giver may rely on a statement set forth in the articles of amendment, articles supplementary, or any other articles affecting the declaration of trust as to its approval having complied with the REIT's declaration of trust, bylaws and the Maryland REIT law. *See also supra* note 164, by analogy.

274 MD. CODE ANN., CORPS & ASS'NS § 8-202(b) (1999 & Supp. 2006).

275 § 8-203 of the Maryland REIT Law sets forth the permitted provisions relating to the shares that may be included in the declaration of trust.

also confirm that any declaration of trust documents being adopted and filed in connection with the current transaction were properly approved by the trustees in accordance with Section 2-501 of the Maryland REIT Law.[276]

Typically, a REIT declaration of trust grants the authority to issue shares to the trustees. The opinion giver should confirm that that the declaration of trust granted the authority to issue shares to the trustees and that the issuance was, in fact, duly authorized by the trustees in accordance with the declaration of trust and the bylaws, or, alternatively, that any other action required by the declaration of trust has been taken.

Matters of governance of Maryland REITs, as well as other matters, are commonly addressed by reference or analogy to Maryland corporate law.[277] Accordingly, where the Maryland REIT Law, the declaration of trust and bylaws of the REIT are silent on an issue that is dealt with in the MGCL, the opinion giver should confirm that the trustees' actions were in compliance with those applicable sections of the MGCL. Therefore, for example, the opinion giver should confirm that (a) in authorizing the issuance of shares, the trustees acted at a properly called and held meeting (or by an informal action, as permitted by the 2-408(c) of the MGCL or in accordance with the declaration of trust of the Company) and (b) the authorizing resolution received the requisite votes in accordance with the declaration of trust and the bylaws.

The opinion giver should examine the trustees' resolution to confirm that it (a) authorized the issuance, (b) set the minimum price or value of consideration for the shares, and (c) fairly described the consideration (if not money).[278]

Since the authorization of the issuance of shares by the trustees is similar to the authorization of any other action by the board of trustees (*e.g.*, the authorization to enter into a contract), the opinion giver may also wish to consider the relevant sections relating to the "authorization" of contracts.[279]

If certain aspects of the issuance of shares are delegated to a committee of the trustees, the opinion giver should also ensure that the committee properly acted within that

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276 *See* MD. CODE ANN., CORPS & ASS'NS § 8-202(d) (1999 & Supp. 2006) (the initial declaration of trust must be signed by each trustee); and *id.* §2-501 (an amendment must be advised by the trustees and approved by at least a two-thirds vote of the shareholders that are entitled to vote on the matter; alternatively, the declaration of trust may permit a majority of the trustees to amend the declaration of trust without the shareholders' consent).

277 *See, e.g., Twenty-Seven Trust v. Realty Growth Investors*, 533 F. Supp. 1028 (D. Md. 1982); *Value Property Trust v. Zim Co. (In re Mortgage & Realty Trust)*, 195 B.R. 740, 750 (1996) (the fiduciary duties of REIT trustees are essentially the same as the fiduciary duties of a corporate director) (applying Maryland law); *Terrydale Liquidating Trust v. Barness*, 642 F. Supp. 917, 930 (S.D.N.Y. 1986) (the trustees of a real estate investment trust are functionally more similar to corporate directors than to ordinary trustees) (subsequent history omitted); Hanks, *supra* note 211, § 17.16 (standard of conduct for directors of Maryland corporations is a useful analogy for judging the conduct of the trustees of a Maryland REIT).

278 MD. CODE ANN., CORPS & ASS'NS § 2-203(a) (1999 & Supp. 2006).

279 *See supra* Section D.4, "Authorization, Execution, Validity and Enforceability."

authority.[280] The opinion giver must also verify that any actions taken by the committee with respect to the issuance of shares were authorized in accordance with the Maryland REIT Law, the declaration of trust and the bylaws.

If shares are issued pursuant to the exercise or conversion of a security that is exercisable or convertible into shares, the issuance of those shares is duly authorized if the issuance of the convertible security that is exercisable or convertible into shares was originally duly authorized.[281]

b. *". . . the Shares are validly issued, fully paid and nonassessable."*[282]

i. Commentary

(A) Compliance with declaration of trust, bylaws and resolutions

In order for shares to be "validly issued," the issuance must have been "duly authorized"[283] and the shares must have been issued in accordance with the Maryland REIT Law, the declaration of trust, the bylaws and, where applicable, the MGCL.[284] In addition, for shares to be "validly issued," the issuance must comply in all material respects with any requirements or conditions imposed by the authorizing resolutions.[285]

(B) Indicia of Ownership

Similar to an issuance by a corporation, in connection with the issuance of REIT shares, a REIT must take some further action to evidence the ownership of REIT shares.[286] A common method to evidence ownership of REIT shares is to deliver certificates to each new holder and to record the shareholders' names in the Company's records.[287] Today, however,

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280 Pursuant to MD. CODE ANN., CORPS & ASS'NS § 8-206 (1999 & Supp. 2006), the trustees may delegate any of their powers to a committee, including the power to authorize the issuance of shares without the necessity of the board, as is required under the MGCL, setting the maximum number of shares to be issued.

281 *See* MD. CODE ANN., CORPS & ASS'NS § 2-204(d) (1999 & Supp. 2006), by analogy.

282 For brevity, the "validly issued," "fully paid," and "nonassessable" opinions are collectively referred to as the "validly issued" opinion. *See also supra* note 177.

283 The duly authorized opinion and the validly issued opinion are also almost always given together. Indeed, one cannot give a validly issued opinion without being satisfied substantively that the issuance of the shares was duly authorized.

284 *See* Glazer and FitzGibbon, *supra* note 11, § 10.5, and TriBar 1998 Report, *supra* note 9, § 6.2.2.

285 *See* Glazer and FitzGibbon, *supra* note 11, § 10.6.5.

286 *See Id.* § 10.6.6.

287 *See id.*

REIT shares are commonly issued without certificates.[288] If certificates are not issued, some additional action to indicate that the shares were issued, such as updating the ledger, should occur. The opinion that shares are "validly issued," however, should be read to include an implicit assumption that the Company has taken or will take or has caused or will cause to be taken the necessary actions to evidence the ownership of the shares that the Company issues.[289]

(C) Consideration

In order for shares to be "validly issued" they must have been issued for the consideration determined by the trustees in the authorizing resolutions and otherwise in accordance with the Maryland REIT Law, the declaration of trust, the bylaws and, where applicable, the MGCL.

In connection with a corporation, the MGCL provides that shares are fully paid and non-assessable if "the corporation receives the consideration for which shares or convertible securities are to be issued . . . ."[290] Section 2-206 of the MGCL provides that consideration may consist (in whole or in part) of: "money; tangible or intangible property; labor or services actually performed for the corporation; a promissory note or other obligation for future payment in money; or contracts for labor or services to be performed."[291] The MGCL further provides, "in the absence of actual fraud in the transaction, the minimum consideration stated in the declaration of trust or determined by the board of directors in its resolution is conclusive for all purposes."[292]

Thus, the opinion giver should confirm that the consideration received by the Company is adequate under the applicable sections of the MGCL, as referenced above. If the consideration is not cash, the opinion giver may rely upon the authorizing resolutions, since the trustees are authorized to set a value for that consideration.[293]

The opinion requires receipt by the Company of all the consideration called for by the resolution approving the issuance of the shares and the compliance with any requirements relating to consideration for newly issued shares in the Company's declaration of trust or bylaws (if applicable).

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288 MD. CODE ANN., CORPS & ASS'NS § 8-203(f) (1999 & Supp. 2006).

289 *See supra* note 184 and accompanying text.

290 MD. CODE ANN., CORPS & ASS'NS § 2-206(c) (1999 & Supp. 2006).

291 *Id.* § 2-206(a).

292 *Id.* § 2-203(b).

293 *See* Glazer and FitzGibbon, *supra* note 11, § 10.8.2.2.

The requirement that a REIT receive consideration for an issuance of shares is not applicable for shares issued as a result of a share split or a share dividend.[294]

(D) Nonassessable

By analogy to the MGCL, "fully paid" and "nonassessable" have identical meanings with respect to REIT shares. It is theoretically possible (although highly unusual), however, that the shares can be "fully paid" but "assessable" if the shareholder has an additional capital contribution obligation (*e.g.*, if such an obligation was included in the applicable subscription agreement). Accordingly, the opinion giver should review the authorizing resolutions and the applicable purchase or subscription agreement to confirm that there is no further payment obligation.[295]

ii. Due Diligence

(A) Compliance with declaration of trust, bylaws and resolutions

The opinion giver should review the applicable declaration of trust and the bylaws to confirm that the Company has complied with all applicable restrictions and prohibitions in connection with the issuance of the shares.

The opinion giver should confirm that the resolutions approving the issuance are still in effect at the time the shares are issued, as resolutions can be amended or rescinded.[296] The opinion giver should obtain a certificate from an appropriate officer of the Company that the resolutions are in full force and effect and that the resolutions have not been amended or rescinded.

The "validly issued" opinion also requires the opinion giver to confirm that there is a sufficient number of authorized but unissued shares.[297] If there are not enough authorized but unissued shares, those shares that the Company attempts to issue in excess of the available shares may be void.[298] For example, the issuance of shares upon exercise of an

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294 *See* MD. CODE ANN., CORPS & ASS'NS §§ 2-203(c); 2-309(c)(2) (1999 & Supp. 2006).

295 *See also Id.* § 2-206(c) (if the shareholder pays with a promissory note, the shares would be fully paid).

296 Glazer and FitzGibbon, *supra* note 11, § 10.6.4.1.

297 *Id*. § 10.4.5. Confirmation may be accomplished through a review of the share ledger or, where the Company uses a transfer agent, the opinion giver may rely on reasonable evidence provided by the transfer agent as to the number of shares then outstanding. The opinion giver may obtain a factual certificate from an officer of the Company as to the outstanding shares. *See also supra* notes 196-198 and accompanying text.

298 *See Larkin v. Maclellan*, 140 Md. 570, 590 (1922). *Compare Larkin with* MD. CODE ANN., CORPS & ASS'NS § 2-208(e) (1999 & Supp. 2006) ("The stock issued by a corporation prior to the time the articles supplementary with respect to the stock are effective shall cease to be voidable as a result of the failure to file the articles supplementary at the time the articles supplementary become effective.") and MD. CODE ANN., CORPS & ASS'NS § 8-210(a) (2002 & Supp. 2006) ("appropriate action" cures an overissue).

option would not be duly authorized if all the authorized shares had previously been issued (even though enough shares were available when the option was actually granted).

If the issuance is as the result of a dividend, the opinion giver should verify that the Company has complied with all provisions under the declaration of trust establishing the terms of a class of shares or any limitation upon the issuance of share dividends.[299] If the issuance violated preemptive rights provisions of the declaration of trust, the opinion giver should exercise caution in opining that the shares are "validly issued."[300]

(B) Consideration

The opinion giver should verify or take an assumption in the opinion that the Company actually received the consideration set forth in the authorizing resolution. The opinion giver may rely upon a factual certificate from an officer of the Company that states that the Company received the appropriate consideration.[301]

Basic Capitalization Opinion: *"The authorized shares of the REIT consist of [_____]common shares of beneficial interest, par value $[_____] per share."*

Discussion:

a. Commentary on Purpose and Sample Language

The term "authorized shares" refers to the total number of shares of all classes that a REIT has authority to issue pursuant to its declaration of trust.

If a REIT's shares are divided into classes, further description will be needed. For example, a reference in the opinion to "[_____] preferred shares of beneficial interest, par value $[_____] per share, of which [_____] shares have been classified as Series A Convertible Non-Voting Preferred Shares" may be appropriate. Where the declaration of trust gives a title to a specific class of shares, the opinion may identify it by name and need not further identify the characteristics of the shares (*e.g.*, preferences, conversion or other rights, voting powers, *etc.*). If the class is not given a specific title, the opinion may identify it by any designation set forth in the declaration of trust, any distinguishing feature and the par value (*e.g.*, "Class A redeemable preferred shares of beneficial interest, par value $[_____] per share").

Section 8-202 of the Maryland REIT Law provides that a declaration of trust shall include, among other things, (i) the total number of shares, and (ii) if the shares are divided into different classes, a description of each class.

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299 TriBar 1998 Report, *supra* note 9, § 6.2.2.

300 *Id.* Shareholders may have preemptive rights if the declaration of trust includes a provision granting preemptive rights to shareholders.

301 TriBar 1998 Report, *supra* note 9, § 6.2.3 n.136.

b. Due Diligence

The opinion giver should confirm the number of shares of the Company's authorized shares, and the class or classes of the shares by examining a certified copy of the Company's declaration of trust. If the declaration of trust includes articles of amendment or articles supplementary that purport to alter the authorized shares, then the opinion giver should consider the adequacy as to the form of the articles under the Maryland REIT Law and the manner of the Company's approval of the articles under the declaration of trust, the bylaws, the Maryland REIT Law and the MGCL in effect at the time the articles became effective in order to conclude that the respective articles supplementary or amendment properly alters the Company's authorized shares.[302]

c. Other Issues

Sometimes the opinion giver is asked to supplement the sample opinion set forth above with a statement as to the number of issued and outstanding shares. For example, the words "_____ of which are issued and outstanding of record as of the date of this letter" may be appended to the sample language set forth above. That opinion is purely factual in nature and should be avoided.[303] The opinion recipient should be capable of reviewing documentation that would support the factual conclusion. In some instances, a transfer agent's certificate could be provided. The Company's ledger or transfer book could be produced for examination. Alternatively, a representation of the Company or a certificate of a Company officer should be satisfactory evidence.[304]

Similarly, the opinion giver is sometimes asked to provide negative assurance as to the existence of contract rights requiring the Company to issue additional shares. Those contract rights are often in the form of options, warrants, subscriptions or convertible or exchangeable securities. Such opinions are also opinions as to factual matters and should be avoided in most circumstances. The opinion recipient should be capable of inquiring of the Company as to the accuracy of factual statements.[305] If required to give this opinion, the opinion

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302 *See supra* note 164.

303 TriBar 1998 Report, *supra* note 9, § 6.2.5.

304 If these opinions are given, the opinion giver should rely on any one or more of these factual foundations.

305 The negative assurances that are requested often go beyond the existence of options, warrants or convertible securities. One formulation of such an opinion might be as follows:

(a) the Company has not issued any option, warrants, rights, calls, commitments, subscriptions or convertible or exchangeable securities pursuant to which the Company may be compelled to issue shares; (b) there are no outstanding contracts or other agreements of the Company to purchase, redeem or otherwise acquire any shares or securities or obligations of any kind convertible into shares; (c) there are no dividends which have accrued or have been declared on the Shares but are unpaid; (d) there are no voting trusts, shareholder agreements, proxies or other agreements or understandings in effect with respect to the voting or transfer of any shares; and (e) there are no authorized or outstanding share appreciation, phantom shares, share plans or similar rights with respect to the Company.

Another formulation of such an opinion might be as follows:

giver should require that an appropriate officer of the Company provide a certificate as to this matter (and the opinion could be based solely on that certificate).

No Preemptive Rights Opinion: *"There are no preemptive rights with respect to the Shares under the Maryland REIT Law, the Declaration of Trust or the Bylaws."*

Discussion:

a. Commentary on Purpose and Sample Language

A preemptive right is the right of existing shareholders of a Company to maintain their fractional ownership of the Company by buying a proportional number of shares of any future issuance of shares. This means that if the Company issues new shares, the existing shareholders with preemptive rights have the right, but not the obligation, to purchase as many shares of the newly issued shares as necessary to maintain their proportional ownership interest in the Company before the Company sells the shares to persons outside of the shareholder group that holds the preemptive rights.

The Maryland REIT Law does not address preemptive rights. Because, however, the concept of preemptive rights is a common law concept relating to corporations, which is founded on the objective of avoiding a perceived risk of abuse by directors in issuing stock, it is possible that a court could find that the shareholders of a REIT, under appropriate circumstances, are entitled to the same kind of protection as stockholders of a corporation are under principles of common law. Therefore, it is advisable for the declaration of trust to provide that there are no preemptive rights. Notwithstanding the foregoing, as a Maryland REIT is much like a Maryland corporation and courts look to the MGCL by analogy, it is not likely that a court would determine that shareholders of a REIT are entitled to preemptive rights absent a provision granting such rights in the declaration, bylaws or contract.

Accordingly, because there is neither statutory nor case law at this time on this subject with respect to REITs, it is not appropriate for one to request or to give an opinion that there are no preemptive rights under Maryland law. It might be appropriate, however, for the opinion giver to opine that there are no preemptive rights under the Maryland REIT Law, and that there are no preemptive rights granted under the declaration of trust or the bylaws.

b. Due Diligence

When issuing a preemptive rights opinion, the opinion giver should review the Company's declaration of trust and the bylaws to determine whether they grant preemptive rights to the Company's shareholders. If the declaration of trust or the bylaws grant preemptive rights, the opinion cannot be given. Depending on the terms of the declaration of trust or the bylaws, the Company may be able to amend its bylaws to eliminate any preemptive rights contained in

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To our knowledge, except as described above or in the [Schedule of Exceptions to the] Purchase Agreement, there are no other presently outstanding preemptive rights, options, warrants, conversion privileges or rights to purchase from the Company any of the authorized but unissued shares of the Company other than [_____].

the bylaws. As stated above, the Maryland REIT Law does not grant preemptive rights to shareholders of REITs.[306]

c. Other Issues

In certain circumstances, the opinion giver may be asked to provide the preemptive rights opinion along with the negative assurances opinion.[307]

Opinion Regarding Certificates: *"The certificates evidencing the Shares comply in all material respects with the Maryland REIT Law, the Declaration of Trust and the Bylaws."*

Discussion:

a. Commentary on Purpose and Sample Language

The Maryland REIT Law does not provide specific requirements for a certificate if there is only one authorized class of shares. Pursuant to Section 8-203(d) of the Maryland REIT Law, however, if a REIT has the authority to issue more than one class of shares, the Maryland REIT Law requires certain information to be included on each certificate. Alternatively, each certificate may include either (i) a summary of the requirements, as included in a registration statement permitted to become effective by the Securities Act of 1933, or (ii) a statement that the REIT will provide such information upon request.[308]

b. Due Diligence

In order to confirm that certificates evidencing the shares comply in all material respects with the Maryland REIT Law, the opinion giver should review Section 8-203 of the Maryland REIT Law for the required contents of a certificate and should compare those requirements with the certificates. The opinion giver may find it more efficient to review a "form" shares certificate for each class of shares and add an assumption to the opinion that all certificates evidencing the shares of each class (if applicable) will be in substantially the same form as the identified form certificates.

In order to confirm that certificates evidencing the shares comply in all material respects with the declaration of trust and the bylaws of the Company, the opinion giver should review the declaration of trust and the bylaws to ensure that the certificate complies with any additional requirements set forth therein, including any required legend regarding restrictions on transferability and ownership of shares or any other restrictions or any special requirements as to which officers may execute and countersign the certificate (provided that such officers are

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306 *Compare* MD. CODE ANN., CORPS & ASS'NS § 2-105(a)(10)(1994) (2002 & Supp. 2006), amended by 1995 Md. Laws ch. 449, *with* MD. CODE ANN., CORPS & ASS'NS § 8-101 *et seq.* (1999 & Supp. 2006).

307 *See supra* note 206 and accompanying text.

308 MD. CODE ANN., CORPS & ASS'NS § 8-203(e) (1999 & Supp. 2006).

permitted signatories under the Maryland REIT Law).[309] It is common for a declaration of trust to include restrictions on transfer (typically with legend requirements) as well as other restrictions on ownership in order to ensure that the Company maintains its status as a real estate investment trust under the Internal Revenue Code. Accordingly, the opinion giver should confirm that the required legends are on the certificates.[310]

c. Uncertificated Shares

It has become increasingly common for shares to be issued without certificates. Section 8-203 of the Maryland REIT Law permits the trustees to authorize the issue of the shares without certificates. If shares are issued without certificates, and there are multiple classes of authorized shares, the Company is required to send each shareholder a written statement of the information required on certificates. In the case of a Company that has multiple authorized classes of shares that has decided to issue shares without certificates, it may be appropriate for an opinion giver, if requested, to opine that "the notice of uncertificated shares of shares complies in all material respects with the Maryland REIT Law, the declaration of trust and the bylaws." If requested, the opinion giver should confirm that the notice contains the items discussed above as required to be on a certificate.[311] No particular signature requirements exist for the notice.

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309 This opinion does not address legends that may be required by contract.

310 If a certificate does not contain the appropriate legend, the restrictions of transfer may not be enforceable against a good-faith purchaser. *See* MD. CODE ANN., CORPS & ASS'NS § 8-301 *et seq.* (2002 & Supp. 2006).

311 The opinion giver may assume that the notice will be delivered to the initial purchasers. *See also supra* notes 183 and 184 and accompanying text.

5.6 BUSINESS TRUST

Basic Opinion: *"The issuance of the shares*[312] *has been duly authorized, and the shares are validly issued, fully paid and nonassessable."*

Discussion:

Commentary on Purpose and Sample Language

The phrase "duly authorized . . . validly issued, fully paid and nonassessable" is most commonly associated with corporate stock. This opinion is often requested in connection with transactions involving business trusts and is intended to assure the recipient that the business trust has complied with the Maryland Business Trust Act and the business trust's governing documents[313] in connection with the creation and issuance of the interests. The opinion has two component parts, each of which has a separate purpose and involves a separate inquiry by the opinion giver before the opinion should be given.

The opinion described in the preceding paragraph only covers the Maryland Business Trust Act. The opinion does not address (i)) federal or state securities laws, (ii) compliance with disclosure requirements associated with the applicable transaction, and (iii) whether those persons who approved the issuance acted in accordance with any particular standard of conduct. In addition, the opinion does not address preemptive rights.

a. *"The issuance of the shares has been duly authorized. . . ."*

i. Commentary

The term "duly authorized," in this context, is intended to provide assurance that (a) all necessary action has been taken to create the interests in question and (b) all necessary action has been taken to authorize the issuance of the interests in question and the admission of the interest holder as a beneficial owner of the business trust.

ii. Due Diligence

In order to give this opinion, the opinion giver should (i) determine from the Maryland Business Trust Act and the Company's governing documents the procedure to be followed in creating the particular class of interests; (ii) determine whether this procedure has been followed in creating the class of interests; (iii) determine the procedure to be followed in

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312 The Business Trust Act (MD. CODE ANN., CORPS & ASS'NS §12-101 through 12-810, *et. seq*.) refers to ownership interests in a business trust as beneficial interests in the business trust. *See* MD. CODE ANN., CORPS & ASS'NS §§ 12-101(b) and 12-303 (1999 & Supp. 2006). These interests can be referred to as shares of beneficial interests in the same sense as a "share of stock" although the beneficial interests may simply be stated as a percentage of the overall ownership of a business trust.

313 A business trust is formed by the creation of a governing instrument and the filing with the SDAT of a certificate of trust. MD. CODE ANN., CORPS & ASS'NS § 12-101(c) (1999 & Supp. 2006). It would be possible, however, for a business trust to have other governing documents such as bylaws.

authorizing the issuance of the interests; and (iv) determine whether this procedure has been followed in authorizing the issuance of the interests.[314]

If the Company has only one class of interests that has been unmodified since the Company's formation,[315] there should be little difficulty in ensuring that the foregoing criteria have been satisfied. If, however, the Company has created an additional class or classes of interests since its formation, the opinion giver should determine whether the proper procedures were followed in creating the particular type of interests.

Assuming that the class of interests was properly created, the opinion giver should then determine whether the proper procedures were followed in authorizing the issuance of the interests. In all cases, the opinion giver should ensure that there are no conflicting provisions in the Company's governing documents that may affect the authority of those acting.

b. ***". . .the shares are validly issued, fully paid and nonassessable."***

i. Commentary

As in the case of corporate stock, in order for a business trust interest to be "validly issued," it must be "duly authorized,"[316] as indicated in Subsection a. of this Section.

ii. Due Diligence

The opinion giver should confirm that the action taken to approve the issuance is still in effect at the time the interest is issued and has not been amended or rescinded. Accordingly, the opinion giver should obtain a certificate from an appropriate person with knowledge and authority that the resolutions or other form of approval are in full force and effect and have not been amended or rescinded.

The ownership of beneficial interests in a business trust may be evidenced by the issuance of a certificate, registration or any other means permitted in the governing

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314 The Maryland Business Trust Act is a flexible statute which contains no restrictions with regard to the characteristics of business trust interests.

315 A business trust, like a corporation, may have different types of interests, such as nonvoting interests and preferred interests. Those different types of interests are referred to as "classes" in this Section of this Report. As a result of the flexibility in the creation and designation of beneficial interests in a business trust, this Report does not provide a sample opinion as to the authorized capital of a business trust. If requested, however, an opinion giver should consider the provisions of this Report related to such an opinion for a REIT. *See supra* Section D.5.5.

316 As in the case of corporate stock, the "duly authorized" opinion and the "validly issued" opinion are also almost always given together. The due authorization opinion is inherent in the "validly issued" opinion. As previously indicated with regard to corporate stock, one cannot give a "validly issued" opinion without being satisfied substantively that the interest was duly authorized.

documents.[317] The opinion giver should review the governing documents to confirm any requirements necessary to effect issuance.

There is no requirement in order for an interest to be "validly issued" that it have been issued for any consideration.[318] Nonetheless, in most cases, the payment or delivery of consideration for the interest will be required. Therefore, confirmation of receipt by the Company of all consideration set forth in organizational documents or authorizing resolution is necessary. Typically, the opinion giver can rely upon a factual certificate from an authorized person of the Company that states that the Company received the appropriate consideration.

As indicated, in the case of a corporation, an opinion that stock is "nonassessable" means that the corporation does not have the right to require stockholders to pay any additional amounts on account of their stock in addition to the original consideration.

No Preemptive Rights Opinion: *"There are no preemptive rights with respect to the shares under the Maryland Business Trust Act or the Company's certificate of trust or governing instrument."*

Discussion:

Commentary on Purpose and Sample Language

iii. Commentary

A preemptive right in the case of a business trust is no different than a preemptive right in the case of a corporation. It is the right of existing beneficial owners to maintain their percentage ownership of the Company by buying a proportionate share of any newly issued interests. This means that if the Company were to issue additional interests, existing beneficial owners with preemptive rights would have the right, but not the obligation, to purchase that proportion of the newly issued interests that is necessary for them to maintain, after the issuance, the same proportionate ownership interest in the Company that they possessed before the issuance of interests.

The Maryland Business Trust Act does not address preemptive rights. As discussed with regard to other entities, however, because the concept of preemptive rights is a common law concept that is founded on the objective of avoiding a perceived risk of abuse by

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317 MD. CODE ANN., CORPS & ASS'NS § 12-101(b) (1999 & Supp. 2006). This Report does not address an opinion as to share certificates of a business trust because the Maryland Business Trust Act only tangentially refers to certificates. If such an opinion is given, however, it likely should be formulated to match that of a Maryland REIT, and the opinion giver should undertake a review of the governing documents of the Company to confirm conformity with any requirements. Even if the Company's governing documents require the issuance of a certificate, evidence of the preparation of the certificate in the form prescribed by the Company's governing documents and the due execution and delivery of the certificate should not be necessary in order to give an opinion that the interest has been validly issued.

318 *Id.* § 12-301(a)(2).

directors in issuing stock,[319] it is possible that a court could find that beneficial owners of a business trust, under appropriate circumstances, are entitled to the same kind of protection as stockholders were under principles of common law.[320]

Accordingly, because there is neither statutory nor case law at this time on this subject with respect to business trusts, it is not appropriate for one to request or to give an opinion that there are no preemptive rights under Maryland law. It might be appropriate, however, for one to opine that there are no preemptive rights under the Maryland Business Trust Act and that there are no preemptive rights granted under the certificate of trust or governing instrument.

iv. Due Diligence

The due diligence required in order to give this opinion would include a review of the Maryland Business Trust Act and would require the opinion giver to confirm that preemptive rights have not been granted in the granted in the certificate of trust or governing instrument.

As in the case of an opinion concerning preemptive rights of a corporation, an opinion concerning business trust preemptive rights should not be construed to be an opinion that there are no other rights to purchase from the Company any interests in the Company. Thus, the opinion is not intended to be an opinion with respect to buy/sell rights, options, warrants, conversion privileges or other rights to purchase interests from the Company. Such an opinion, if requested, would be separately given.[321]

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319 *See supra* text accompanying notes 207-212.

320 Under modern corporate law, preemptive rights are disfavored. In fact, the law with respect to corporations has evolved from the common law presumption that preemptive rights exist to a statutory presumption that they do not exist unless the corporation provides otherwise.

321 *See, e.g., supra* note 206.

6. Creation, Perfection and Priority of Liens on Personal Property

a. Overview.

i. Scope Limited to Article 9.

The law with respect to the agreements ("security agreements") by which a debtor gives an interest (a "security interest") in its personal property (the "collateral") to secure an obligation to a creditor (the "secured party") has been largely codified in Article 9 of the Uniform Commercial Code. Article 9, however, excludes from its scope certain specified types of secured transactions and certain types of collateral.[322] Article 9 also provides that it does not apply to the extent other applicable law takes precedence.[323]

This distinction between secured transactions that are covered by Article 9 and those that are not carries into opinion practice. Generally, opinions relating to security interests that are outside the scope of Article 9 are not customarily requested or given. Non-Article 9 security interests are generally creatures of state common law or federal statute and require extensive analysis that often results in reasoned opinions and great expense. In those instances where non-Article 9 security interests have sufficient value to merit the expense, an opinion giver with the requisite experience should be involved.

Notwithstanding the relative uniformity of Article 9 across the country, it is not identical in every state. In a transaction involving a company or personal property located in Maryland and a secured party based in a state other than Maryland, the secured party may want to confirm that the Maryland version of Article 9 does not contain significant non-uniform provisions. For these reasons, the request for and the giving of an Article 9 opinion are fairly common.

It still must be emphasized that even though Article 9 is relatively compact and Article 9 opinions are commonly given, such opinions require significant due diligence. As suggested by the Business Law Guidelines,[324] the opinion recipient and its lawyer should weigh the benefit of receiving the opinion against time and expense of furnishing the opinion, in light of the nature and size of the transaction, especially in connection with a secured transaction that is wholly within the State of Maryland. Also in accord with the Business Law Guidelines[325] and the 2003 TriBar U.C.C. Report,[326] the opinion giver may assume that the opinion recipient, with its counsel, is familiar with opinions of this type.

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322 MD. CODE ANN., COM. LAW § 9-109(d) (2002 & Supp. 2006).

323 *Id.* § 9-109(c).

324 § 1.2, Business Law Guidelines, *supra* note 7

325 *Id.* § 1.7.

326 2003 TriBar U.C.C. Report, *supra* note 9, § 2.1(a), at footnote 23.

Because non-Article 9 security interest opinions are rarely requested or given, this Report only addresses opinions relating to security interests under Article 9. In giving an Article 9 opinion, the opinion giver may be called upon to opine as to (a) creation, (b) perfection, and (c) rarely, priority of the security interest.

ii. Opinion Reports.

Prior to the 1989 Report, there was no consistent practice in Maryland relating to requiring or giving legal opinions concerning the perfection or priority of security interests in or other liens on personal property created in commercial transactions.[327] The 1989 Report provided to Maryland practitioners a certain standard of uniformity for the giving of opinions relating to the creation, perfection and priority of such security interests and liens. Subsequent to the issuance of the 1989 Report, the TriBar Opinion Committee issued a report, in 1993, on opinions rendered under Article 9 of the Uniform Commercial Code.[328]

In 2001, Article 9 of the Uniform Commercial Code was revised in its entirety and, as revised, has been adopted with some variations, but generally on a very uniform basis, by the District of Columbia and by every state in the United States, including Maryland.[329] Article 9, as revised, changed former Article 9 of the Uniform Commercial Code by providing clarity in some places, identifying and defining new categories of collateral, and creating new methods of perfection of security interests. In addition, revised Article 9 completely changed the places of filing financing statements.

As a result of the revision of former Article 9 of the Uniform Commercial Code, in 2003, the TriBar Opinion Committee, comprised of many of those instrumental in the drafting and implementation of the revision and some of the most knowledgeable practitioners in that subject area, issued its 2003 TriBar U.C.C. Report,[330] which replaced the 1993 TriBar U.C.C. Report and which provides guidance to lawyers across the nation, including lawyers in Maryland, in connection with the rendering of legal opinions relating to the creation, perfection and priority of security interests under revised Article 9 and the effect of those revisions on Article 9 opinions. The 2003 TriBar U.C.C. Report provides a thoughtful and excellent discussion of the revisions to Article 9. The Committee recommends the 2003 TriBar U.C.C. Report as an important resource and guide when rendering opinions relating to Article 9 matters.

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327 1989 Report, §7b, p. 43.

328 *Special Report of the TriBar Opinion Committee: U.C.C. Security Interest Opinions, 49* BUS. LAW. 359 (1993) (hereinafter "1993 TriBar U.C.C. Report").

329 Revised Article 9 became effective in Maryland, on July 1, 2001. *See* MD. CODE ANN., COM. LAW §9-701(a) (1999 & Supp. 2006).

330 *See supra* note 9.

b. Governing Law - Overview.

With considerable frequency, counsel is called upon to give an opinion where Maryland law is not the law governing the security agreement. In addition, whether or not the security agreement is governed by Maryland law and whether or not the debtor's business or assets are physically present in Maryland, Article 9 may provide that law of another jurisdiction governs matters pertaining to perfection and priority. Especially with respect to perfection and priority, Article 9's rules as to governing law are not intuitive. Opinion givers should take great care to limit the Article 9 opinion to the effect of Maryland law. The issues surrounding the application of non-Maryland law are important enough to be covered by a separate subsection below entitled "Governing Law."

c. Creation of a Security Interest in Personal Property

i. Sample Opinion Language:

The [Transaction Documents] are effective to create in favor of the [Secured Party], as security for the [Obligations], a security interest (the "Article 9 Security Interest") in the collateral described in the [Security Agreement] in which a security interest may be created under Article 9 of the Uniform Commercial Code, as in effect in the State of Maryland (the "Article 9 Collateral").

ii. Assumptions and Qualifications: For many of the assumptions and qualifications relating to this section, see Section D.16 of this Report.

iii. Discussion:

The general opinion that transaction documents (which may include a security agreement) are "valid, binding and enforceable" may address whether a contract exists between the debtor and the secured party, but that opinion does not address whether a security interest has been created or has "attached" under Article 9. The opinion as to whether the security interest has been created or has attached is a separate opinion and, if not explicitly stated, should not be inferred by the opinion recipient from the enforceability opinion. A secured party that wants an Article 9 opinion customarily will expressly require it, so that the absence of an express Article 9 opinion means that none was required or given.

Section 9-203 of the Uniform Commercial Code contains the requirements for the enforceability of a security interest. Section 9-203(a) states that a security interest attaches when it becomes enforceable, and Section 9-203(b) provides that it is enforceable only if (a) value has been given, (b) the debtor has rights (or the power to transfer rights) in the collateral, and (c) a security agreement exists that sufficiently describes the collateral and the obligation that the parties intended to be the subject of the security agreement. The opinion giver must consider each of these requirements in giving the Article 9 opinion. The opinion giver will usually explicitly assume the requirements described in this paragraph.

(A) *Existence of a security agreement.* A "security agreement" is an agreement that provides for the creation of a security interest.[331] A "security interest" is "an interest in personal property or fixtures which secures payment or performance of an obligation."[332]

To determine whether a security agreement exists, the opinion giver must be satisfied with each of the following:

(1) The security agreement meets the general requirements of any contract, such as power, authorization, execution and delivery.

(2) The debtor's security agreement is set forth in a record that the debtor has authenticated.[333] Article 9 defines the terms "record"[334] and "authenticate"[335] to indicate that Article 9 is "medium neutral," meaning that the debtor may use electronic or other means to evidence its agreement. Until other media are reliable and accepted, however, the security agreement will be in a writing that the debtor has signed.

(3) The security agreement contains the debtor's agreement that the secured party has an interest in identified collateral that secures identified obligations. There is no prescribed formulation for the debtor's agreement that creates the security interest,[336] although a very common formulation is: "The debtor hereby grants a security interest to the secured party in [described collateral]."

(4) The obligations secured are identified; they may include a past debt, a debt to be incurred at the time the debtor enters into the security agreement, or future advances and obligations.[337] Comment 5 to Section 9-204 of the Uniform Commercial Code confirms that the parties' agreement as to the scope of the secured obligations is to be given effect, stating, "Indeed, the parties are free to agree that a security interest secures any obligation whatsoever."

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331 *Id.* § 9-102(a)(74).

332 *Id.* § 1-201(37).

333 Exceptions to this requirement are limited to circumstances that are described in clauses (B), (C) and (D) of § 9-203(b)(3) and that relate to collateral that is (1) in the possession of the secured party (except when the collateral is a certificated security), (2) a certificated security in registered form that has been delivered under § 8-301, or (3) in the control of the secured party under MD. CODE ANN., COM. LAW § 9-104, 9-105, 9-106 or 9-107 (2002 & Supp. 2006).

334 MD. CODE ANN., COM. LAW § 9-102(a)(70) (2002 & Supp. 2006).

335 *Id.* § 9-102(a)(7).

336 *Id. See* Comment 3b to § 9-102.

337 *Id.* § 9-204(c). *See also* the subsection headed "*Value*" *infra*.

(5) The collateral is described. The collateral may include, if the security agreement expressly provides, after-acquired property[338] other than after-acquired consumer goods and commercial tort claims.[339] Section 9-108(a) of the Uniform Commercial Code provides that the description will be sufficient if it "reasonably identifies" the collateral, and Section 9-108(b) provides examples of reasonable identification. Section 9-108(c) contains an important exception by stating that supergeneric descriptions, such as "all assets" of the debtor, do not reasonably describe the collateral. Such supergeneric descriptions, however, are not uncommon. It is common for opinion givers to include a qualification to the effect that no opinion as to the creation of a security interest is given with respect to collateral described supergenerically.[340] It is also not uncommon for opinion givers to assume that the description of the collateral contained in the transaction documents reasonably identifies the collateral intended to be identified. In any event, the opinion addresses only whether the description is legally sufficient, not whether the description is factually correct. For example, if the collateral is described as a "three carat diamond," the opinion giver is not rendering an opinion as to whether the property in question is a diamond rather than cubic zirconium or that it weighs at least three carats.

(B) *Value*. A security interest cannot attach unless the debtor has received value. "Value," as defined in the Uniform Commercial Code,[341] includes not only consideration that would support a contract but also commitments to extend credit (whether or not credit is extended), security for antecedent debts and other benefits. Generally, the opinion should specifically assume that value (whether in the form of a loan commitment, receipt of goods or otherwise) has been given, even if the opinion giver is in a position to confirm the giving of such value. Typically, the opinion giver is in no better position than the parties themselves to make such a confirmation of factual circumstances.

(C) *Rights in the collateral*. Although a security interest cannot attach until the debtor has rights in, or the right to transfer rights in, the collateral, the opinion does not cover whether such rights exist. There is no need for the opinion giver to make an assumption that such rights exist, as the existence of such rights is an implicit assumption in every creation opinion; nevertheless, the opinion giver may state such an assumption, and many opinion givers do so.

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338 MD. CODE ANN., COM. LAW § 9-204(a) (2002 & Supp. 2006).

339 *Id.* § 9-204(b).

340 Such qualification is often written so that it disclaims any opinion regarding the creation, attachment, perfection, effect of perfection or enforceability of any security interest created in collateral so described. If it does so, and an opinion is also given as to perfection of the security interest by the filing of a financing statement, the qualification should be limited to make clear that it applies to the use of such a description in the security agreement creating the security interest, but not in any financing statement, to the extent that the security agreement otherwise sufficiently describes the collateral.

341 MD. CODE ANN., COM. LAW § 1-201(44) (2002 & Supp. 2006).

iv. Comment on Sample Opinion Language:

The opinion set forth in the Sample Opinion Language speaks to the effectiveness of the security agreement to "create" a security interest. Another common formulation for this same conclusion is that a "security interest has attached" to the collateral. In fact, the 2003 TriBar U.C.C. Report proposes the "creation" and "attachment" formulations as alternatives.[342] The Committee prefers the creation alternative over the attachment alternative because the latter could be interpreted (improperly) to include an opinion as to the debtor's rights in collateral. As described above, because the opinion giver will either assume, or offer no opinion as to whether, the debtor has received value or has rights in the collateral, there is no substantive difference in these formulations. References in the balance of this section to "attachment" mean both attachment and creation.

v. Law Governing the Security Agreement:

The opinion set forth in the Sample Opinion Language covers only security interests created under Article 9 of the Maryland Uniform Commercial Code.

In order to determine the law governing the perfection of a security interest, an opinion giver must first determine which law governs the attachment or enforceability of the security interest or make an assumption regarding that issue. In many cases, the opinion giver will assume that Maryland law is the law generally covered by the opinion letter, particularly if the opinion giver is not otherwise opining as to the enforceability of any choice of law provision contained in the security agreement.

Where Maryland law does not govern the security agreement, the discussion on Governing Law below would apply (a) as to choice of law, and (b) as a basis for bridging to Maryland law.

d. Perfection Opinions - General Limitations

There are important limitations that apply to any perfection opinion, in addition to those limitations that are peculiar to the specific methods for perfecting a security interest in personal property.

The perfection opinion does not cover the creation of a security interest. If the opinion giver is issuing an opinion as to perfection of a security interest but not the creation of the security interest (for example, where another state's law may apply and another opinion giver is issuing the creation opinion), the opinion should contain an assumption that the security interest has been created.[343]

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342 *See* paragraph 2 to the Illustrative Security Interest Opinion, in Appendix A of the 2003 TriBar U.C.C. Report, pp. 1505-06.

343 *Id.*

The perfection opinion expresses opinions as to perfection of security interests only to the extent expressly provided therein. For example, if the perfection opinion is to be rendered only with respect to property of a type in which a security interest is perfected by filing, but the description in the security agreement and that in the financing statement covers other property as well, it is not necessary to identify specifically those types or items of property for which the financing statement may be ineffective to perfect the security interest.[344] Although it is not necessary to do so, this limitation may be stated as follows: *We express no opinion regarding the perfection of any security interest except as specifically set forth in this letter.*

The perfection opinion does not address the effect of subsequent occurrences.[345] Opinion givers generally have no obligation to qualify specifically their opinions to exclude the possible effect of subsequent changes in facts, including lapse of time.

The perfection opinion covers only collateral in which a security interest may be perfected under the laws of the State of Maryland. Conversely, the opinion assumes that the law of Maryland is also the law for perfection and does not address whether Maryland law in fact governs perfection. If the opinion recipient wants such an opinion, the opinion giver will need to examine the governing law issues raised generally by Section 9-301 of Article 9, as further discussed in the Governing Law Section below. In rendering a perfection opinion, an opinion giver does not implicitly give an enforceability opinion as to any provision of the applicable documents, including any choice of law provision contained in the security agreement.

Security interests in certain types of Article 9 collateral may be perfected by means other than filing and, in certain cases, may be perfected only by means other than filing. Available means of perfection in addition to filing include perfection by possession or delivery and perfection by control.

e. Perfection Opinion Regarding the Filing a Financing Statement in Maryland.

i. Sample Opinion Language:

Upon the filing of the financing statement in the form attached hereto (the "Financing Statement") with the Maryland State Department of Assessments and Taxation [specify any other applicable filing office], the Article 9 Security Interest in that portion of the Article 9 Collateral in which a security interest may be perfected by the filing of a financing statement under the Maryland Uniform Commercial Code will be perfected.

ii. Assumptions and Qualifications: For many of the assumptions and qualifications relating to this section, see Section D.16 of this Report.

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344 *See* MD. CODE ANN., COM. LAW §§ 9-310, 9-311 and 9-312(b) (2002 & Supp. 2006), and discussion in this Report on creation of a security interest in real property, Section D.6, "Creation, Perfection and Priority of Liens on Personal Property."

345 Business Law Principles, *supra* note 7, § IV.

iii. Discussion.

The perfection-by-filing opinion set forth in the Sample Opinion Language is subject to the important limitations discussed in the Perfection Opinion Limitations above.[346]

As a further illustration of those limitations, the perfection-by-filing opinion does not cover extended periods of financing statement effectiveness that may be available. Article 9 generally provides that a financing statement is effective for a period of five years[347] without the need for any indication of the period of effectiveness. Financing statements may, however, indicate (a) that they are filed in connection with public-finance transactions and manufactured-home transactions, thereby, in the proper circumstances, extending the period of effectiveness to 30 years;[348] or (b) that the debtor is a transmitting utility, thereby, in the proper circumstances, extending the period of effectiveness until a termination statement has been filed.[349] Although opinions as to the nature of the transaction or the type of debtor as they relate to longer periods of effectiveness for financing statements may be given along with the perfection opinion, those opinions are beyond the scope of the customary perfection opinion and are not deemed given therein; therefore, a specific exclusion as to the period of effectiveness is not necessary. It would not be inappropriate, however, for an opinion giver to state such an exception or make an explicit assumption about the nature of the transaction and the type of debtor if the financing statements include such an indication, and the opinion giver is not providing a separate opinion as to the nature of the transaction or the debtor.

A perfection-by-filing opinion does include an opinion that upon the creation of the secured party's Article 9 security interest in after-acquired property[350] that is of a type described in the financing statement and is also of a type in which an Article 9 security interest may be perfected by filing, such Article 9 security interest will be perfected, subject, of course, to the limitations, assumptions and qualifications otherwise set forth in the opinion or inherently or implicitly applicable thereto. If the opinion giver wants to exclude after-acquired collateral from the perfection opinion, such exclusion should be set forth specifically.

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346 This means, for example, that the opinion covers only collateral in which a security interest may be perfected by the filing of a financing statement in the State of Maryland, assumes that the law of Maryland is also the law for perfection, and does not cover the creation of the security interest.

347 MD. CODE ANN., COM. LAW § 9-515(a) (2002 & Supp. 2006); MD. CODE ANN., COM. LAW § 9-515(e) (2002 & Supp. 2006) provides for five-year extensions if continuation statements are properly filed (*see* § 9-515(c)). The period of effectiveness of a financing statement, however, is 30 years for public-finance transactions and manufactured-home transactions. MD. CODE ANN., COM. LAW § 9-515(b) (2002 & Supp. 2006).

348 *Id.* § 9-515(b).

349 *Id.* § 9-515(f).

350 The security agreement must, however, expressly contain an after-acquired property clause if such a security interest is to attach, MD. CODE ANN., COM. LAW § 9-204(a) (2002 & Supp. 2006), provided that such clause may not be effective with respect to after-acquired consumer goods or commercial tort claims. MD. CODE ANN., COM. LAW § 9-204(b) (2002 & Supp. 2006).

iv. Financing Statements; Filing:

An opinion giver should determine whether the financing statement and the filing thereof meets the requirements of Maryland law in order to perfect a security interest in the items or types of collateral described in the financing statement, to the extent such collateral is of a type that may be perfected by the filing of a financing statement.[351] If a perfection by filing opinion is to be rendered before the financing statements have been filed, it should not be based on an assumption that the financing statements will be duly filed, unless the financing statement contains all of the information necessary to prevent it from being rejected pursuant to Section 9-516(b). The Sample Opinion Language provides that the form of the financing statement that is the subject of the perfection opinion is attached. If that is not the case, the opinion giver should set forth in the opinion the details of the financing statement that pertain to its sufficiency for perfection and recording. Absent that, it is likely that the opinion recipient may rely on whatever financing statement was filed or was presented for filing in connection with the transaction.

v. Issues When the Place of Filing is Not Maryland:

An opinion that the filing of the financing statement perfects a security interest in collateral is not an implicit opinion that the law of the state in which the financing statement is or is to be filed governs perfection; rather no opinion on choice of law issues is deemed given unless specifically stated. The Committee concluded that it is inappropriate for an opinion recipient to require an opinion from a Maryland lawyer[352] that applies the law of the state in which the financing statement is or is to be filed in order to identify the appropriate filing office or filing offices in such foreign state or to determine the sufficiency of the financing statement. The Committee was concerned that rendering such an opinion might constitute the unauthorized practice of law in the applicable state. If, nonetheless, the opinion giver intends to issue such an opinion, the principles discussed in Governing Law Section, below, should be applied.

f. Perfection Opinion Regarding by Possession or Delivery.

Section 9-313 permits perfection of a security interest in negotiable documents, goods, instruments, money or tangible chattel paper by taking possession of the collateral and permits perfection under Article 9 of a security interest in certificated securities by taking delivery of the certificated securities under Section 8-301 of the Uniform Commercial Code.[353] If the collateral is certificated securities, it is customary for delivery of the securities to be made in a form that is the same as the form of delivery when such securities are transferred to a buyer, usually including any endorsement required to permit the further transfer of the securities by the transferee (or registration of the transferee's interest with the issuer or its transfer agent). In such

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351 *Id.* §§9-502 through 9-504 describe the required contents of a financing statement. §9-501 sets forth the appropriate filing office, depending on the debtor and the type of collateral. §9-516 states what constitutes filing.

352 The opinion recipient may, of course, still require the opinion from another opinion giver.

353 MD. CODE ANN., COM. LAW § 8-301 (2002 & Supp. 2006).

cases, it is common for an opinion to include an assumption that the secured party acquires its interest without notice of an adverse claim.

i. Sample Opinion Language:

The security interest in the [Collateral][354] will be perfected upon the Secured Party's taking [delivery] [possession] of the [Collateral].

ii. Assumptions and Qualifications: For many of the assumptions and qualifications relating to this section, see Section D.16 of this Report. When an opinion is given regarding perfection of a security interest by means of the secured party's possession or delivery of the collateral, the opinion should be made expressly subject to the following additional assumptions and qualifications:

(A) Generally: The [Collateral] is located and delivered, within the meaning of Sections 9-301 and 9-305(a)(1) of the Maryland Uniform Commercial Code, only in the State of Maryland.

(B) In the case of Pledged Securities:

(1) We express no opinion as to the perfection of the security interest of the Secured Party in any portion of the Pledged Securities, the continuous possession of which is not maintained by the Secured Party in the State of Maryland,[355] and, in addition, we call to your attention that perfection (and the effect of perfection and non-perfection) of the security interest of the Secured Party in the Pledged Securities may be governed by laws other than those of the Maryland Uniform Commercial Code to the extent the Pledged Securities become located in a jurisdiction other than the State of Maryland; and

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354 *Id.* §9-313 permits perfection of a security interest in negotiable documents, goods, instruments, money or tangible chattel paper by taking possession of the collateral and permits perfection of a security interest in certificated securities by taking delivery of the certificated securities under §8-301. If the collateral is certificated securities, it is customary for delivery of the securities to be made in a form that is the same as the form of delivery when such securities are transferred to a buyer, usually including any endorsement required to permit the further transfer of the securities by the transferee (or registration of the transferee's interest with the issuer or its transfer agent). In such cases, it is common for a perfection opinion to be combined with an opinion as to the priority of the security interest and an assumption that the secured party acquires its interest without notice of an adverse claim. For example:

Upon the delivery, in the State of Maryland, to the Secured Party of the stock certificates listed on Exhibit ___ hereto (the "Pledged Stock") and the related stock powers pursuant to the Security Agreement and assuming that the Secured Party had no notice of an adverse claim (within the meaning of §8-105 of the Maryland Uniform Commercial Code) with respect to the Pledged Stock at the time the Pledged Stock is delivered to the Secured Party, the security interest in the Pledged Stock created in favor of the Secured Party under the Security Agreement will constitute a perfected security interest in the Pledged Stock, free of any "adverse claim" (as defined in §8-102 of the Maryland Uniform Commercial Code).

355 Alternatively, the opinion giver might assume that the lender has taken, and will continue to maintain, legal possession of the Pledged Securities in the State of Maryland.

(2) We call to your attention that in the case of the issuance of additional *shares or other distributions in respect of the Pledged Securities, the security interests of the Secured Party therein will be perfected only if possession thereof is obtained or other action appropriate to the nature of the distribution is taken, in either case, in accordance with the provisions of the Maryland Uniform Commercial Code and other applicable law.*

iii. Discussion.

The perfection-by-possession/delivery opinion set forth in the Sample Opinion Language is subject to the important limitations discussed in the Perfection Opinion Limitations above.[356] In addition:

(A) *Governing Law*. When a security interest is perfected by possession or delivery, the law of the jurisdiction where the collateral is located governs perfection of a security interest in that collateral.[357] As set forth in the Assumptions and Qualifications subsection above, the opinion giver may assume that the collateral is located in the State of Maryland. If that is not an alternative, the principles set forth in the Governing Law subsection below should be followed.

(B) *Applicable Collateral*. A security interest in money can only be perfected by possession.[358] Security interests in negotiable documents, goods, instruments or tangible chattel paper may be perfected by filing or possession.[359] A secured party may perfect a security interest in certificated securities by taking delivery of certificated securities under Section 8-301, which provides the circumstances under which delivery of a certificated security occurs.[360]

(C) *Other Considerations*. When perfection is achieved by possession, the opinion giver should satisfy itself that: (i) the collateral is located in Maryland;[361] (ii) the relevant collateral is the type of collateral in which a security interest may be perfected by possession under Article 9; and (iii) the secured party (directly or through a third party) has taken and maintains exclusive "possession" of the collateral in a manner that satisfies the requirements of the Maryland Uniform Commercial Code. Where a third party (*e.g.*, a bailee) is in possession of the collateral, such third party must acknowledge in an authenticated record that it is in

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356 This means, for example, that the opinion covers only collateral in which a security interest may be perfected by the filing of a financing statement in the State of Maryland, assumes that the law of Maryland is also the law for perfection, and does not cover the creation of the security interest.

357 MD. CODE ANN., COM. LAW §§ 9-301(2) and 9-305(a)(1) (2002 & Supp. 2006).

358 *Id.* § 9-312(b)(3).

359 *Id.* §§ 9-310 and 9-313. Perfection by possession, however, is limited for goods covered by a certificate of title. MD. CODE ANN., COM. LAW § 9-313(b) (2002 & Supp. 2006).

360 *Id.* § 9-313(a).

361 *Id.* § 9-313.

possession of the collateral for the benefit of the secured party.[362] No acknowledgment is necessary, however, when the bailee has issued a negotiable or nonnegotiable document covering goods, or in certain other situations.[363] Note also that possession by a third party that is controlled by the debtor or closely connected with the debtor may not be effective as the debtor may be deemed to still have possession.[364] Unless such an assumption is unreasonable under the circumstances actually known to the opinion giver, the opinion is assumed to be subject to an inherent or implicit assumption that the third party is not closely connected with or controlled by the debtor. In addition, the opinion preparer may assume, without stating, that the acknowledgment has been properly authorized and authenticated by the bailee/third party and that the bailee/third party in fact has possession of the collateral.

g. Perfection Opinion Regarding Control (Other than by Possession or Delivery).

Section 9-314 permits a security interest in certain types of collateral[365] to be perfected by control of the collateral. The scope of the Sample Opinion Language, the Assumptions and Qualifications, and other limitations set forth in this section are intended to address the most commonly encountered situations; this Report does not attempt to create an exhaustive or comprehensive set of illustrative opinions for the many situations that can arise. If control of collateral is established by means of an agreement (such as an authenticated record described in Section 9-104(a)(2) regarding a deposit account, an agreement described in Section 9-106(b)(2) regarding a commodity contract, an agreement described in Section 8-106(c)(2) regarding an uncertificated security, or an agreement described in Section 8-106(d)(2) regarding a securities entitlement), the opinion may be stated as follows:

i. Sample Opinion Language:

The security interest in the [Collateral] will be perfected upon the execution and delivery of the [Control Agreement] by the Debtor, the Secured Party and the [Depository Bank/Commodities Intermediary/Securities Intermediary].

ii. Assumptions and Qualifications: For many of the assumptions and qualifications relating to this section, *see* Section D.16 of this Report. If an opinion is given regarding perfection of a security interest by means of the secured party's control of the collateral, the opinion should be made expressly subject to the following assumptions, as applicable, depending on the type of collateral:

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362 *Id.* § 9-313(c).

363 *Id.* § 9-312(d)(2); § 9-313(h).

364 *Id.* § 9-313.

365 These types of collateral include investment property, deposit accounts, letter-of-credit rights and electronic chattel paper. *See* MD. CODE ANN., COM. LAW § 9-104, § 9-105, § 9-106, or § 9-107 (2002 & Supp. 2006).

We assume the following:

(A) Depository Institution. [Name of Depository Institution] (the "Depository Institution") is a "bank," within the meaning of Section 9-102(a)(8), with which the deposit accounts described in [such paragraph] are maintained;

(B) Deposit Accounts. *The account described in the [Control Agreement] is a "deposit account" within the meaning of Section 9-102(a)(29);*

(C) Securities Intermediary. *[Name of Securities Intermediary] (the "Securities Intermediary") is a "securities intermediary" as defined in Section 8-102;*

(D) Investment Accounts. *The [Investment Account] (as defined in the [Security Agreement]) is a "securities account" as defined in Section 8-501(a) and all property from time to time credited to the [Investment Account] is a "financial asset" as defined in Section 8-102(a)(9).*

(E) Deposit Accounts, Investment Property or Letter-of-Credit Rights. *The [Collateral] is located, within the meaning of Sections 9-304, 9-305 and 9-306, only in the State of Maryland.*

iii. Discussion.

The perfection-by-control filing opinion set forth in the Sample Opinion Language is subject to the important limitations discussed in the Perfection Opinion Limitations above.[366] In addition:

(A) *Governing Law*. For most security interests perfected by control, such as security interests in deposit accounts, letter-of-credit rights, and certain forms of investment property, perfection is generally governed by the local law of the jurisdiction of a third party because it is a third party that is the conduit through which the secured party exercises control.[367] Exceptions to this general rule include: perfection of a security interest in electronic chattel paper by control, which is governed by the law of the location of the debtor, and perfection of a security interest in a certificated security by control, which is governed by the local law of the jurisdiction in which the certificated security is located.

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366 This means, for example, that the opinion covers only collateral in which a security interest may be perfected by the filing of a financing statement in the State of Maryland, assumes that the law of Maryland is also the law for perfection, and does not cover the creation of the security interest.

367 For example, in the case of a deposit account maintained with a bank located in another jurisdiction, the local law of the bank's jurisdiction governs, among other things, perfection. MD. CODE ANN., COM. LAW § 9-304 (2002 & Supp. 2006). *See also* MD. CODE ANN., COM. LAW § 9-305 (2002 & Supp. 2006) (Investment Property) and § 9-306 (Letter of Credit Rights).

(B) Applicable Collateral. Certain types of collateral, such as deposit accounts and letter-of-credit rights, can only be perfected by "control."[368] Control is also an available method for perfection of security interests in investment property (including certificated securities)[369] and electronic chattel paper.[370] While a security interest in certificated securities can be perfected by delivery, perfection by control gives the secured party greater priority rights.[371]

(C) Opinion Considerations. The opinion giver must make a determination that the method of control satisfies the requirements of Article 9 for the type of collateral that is the subject of the opinion.[372] Certain methods of perfection by control require agreements with a third party, such as the holder or issuer of the collateral.[373] A control agreement is not necessary to perfect a security interest with respect to three kinds of investment property: (a) an uncertificated security where the "delivery" of the uncertificated security occurs when the secured party becomes the registered owner of the security;[374] (b) a "security entitlement" (defined in Section 8-102(a)(17)) where the secured party becomes the entitlement holder;[375] and (c) a commodity contract where the secured party is the commodity intermediary with which the commodity contract is carried.[376] A control agreement is not necessary to perfect a security interest in a deposit account if the secured party is the bank with which the deposit account is maintained or if the secured party becomes the bank's customer with respect to the deposit account.[377] A secured party will have control of a certificated security in bearer form if the certificated security is delivered to the secured party.[378] A security interest in a certificated security not in bearer form can be perfected by control if it is endorsed to the secured party in

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368 MD. CODE ANN., COM. LAW § 9-312 (2002 & Supp. 2006). *See also* MD. CODE ANN., COM. LAW § 9-104 (2002 & Supp. 2006) (describing the circumstances under which the secured party has control of a deposit account) and MD. CODE ANN., COM. LAW § 9-107 (2002 & Supp. 2006) (describing the circumstances under which the secured party has control of a letter-of-credit right).

369 *Id.* §§ 9-106 and 8-106.

370 *Id.* § 9-105.

371 *Compare* MD. CODE ANN., COM. LAW §§ 8-301 and 8-106 (2002 & Supp. 2006).

372 For example, if a control agreement is used to perfect a security interest in a deposit account, it must include an agreement by the debtor, the secured party and the depository bank that the bank will "comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor." MD. CODE ANN., COM. LAW § 9-104(a)(2) (2002 & Supp. 2006).

373 MD. CODE ANN., COM. LAW §8-106; §§ 9-104, 9-106 and 9-107 (2002 & Supp. 2006).

374 *Id.* §§ 9-106(a), 8-106(c)(1) and 8-301(b)(1).

375 *Id.* § 9-106(a) and § 8-106(d)(1).

376 *Id.* § 9-106(b)(1).

377 *Id.* § 9-104(a)(1), (3); § 4-104(a)(5).

378 *Id.* §§ 9-106(a) and 8-106(a).

blank or with an effective endorsement, or if the certificate is registered in the name of the secured party by the issuer.[379]

iv. Letter-of-Credit Rights.

If the collateral is letter-of-credit rights, the establishment of control requires the giving of consent to an assignment of the letter-of-credit rights by the issuer or the issuer's nominee under Section 5-114(c) or otherwise applicable law or practice. Section 5-114(c) does not specifically prescribe the manner of consent, but as described in the comment, is intended to follow recognized national and international practices, under which the issuer's signature on a consent form attached to the assignment is generally accepted as sufficient. If an opinion is requested on the perfection of a security interest in letter-of-credit rights and the opinion giver is willing to render it, the opinion could be similar to that set forth above, but should be based on an explicit assumption that the manner of consent by the issuer or the issuer's nominated person is sufficient for purposes of Section 5-114(c).

v. Assumptions regarding Status Third Parties.

In circumstances where control depends on the status of the secured party (for example, whether the secured party is the bank with which a deposit account is maintained or the bank's customer with respect to the deposit account,[380] a securities intermediary with respect to a securities entitlement, or the commodities intermediary with respect to a commodities account), Maryland lawyers may give opinions as to the perfection of a security interest by means of such control, but they should base any such opinion on an assumption, as set forth in the Sample Opinion Language above, that the status giving rise to control has been established and exists.

h. Priority Opinion Based on Perfection by a Financing Statement Filing.

i. Priority Opinions Generally Disfavored

It is the position of the Committee that an opinion recipient generally should not request, and a Maryland lawyer generally should not be required to render, an opinion as to the priority of a security interest under Article 9. The reason is that the priority of a perfected security interest under Article 9 can usually be determined by reference to records, reports or other information (other than a legal opinion) that are available to the secured party. The Committee's position is consistent with customary practice in Maryland and national practice as described in the 2003 TriBar U.C.C. Report.[381] In addition, UCC insurance, discussed below, is available to secured parties.

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379 *Id.* § 8-106(b).

380 As defined in MD. CODE ANN., COM. LAW § 4-104(a)(5) (2002 & Supp. 2006), "customer" means a person having an account with a bank or for whom a bank has agreed to collect items, including a bank that maintains an account at another bank.

381 *See* 2003 TriBar U.C.C. Report, *supra* note 9, § 5.2(a).

In the unusual case, however, in which a priority opinion is required and the opinion giver is willing to render it, the opinion giver should do so only to the extent that the opinion giver can determine that the secured party's security interest is perfected by analysis of the underlying collateral and priority can be established by further factual analysis discussed below. That discussion is limited to priority based on the filing of financing statements and reports of the status of financing statement records. Priority opinions with respect to collateral perfected by possession or by control are very rarely requested or given, but the 2003 TriBar U.C.C. Report[382] covers the prerequisites for such opinions thoroughly.

ii. Sample Opinion Language:

For purposes of this opinion, we have reviewed the Search Report dated _____, based on a search conducted by _____ (the "Search Report"), of U.C.C. financing statements filed in the Filing Office naming as debtor the Debtor identified in the Search Report and on file in the Filing Office through _____ (the "Effective Date")[383].

The Search Report sets forth the proper filing office and the proper name of the Debtor necessary to identify those [secured parties] who under the Maryland Uniform Commercial Code have, as of the Effective Date, financing statements on file against the Debtor indicating any of the Article 9 Collateral, as of the Effective Date. [Except for _____,] [T][t]he Search Report identifies no still-effective financing statement naming the Debtor as debtor and indicating any of the Article 9 Collateral filed in the Filing Office, prior to the [Effective Date] [filing in the Filing Office of the Financing Statement].[384]

iii. Assumptions and Qualifications: For many of the assumptions and qualifications relating to this section, see Section D.16 of this Report. In addition, the opinion should be made expressly subject to the following assumption:

This opinion covers only the Article 9 Collateral and does not address the priority of any other collateral or property referenced in any financing statement listed in the Search Report.

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382 *See* 2003 TriBar U.C.C. Report, *supra* note 9, §§ 5.3 and 8.

383 This is date and time through which the filing office records are complete. For example, a search on July 12 may only reveal filings made on or before July 8. July 8 would be the Effective Date in this example.

384 The latter bracketed language would be used in the circumstance where the financing statement, which is the subject of the opinion, was filed in the Filing Office prior to the rendering of the opinion and was included in the Search Report. Note that this language does not constitute a priority opinion. *See* discussion *infra*.

iv. Discussion:

A priority opinion related to a security interest that is perfected by the filing of a financing statement should be limited to a review of public records (usually based on a report by a third party, a "Search Report"), and to a conclusion, based on the Search Report, whether there exist other filed financing statements covering the same collateral and, if so, whether a security interest perfected by those other financing statements would be entitled to priority. It should be noted that this priority-by-financing-statement-filing priority opinion does not speak to the effect of security interests that may be[385] or must be perfected by possession or by control,[386] or by other methods under Article 9[387] or to the effect of the rights of lien creditors, buyers, licensees, and others who may under Article 9 or other applicable law have priority.[388] To attempt to cover those effects would require the opinion giver provide "a boilerplate list of qualifications that relate to theoretically possible, but rarely applicable events."[389] The following is a limited example of the types of limitations that may be drawn, with little benefit, into a broader opinion:

> *We call to your attention the following: Security interests in chattel paper, instruments, documents, securities, financial assets, and security entitlements are subject to the rights and claims of holders, purchasers and other parties as provided in Sections 9-330 and 9-331.*[390] *Rights to money or funds contained in a deposit account are subject to the rights of transferees under Section 9-327. Security interests in goods are subject to rights of holders of possessory liens under Section 9-333.*[391] *Security interests in deposit accounts are subject to the rights of the depository bank under Section 9-340. Security interests in Collateral consisting of proceeds will be limited as provided in Section 9-315 and 9-322(c). Security interests in goods that are installed in, or attached or affixed to,*

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385 MD. CODE ANN., COM. LAW § 9-312(a) (2002 & Supp. 2006).

386 *Id.* § 9-312(b).

387 *See Id.* § 9-310(b) for a list of instances when the filing of a financing statement is not necessary to perfect a security interest; and MD. CODE ANN., COM. LAW § 9-322 (2002 & Supp. 2006) for the general and special rules affecting priority.

388 *See Id.* § 9-317(a), 312(b) (2002 & Supp. 2006).

389 *See* 2003 TriBar U.C.C. Report, *supra* note 9, page 1479.

390 MD. CODE ANN., COM. LAW § 9-330 (2002 & Supp. 2006) (creating special priority rules for purchasers of chattel paper and instruments). §9-331 sets forth rules regarding the interaction of Article 9 and other Articles of the Maryland Uniform Commercial Code that govern instruments (Article 3), documents of title (Article 7) and financial assets, securities and securities entitlements (Article 8).

391 *Id.* § 9-333(a) (defining "possessory lien"). Generally, the elements of a possessory lien are an interest, not arising under Article 9, which (a) secures amounts owed to a person in the ordinary course of its business for services or materials furnished with respect to goods, (b) arises by a statute or rule of law, and (c) depends for its effectiveness on possession of the goods by the person. *See* MD. CODE ANN., COM. LAW § 9-333 (2002 & Supp. 2006), cmt. 2.

any other goods may be subject to the provisions of Section 9-335[392] *and may be subject to the provisions of Section 9-336*[393] *to the extent that such goods form part of a larger product or mass. We express no opinion as to the Secured Party's rights in the [Collateral] to the extent that the Secured Party has knowledge that its security interest in the [Collateral] violates the rights of another secured party.*[394]

It is neither useful nor economical for debtor's counsel to research, identify, and describe every possible such instance in a priority opinion. Even if the opinion giver is very familiar with this area of the law, such an undertaking is very time-consuming, and the priority opinion itself would simply restate potentially applicable rules of law. More importantly, an opinion giver generally should not opine on matters that so depend upon facts that are not readily ascertainable. If the opinion recipient has a specific concern as to the priority of security interests perfected by possession or control and the concern justifies the cost, the opinion giver should consult the excellent discussions contained in the 2003 TriBar U.C.C. Report.[395] If, based on searches of other records, the opinion recipient has a specific concern as to the effect of other liens, such as State of Maryland sales tax liens or federal tax liens, the opinion giver can address them by appropriate statutory analysis.

A priority opinion based on a Search Report is only as good as the accuracy and completeness of the Search Report. The opinion giver is implicitly entitled to rely on the Search Report without verification of its factual accuracy.[396] While no qualification relating to the accuracy of the Search Report is necessary, the opinion giver may make an express qualification or assumption regarding the completeness and accuracy of the Search Report.

In any event, the opinion giver should take care to describe the Search Report in detail, including the name of the debtor searched, the records searched, the date of the Search Report, the Effective Date of the Search Report,[397] and the person conducting the search.

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392 *Id.* § 9-335(a) provides that a security interest may be created in an accession and continues in collateral that becomes an accession. An accession is defined as "goods that are physically united with other goods in such a manner that the identity of the original goods is not lost." MD. CODE ANN., COM. LAW §9-102(a)(1) (2002 & Supp. 2006).

393 *Id.* § 9-336 sets forth rules for determining the treatment of security interests in commingled goods.

394 In the case of certain items of (Possessory Collateral and Control Collateral), the Secured Party's priority over other secured parties turns on its lack of knowledge that its security interest violates rights of the other secured party. *See, e.g.*, MD. CODE ANN., COM. LAW § 8-303 (2002 & Supp. 2006) (rights of "protected purchaser" of security under Article 8 and i*d.* § 9-330(b) (rights of purchaser of chattel paper).

395 *See* 2003 TriBar U.C.C. Report, *supra* note 9, § 5.3 and § 8.

396 Accuracy includes accurate information regarding the debtor, accurate searches and accurate reporting by the searcher, and accurate maintenance of the records by the Filing Office.

397 *See* note 383, *supra* and 2003 TriBar U.C.C. Report, *supra* note 9, § 5.4(a).

In rendering a filing-priority opinion, the opinion giver is determining that (i) no other still-effective financing statement naming the debtor under its current name remains on file in the filing office (or has been so reported by the Search Report), or (ii) if a still-effective, previously-filed financing statement remains on file, then, subject to any specifically identified exceptions, the security interest perfected by the prior filing would not have priority over the security interest covered by the opinion, or (iii) if a still-effective, previously-filed financing statement remains on file that would give the security interest perfected by the prior filing priority over the security interest covered by the opinion, no prior filer against the debtor has priority over the security interest covered by the opinion because appropriate releases, terminations or subordinations have been obtained.[398] Clauses (i) and (ii) above relate to the fact that, under the Maryland Uniform Commercial Code, the filing office may not remove a debtor's name from the financing statement index for a period of one year after the date the financing statement would have lapsed had it not been terminated.[399] Therefore, financing statements naming a debtor (and any amendments, including termination statements) would still appear in a Search Report even if the financing statements were terminated within the prior year.

As is generally the case, the priority opinion does not address the effect of subsequent occurrences.[400] Opinion givers generally have no obligation to qualify specifically their opinions to exclude the possible effect of subsequent changes in facts.[401]

i. Governing Law

i. Scope.

This subsection addresses issues that Maryland counsel must consider when asked to give an attachment and enforceability opinion or a perfection opinion.[402] For the reasons discussed below, these opinions should be given only if they are based on substantial assumptions and limitations.

ii. General Choice-of-Law Principles Govern the Creation Opinion.

While the opinion as to whether the security interest has been created or has attached is a separate opinion and should not be inferred by the opinion recipient from the enforceability opinion,[403] nonetheless the security interest is not enforceable without a security agreement.[404] The security agreement, in addition to the requirements of Article 9, is subject to

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398 *See supra* 2003 TriBar U.C.C. Report, *supra* note 9, § 5.2(b), p. 1479.

399 *See* MD. CODE ANN., COM. LAW § 9-519(f) (2002 & Supp. 2006).

400 Business Law Principles, *supra* note 7, § IV.

401 *See* note 345 and accompanying text.

402 *See also* Appendix B to the 2003 TriBar U.C.C. Report, *supra* note 9.

403 *See* Section D.6 (c)(iii), *supra*.

404 MD. CODE ANN., COM. LAW § 9-203(b) (2002 & Supp. 2006).

the basic, non-conflicting[405] tenets of contract law,[406] including those with respect to choice of law. If an opinion giver agrees to give an opinion that a security agreement that purports to be governed by the laws of another state is effective to create a security interest, the opinion giver should follow applicable choice-of-law principles in giving that opinion.

iii. Mandatory Choice-of-Law Rules Regarding Perfection.

Once it is determined or assumed, as the case may be, which state's law governs attachment and enforceability of the Article 9 security interest, that state's law will determine which state's law determines perfection, the effect of perfection or nonperfection, and the priority of the Article 9 security interest.

The analysis begins with Section 9-301 of the version of the Uniform Commercial Code of the state whose law governs the security agreement. That state could be Maryland or it could be another state. In any case, Section 9-301(1)[407] provides the basic rule that while a debtor is located in a jurisdiction, the local law of such jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of the Article 9 security interest. The exceptions to that rule are found in subsections (2), (3), and (4) of Section 9-301[408] and Sections 9-303 through 9-306.[409]

iv. Basic Rule - Location of Debtor.

An opinion on perfection by filing is not deemed to include an opinion as to the state of the debtor's location, unless specifically stated. In the absence of such a specific opinion, an opinion regarding perfection by filing is deemed to be given under the law of the state where the financing statement is or is to be filed. It is not inappropriate, however, for an opinion recipient to request, or an opinion giver to give, an opinion as to the debtor's location based on the law of the state as to which the opinion giver is opining (for example, if Maryland law governs creation and a Maryland creation opinion is being given), even if the opinion giver would not generally be willing to issue opinions on another state's law.[410] The Committee has

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405 *Id.* § 1-104.

406 *Id.* § 1-103.

407 *See, e.g., id.* § 9-301(1).

408 *See, e.g., id.* § 9-301(2), (3), and (4).

409 *See, e.g., id.* §§ 9-301 through 9-306 which specify the choice of law for various types of collateral, such as fixtures or timber to be cut (§ 9-301(3)), as-extracted collateral (§ 9-301(4)), farm products (§ 9-302), goods covered by a certificate of title (§ 9-303), deposit accounts (§ 9-304), and certain investment property (§ 9-305), and letter-of-credit rights (§ 9-306).

410 The question of a debtor's location is determined under the law of the state whose law is applicable to the perfection of a security interest, which is itself determined by reference to the mandatory choice of law provisions of the state law under which the security interest is created (in each case, for purposes of this Report, usually Maryland). Whether a debtor is a registered organization and in which state or states it may be registered are matters of the law of any state in which such status may exist. It is appropriate for an

concluded that, based on concerns regarding the unauthorized practice of law and the liability of the opinion giver for rendering an opinion in a state where not admitted to practice, it is inappropriate for an opinion recipient to *insist* that a Maryland lawyer (as opposed to a lawyer in the other state) issue opinions on the Uniform Commercial Code of other jurisdictions in connection with perfection opinions.[411] If an opinion giver determines, nonetheless, to issue such an opinion, it is not inappropriate for the opinion giver to specify that the opinion giver's review of the local laws of the state of the debtor's location is limited to a review of a compilation of state variations of the Uniform Commercial Code, and that the opinion giver relies solely on such compilation in forming the opinion as to the requirements of the Uniform Commercial Code as in effect in the state of the debtor's location.

If such an opinion is given, in most circumstances (other than those in which the Uniform Commercial Code provides that perfection issues are determined by law other than that of the state of the debtor's location[412]) the opinion giver must determine or assume the state of the debtor's location. If the rule of Section 9-301(1) is applicable and no specific opinion on the location of the debtor or enforceability of any choice of law provision in the security agreement is provided, it should be implicitly assumed that the opinion on the issue of perfection is given under the laws of the state in which the financing statement is or is to be filed. Otherwise, the rules for determining the location of a debtor are set forth in Section 9-307.

Section 9-307(e) provides that a registered organization is located in that state under whose law it is organized. Section 9-102(a)(71) defines a "registered organization" as "an organization organized solely under the law of a single state or the United States and as to which the state or the United States must maintain a public record showing the organization to have been organized." Section 9-307(e) and this definition will generally result in or lead to the conclusion that a corporation, limited partnership, limited liability company or REIT is located in the state under whose laws it is formed. In order to reach such a conclusion, an opinion giver must ascertain that the laws of the state in which the debtor is incorporated or formed require such state to maintain a public record of such debtor's incorporation or formation. Unless otherwise stated in the opinion letter or in certificates or other documents listed as having been reviewed by the opinion giver, it should be assumed, whether or not such an assumption is explicitly stated, that the debtor is not incorporated or formed, as the case may be, in more than one state. Where the opinion giver is not rendering an opinion as to the debtor's incorporation or formation, as the case may be, the state of the debtor's incorporation or formation should be stated as a specific assumption. It is also appropriate for the opinion giver to include an express assumption as to the status of the debtor as a registered organization under the laws of its state of incorporation or other formation, as the case may be, and of no other state.[413]

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opinion giver to assume registered organization status and to assume the identity of the state under whose laws such status exists, as described below.

411 *But see* 2003 TriBar U.C.C. Report, *supra* note 9, at p. 1510.

412 *See* notes 408 and 409 *supra*.

413 It should usually be considered acceptable for a Maryland lawyer issuing a perfection opinion to include in that opinion an explicit assumption that a debtor that is a corporation, limited liability company or limited

Section 9-307(b) provides that an individual is located at the individual's principal residence; an organization that is not a registered organization (such as a general partnership) and that has only one place of business is located at that place of business; and an organization other than a registered organization with more than one place of business is located at its chief executive office. An opinion as to perfection of a security interest in the property of any of such types of debtor should not be deemed to implicitly include an opinion as to the location of such debtor; rather, it is an implicit assumption that the debtor is located in the applicable state. Nevertheless, because the location of the debtor is necessary information for the conclusion that a security interest is perfected by filing, an opinion giver might choose to state this assumption explicitly. It is not unreasonable for an opinion recipient to ask that the perfection opinion not assume the conclusion of the debtor's location. If such an opinion is requested, however, the opinion recipient should accept the opinion if the opinion giver relies on a certification of the debtor as to the debtor's principal residence, sole place of business or chief executive office, as the case may be.

It should be noted that Section 9-307 contains special designations for the location of certain other federally-created, governmental or foreign debtors [414]

v. Sample Opinion Language.

It is not uncommon for the opinion giver to assume, solely for purposes of the perfection opinion, that Maryland law governs the attachment and enforcement of the Article 9 security interests. The Committee recommends this approach. The following suggested opinion language includes such an assumption:

> *We note that Section ___ of the Security Agreement provides that the Security Agreement and all issues arising thereunder shall be governed by the laws of the State of _____, without regard to principles of conflicts of laws. We express no opinion as to whether the provisions of such Section ___ are enforceable or as to the law that is applicable to the Security Agreement or the transactions contemplated thereby, including any security interest created pursuant to the Security Agreement, and we express no opinion regarding the laws of the State of _____; rather, with your permission, we have assumed, solely for purposes of our opinions herein, that Maryland law is applicable to the Security Agreement and the transactions contemplated thereby, including the creation of any security interest thereunder.*

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partnership is a "registered organization" under the state of the debtor's incorporation or formation, unless it is known that the debtor is registered under the laws of more than one state and therefore does not meet the requirements of a "registered organization" under MD. CODE ANN., COM. LAW § 9-102(a)(71) (2002 & Supp. 2006). The assumption regarding the debtor's registered organization status should be based on the debtor's incorporation or formation in the applicable state, whether the opinion giver is opining as to such incorporation or formation or assuming such incorporation or formation.

414 *See* § 9-307 (f) (entities organized under federal law), (h) (federal government), (i) (foreign banks), and (j) (foreign air carriers).

While the Committee recommends against giving opinions on the laws of states in which the opinion giver is not licensed to practice, in some circumstances, the opinion giver may be willing to issue the perfection opinion applying the laws of the specified state, specifically limiting the opinion giver's review of such laws to the text of the Uniform Commercial Code as it appears in the official statutory compilation or a recognized reporting service. This limitation makes clear that the opinion giver has not reviewed case law or otherwise conducted the same review that would be conducted by lawyers who regularly render opinions on the law of the state specified in the security agreement's choice of law provisions. The following is an example of language indicating the limited scope of the opinion giver's review of the foreign state's law:

> *We have reviewed Article 9 of the Uniform Commercial Code appearing in the official statutory compilation of the State of _____ Uniform Commercial Code as reported in [cite source] ("State of _____ Article 9 Statutory Text") and have relied solely upon this review in forming the opinion set forth in this paragraph.*

One of the reasons the Committee recommends against merely rendering an opinion under the laws of a state other than Maryland is that doing so may constitute the unauthorized practice of law in the other jurisdiction and may cause the opinion giver to be liable in the event the opinion is incorrect. As a result, before undertaking to give an opinion as to the law of another state, an opinion giver should make sure that doing so does not constitute the unauthorized practice of law in such state.

If an opinion recipient is not willing to accept an opinion with such an assumption or limitation, the opinion giver must determine whether it is able to render the requested opinion. If not, then it will be necessary to retain local counsel in the applicable jurisdiction to render the perfection opinion.

vi. Issues Where Maryland is Not the State of Perfection.

An opinion that the filing of the financing statement perfects a security interest in collateral is not an implicit opinion that the law of the state in which the financing statement is or is to be filed governs perfection; rather no opinion on choice of law issues is deemed given unless specifically stated. The Committee concluded that it is inappropriate for an opinion recipient to require an opinion from a Maryland lawyer that applies the law of the state in which the financing statement is or is to be filed in order to identify the appropriate filing office or filing offices in such foreign state or to determine the sufficiency of the financing statement. The Committee was concerned that rendering such an opinion might constitute the unauthorized practice of law in the applicable state. If, nonetheless, the opinion giver intends to issue such an opinion, the opinion giver might, as set forth above with respect to determining which mandatory choice-of-law rules are applicable, limit the opinion to such law as set forth in the official statutory compilation or as stated by a recognized reporting service.[415] In the absence of a

[415] *See* the second Sample Opinion language in subsection vi above for a formulation which would also apply if the opinion giver may not assume that Maryland is the applicable state for the perfection of a security interest perfected by possession, delivery, or control.

specific statement in the opinion applying the law of a state other than that generally covered by the opinion, the opinion should be read to cover the sufficiency of the financing statement only under the law covered by the opinion and should be read to include an implicit assumption that filing of the financing statement in the proper filing office has been or will be made. Although the Committee does not think it is necessary for an opinion giver to include such assumptions or qualifications specifically, the opinion giver may choose to do so, as the determinations of sufficiency of the financing statement and the proper filing office(s) are those that must be made under the law of the state in which the financing statement is filed.

j. Uniform Commercial Code Insurance

Since the adoption of revised Article 9, the major underwriters of title insurance have developed a new insurance product commonly known as "Uniform Commercial Code insurance" or "UCC insurance." While it is beyond the scope of this Report to present an exhaustive analysis of UCC insurance, it is worth noting that UCC insurance might be used in a transaction in lieu of or in conjunction with an opinion of counsel on UCC issues. UCC insurance is similar to title insurance in that it is a contract of indemnity for specified losses, subject to the exclusions and exceptions stated in the policy.

In general terms and subject to the stated exclusions and exceptions, the UCC insurance policy insures against loss or damage arising out of the failure of the insured security interest to attach, be perfected, and have priority over any other lien or security interest. UCC insurance differs, however, from title insurance, in that it does not insure title to the collateral, except in the case of collateral governed by Article 8 of the UCC, which coverage must be specifically requested. In addition, UCC insurance differs from title insurance because the product is not standardized and uniform throughout the industry. If UCC insurance is considered, it is important for the opinion giver to review the policy in advance to determine the extent of coverage.

UCC insurance offers some advantages over an opinion. UCC insurance offers an established claims process and coverage for the costs of defense. With an additional endorsement, the insurance company will notify the insured when the financing statements are about to lapse.

Another area where UCC insurance offers added assurances is with respect to priority. Opinion givers are usually loathe to give priority opinions because of the necessity of relying on searches of the public records often performed by companies whose liability for inaccuracies does not exceed the cost paid for the search.[416] With UCC insurance, the underwriters stand behind the public record searches up to the amount of insurance.[417] If requested, by endorsement,

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416 *See supra* discussion in Subsection D.6.h, "Priority Opinion Based on Perfection by a Financing Statement Filing."

417 The amount of insurance is defined as the least of the maximum amount of insurance stated on the face of the policy, the outstanding indebtedness at the time of loss, and the value of the collateral.

the policy will also insure patent, trademark and copyright searches, as well as tax lien searches up to $250,000.

Except for insuring the public records searches and the filing of financing statements, the exclusions from the UCC insurance policy are generally similar to the assumptions and qualifications in an opinion letter.

7. Form of Documents and Real Property Issues

Sample Opinion Language:

a. Form of Documents and Perfection Opinions

WITH RESPECT TO DEEDS OF TRUST OR MORTGAGES:

The Deed of Trust [Mortgage] is in a form sufficient to permit due recordation in the real estate records of the county/Baltimore City in which the real property described in the Deed of Trust [Mortgage] is located (the "Recording Office") and, upon proper recording and indexing,[418] *to create the encumbrance and security interest that it purports to create on all right, title and interest of the grantor named therein in the real property described therein.*[419] *[_____ County/Baltimore City], Maryland, is the county[jurisdiction] in which the Deed of Trust [Mortgage] must be properly recorded and indexed in order to cause the encumbrance and security interest that the Deed of Trust [Mortgage] purports to create to be effective as against creditors of and purchasers from the grantor of the Deed of Trust [Mortgage]. No instrument other than the Deed of Trust [Mortgage] is required to be filed in the Recording Office in order to create the aforesaid encumbrance and security interest.*

The Deed of Trust [Mortgage] creates a security interest in favor of the Lender, as security for the obligations described therein, in all of the collateral described in the Deed of Trust [Mortgage] that is composed of fixtures (as that term is defined in the Maryland Uniform Commercial Code) and goods that are to become fixtures. Upon recordation of the Deed of Trust [Mortgage] in the Recording Office and proper indexing there, the security interest created by the Deed of Trust [Mortgage] in that portion of the collateral described in the Deed of Trust [Mortgage] that is composed of fixtures and goods that are to become fixtures will be perfected.

WITH RESPECT TO FINANCING STATEMENTS THAT SERVE AS FIXTURE FILINGS:

The Financing Statement is in appropriate form for filing in the real estate records of the county in which the real property described in the Deed of Trust [Mortgage] is located (the "Recording Office"). The Deed of Trust [Mortgage] creates a security interest in favor of the

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418 The Court of Appeals has stated that "absent evidence of actual knowledge, when a judgment is indexed and recorded under a name different than the name of the title holder as reflected in the land records, it fails to become a lien against that real property in respect to subsequent lien holders or purchasers without actual knowledge." *Waicker v. Banegura*, 357 Md. 450 (2000).

419 Note that in transactions in which the opinion recipient is not based in Maryland, the opinion giver may be asked to use the words "a lien" in lieu of the words "the encumbrance and security interest." In these instances, the opinion giver should include an explicit statement regarding Maryland's status as a title theory state, such as: "Maryland is a title theory state, and references to creation of liens in this opinion should be considered in that context, as deeds of trust in the State of Maryland transfer title to the trustees named therein for security purposes" or "mortgages in the State of Maryland transfer title to the mortgagees named therein for security purposes."

secured party, as security for the obligations described therein, in all of the collateral described in the Deed of Trust [Mortgage] that is composed of fixtures and goods that are to become fixtures. Upon the acceptance and filing of the Financing Statement in the Recording Office, the security interest created by the Deed of Trust [Mortgage] in that portion of the collateral described in the Financing Statement that is composed of fixtures and goods that are to become fixtures will be perfected.

b. Qualifications and Assumptions

(i) We express no opinion with respect to (a) the title to or the rights or interests of the Debtor in the collateral, (b) the adequacy of the description of the collateral, or (c) except as explicitly set forth herein, the creation, attachment, perfection or priority of any liens thereon and/or security interests therein.[420] *Such opinions are given only to the extent set forth in opinion paragraphs [_ - _] and are subject to the additional assumptions, qualifications and limitations applicable to such opinions set forth in this opinion;*

(ii) As to due recordation of the Deed of Trust [Mortgage] [and as to the due recording and/or filing of the Financing Statement in the Recording Office], you are relying upon the title insurance company that has issued a commitment for title insurance (the "Title Company"), and as to the priority of the Deed of Trust [Mortgage], you are relying upon title insurance to be provided by the Title Company, and we assume that such document has been [will be] properly recorded and indexed;

(iii) The real property described in the Deed of Trust [Mortgage] is located in [_____ County/Baltimore City], Maryland.

(iv) Debtor owns and holds a [fee simple/leasehold] interest, of record and in fact, in the real property described in the Deed of Trust and [owns/leases] that portion of the collateral described in the Deed of Trust that is composed of fixtures (as that term is defined in the Maryland Uniform Commercial Code).

(v) The descriptions of the real and personal property constituting the collateral described in the Deed of Trust [Mortgage] and the description of the personal property constituting the collateral contained in, or attached as exhibits or schedules to the loan documents, reasonably identify the property described or intended to be described.

(vi) We express no opinion as to the creation, attachment, perfection or priority of any lien or security interest where the Deed of Trust [Mortgage] has not been properly recorded and indexed.

(vii) We call your attention to Section 3-104(g) of the Real Property Article of the Annotated Code of Maryland, which provides, among other things, that each deed of trust or mortgage presented for recordation shall be accompanied by a completed State of Maryland Land Instrument Intake Sheet, on the form provided by the Administrative Office of the Courts.

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[420] *See* 1998 Mortgage Loan Opinion Report, *supra* note 153.

Please note, however, that such section also provides that the filing officer may not refuse to record an instrument because it is not accompanied by an Intake Sheet, and the lack of an Intake Sheet does not affect the validity of any conveyance, lien or lien priority based on recordation of an instrument.

(viii) We express no opinion as to the enforceability of any provision of the Deed of Trust [Mortgage] that purports to make an absolute assignment of the interest of the debtor in the leases, rents and profits arising from the real property described in the Deed of Trust [Mortgage], rather than an assignment for security.

Discussion:

Form of Documents Opinions[421]

The availability of real property title insurance obviates the need for opinions concerning the due recordation, perfection or priority of liens on real property created in business transactions. The grantee or beneficiary of the real property security may elect to purchase, or require that another party to the transaction purchase for its benefit, title insurance insuring the validity and priority of the lien. Further, a lawyer should not issue an opinion concerning the validity and priority of a real property lien that relies entirely upon a title insurance commitment or policy issued to insure the lien. Such an opinion is a "pass-through" opinion unless issued by the person who examines the title records. As a "pass-through" opinion it is not, in reality, a legal opinion at all and adds no additional value or protection to the opinion recipient beyond the title insurance coverage.

Although real property title insurance addresses perfection and priority of liens on real property, lenders not based in Maryland who are the beneficiaries of Maryland real property collateral and rating agencies are likely to request an opinion that the deed of trust (i) creates an encumbrance and security interest on the real property and fixtures secured thereby or (ii) is in form sufficient to create such lien.[422] Although it is commonly agreed that the enforceability opinion with respect to a deed of trust includes an opinion that the deed of trust creates an enforceable lien between the parties on the real property (subject to the assumptions about ownership of the property, accuracy of the legal description, and proper recordation and indexing), the TriBar Article 9 Report adopts the position that the general opinion that transaction documents are "valid, binding and enforceable" does not speak to whether a security interest in personalty has been created or attached.[423] In light of the frequent requests of opinion

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421 The provisions of this portion of the "Commentary" are based upon the following sources: (a) the 1998 Mortgage Loan Opinion Report, *supra* note 153, (b) Section of Real Property, Probate and Trust Law, American Bar Association, *Local Counsel Opinions in Multi-State Transactions*, American Bar Association 15th Annual Real Property Symposia, May 14, 2004 (the "ABA Symposia Report"), and (c) the Real Estate Guidelines, *supra* note 8.

422 ABA Symposia Report, *supra* note 423, at 11.

423 1998 Mortgage Loan Opinion Report, *supra* note 153, at 573-4, n. 29-30. *See also*, *supra* Section D.6, "Creation, Perfection and Priority of Liens on Personal Property."

recipients and rating agencies for a "form of documents opinion" and the position of the TriBar Article 9 Report, an opinion giver should expect requests for a "form of documents opinion," and an opinion giver may comfortably deliver this opinion after determining that the statutory requirements for the form of a deed of trust have been met.[424]

Pursuant to Section 4-101 of the Real Property Article of the Annotated Code of Maryland (the "Real Property Article"), a deed, which, pursuant to Section 1-101 of the Real Property Article, includes a deed of trust, contains the names of the grantor and grantee, a description of the property sufficient to identify it with reasonable certainty, and the interest or estate intended to be granted, is sufficient, if executed, acknowledged, and recorded. Section 4-202(c) and (h) of the Real Property Article contains forms of deeds of trust and mortgages, which include "grants" by the grantor to the trustees or mortgagees.

Because Maryland is a title theory state, a deed of trust in Maryland transfers title to real property to the trustees named therein for security purposes, and a mortgage in Maryland transfers title to real property to the mortgagee named therein for security purposes. These transfers are functionally equivalent to the creation of liens on real property as security for indebtedness in a lien theory state. Additionally, although there are obvious differences between deeds of trust and mortgages in Maryland, in this Report reference to deeds of trust include reference to mortgages as well, unless there is an indication to the contrary.

Sections 3-101 and 3-103 of the Real Property Article provide that every deed of trust or mortgage must be recorded in every county where the land affected by them lies in order to take effect, and the Court of Appeals has held that documents must be properly indexed in order to achieve a lien on the property that is effective as a priority position against third parties without knowledge of those documents.[425] Section 3-104 of the Real Property Article sets forth the prerequisites to recording instruments, including having the name of each person executing the document typed or printed directly above or below the signature of such person, paper and size of type requirements, inclusion of a certificate of preparation by a Maryland lawyer or a party to the instrument, local and special requirements, and the requirement of, and composition of, land instrument intake sheets. An opinion giver delivering a "form of documents opinion" must confirm that the deed of trust satisfies the prerequisites for recording as set forth in Section 3-104. A form of "documents opinion" does not require an assumption or qualification that the deed of trust be recorded or that it be properly indexed because the opinion merely addresses its ability to be recorded. On the other hand, an opinion that states that the deed of trust creates a security interest must assume the proper recordation of the deed of trust. The opinion need not assume due indexing because improper indexing merely prevents a priority position from being

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424 *See* 1998 Mortgage Loan Opinion Report, *supra* note 153, at 573-4, n. 29-30; ABA Symposia Report, *supra* note 423, at 11.

425 *See Waicker v. Banegura*, 357 Md. 450 (2000), which held that a judgment indexed under an incorrect name would not be enforceable as a security interest against a third party who was unaware of the judgment. *See also Greenpoint Mortgage Funding, Inc. v. Schlossberg*, 390 Md. 211 (2005).

obtained.[426] Additionally, if an opinion provides that a security interest in the collateral will be perfected, the opinion giver should assume both proper recordation and indexing.

A deed of trust may also create a security interest in that portion of the collateral that may constitute goods that are or are to become fixtures (as defined in the Maryland Uniform Commercial Code). Pursuant to Section 9-102(74) of Revised Article 9, a deed of trust will constitute a "security agreement" if the deed of trust creates or provides for a security interest. Once the opinion giver determines that the deed of trust qualifies as a security agreement with respect to fixtures, the opinion giver may consider giving an opinion that the deed of trust is in sufficient form to create a lien on fixtures.[427] In order to give the opinion that the deed of trust creates a lien on fixtures, the opinion giver would have to assume, among other things, proper recording and indexing.

Pursuant to Section 9-501 of Revised Article 9, the security interest in fixtures created by the deed of trust will be perfected upon the filing of a financing statement as a fixture filing in the office designated for the filing or recording of a deed of trust on the related real property. The sufficiency of the fixture filing is governed by Section 9-502(b) of Revised Article 9. The opinion giver should note especially that a fixture filing must include a description of the real property to which the collateral is related.[428] Pursuant to Section 9-502(c) of Revised Article 9, the deed of trust will be in a form sufficient to constitute a financing statement with respect to the fixtures if (i) it identifies the goods that it covers, (ii) the goods are or are to become fixtures related to the real property described in the record, (iii) it satisfies the requirements for a financing statement (*i.e.*, it (a) provides the name of the debtor, (b) provides the name of the secured party or a representative of the secured party, and (c) indicates the collateral covered by the financing statement),[429] and (iv) it states whether a recordation tax is due on its recordation.

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426 *Id.*

427 *See supra* discussion in Section D.6.c on Creation of a Security Interest in Personal Property.

428 MD. CODE ANN., CORPS & ASS'NS § 9-502(b)(3) (2002 & Supp. 2006).

429 *Id.* § 9-502(a).

8. Recordation Tax Opinions

Sample Opinion Language:

IF A RECORDATION TAX IS DUE:

Other than the recordation tax imposed pursuant to Title 12 of the Tax-Property Article, Annotated Code of Maryland,[430] *and nominal per page or per document filing fees due on recordation of the Deed of Trust [Mortgage], no fees, taxes or other charges are due or payable in the State of Maryland in connection with the execution, delivery and recording of the Deed of Trust [Mortgage] and the filing of the Financing Statement in the Recording Office.*

IF NO RECORDATION TAX IS DUE BECAUSE OF AN EXEMPTION:

Subject to the qualifications set forth below, pursuant to Sections 12-108(__) and 13-207(__) of the Tax-Property Article, Annotated Code of Maryland,[431] *no fees, taxes or other charges are due or payable in the State of Maryland in connection with the execution, delivery and recording of the Deed of Trust and the filing of the Financing Statement in the Recording Office, other than nominal per page or per document filing fees.*

IF NO RECORDATION TAX IS DUE BECAUSE THE INSTRUMENT IS AN INDEMNITY DEED OF TRUST:

Subject to the qualifications set forth below and for the reasons set forth in the following paragraph, no fees, taxes or other charges should be due or payable in the State of Maryland in connection with the execution, delivery, and recordation of the Indemnity Deed of Trust [Mortgage] ("IDOT") and the filing of the Financing Statement at the time of its recordation or filing, other than nominal per page or per document filing fees due on (i) recordation of the IDOT and (ii) filing of the Financing Statement.[432]

Pursuant to Section 12-105(f) of the Tax-Property Article of the Annotated Code of Maryland ("Tax-Property Article"), Maryland recordation tax applies only to the principal amount of the debt that has been incurred at the time of recording or filing of a recorded instrument. The Attorney General of the State of Maryland, in an opinion reported at 58 Op. Att'y Gen. 792 (1973), opined that a guarantor of a loan granting to the lender an IDOT has not incurred a debt at the time when the IDOT is recorded if the guarantor is not primarily liable for

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430 If the real property is located in Prince George's County, the following should be added to the text here prior to the comma: "*and the County Transfer Tax imposed pursuant to* § *10-187(a) of the Prince George's County Code.*"

431 If the real property is located in Prince George's County, the following should be added to the text here prior to the comma: "*and the County Transfer Tax imposed pursuant to* § *10-187(a) of the Prince George's County Code.*"

432 If the real property is located in Prince George's County, the following should be added to the text here prior to the period: "*, and the County Transfer Tax imposed pursuant to* § *10-187(a) of the Prince George's County Code.*"

repayment of the indebtedness; that is, if the guarantor's liability is contingent upon the borrower's defaulting under the loan. That opinion was re-expressed and expounded upon in 1989. See 74 Op. Att'y Gen. 281 (1989) (the "1989 Opinion"). These opinions have not been overruled or affected by any subsequent Maryland legislation. Both the Court of Appeals and Court of Special Appeals have recognized IDOTs without commenting on the recordation tax issue. See Farmers Bank of Maryland v. Chicago Title Insurance Company, 163 Md. App. 158, 877 A.2d 1145 (2005); Knapp v. Smithurst, 139 Md. App. 676, 779 A.2d 970 (2001); Walpert, Smullian & Blumenthal, P.A. v. Katz, 361 Md. 645, 762 A.2d 582 (2000).

[In a 1999 opinion, however, the Maryland Court of Appeals (the highest court in the State of Maryland) held that a tax may be due if a transaction involves several steps, even if none of the steps by itself is taxable, if a tax would be due if the steps were "collapsed." Read v. Supervisor of Assessments of Anne Arundel County, 354 Md. 383, 731 A.2d 868 (1999). Read involved a rollback tax under the Conservation of Woodland Acres Act and did not directly involve a recordation or transfer tax. There is concern that the Court of Appeals or other courts in Maryland might extend the reasoning in the Read case to include the recordation tax and to tax IDOTs, or that the Clerks' offices will not accept IDOTs for recording without payment of the recordation tax, at least in certain cases. Shortly after the Read case was decided, the Assistant Attorney General who represented the Clerks of the Courts issued a memorandum to the Clerks stating that the step transaction doctrine applies to recordation and transfer taxes, but, at the same time, that Assistant Attorney General indicated informally that IDOTs could still be recorded without payment of a recordation tax. Based on [discussions with the Assistant Attorney General who represents the Clerks of the Courts and] review of the Land Recording Seminar of the Office of the Attorney General, that is still the position of the Attorney General's Office.[433] *We note, however, that in certain counties, the County Attorney has the authority to decide whether an IDOT may be recorded without payment of the recordation tax. Generally, a determination by a filing officer of whether a purported indemnity deed of trust or indemnity mortgage will be admitted to record without the payment of recordation tax is made based upon the filing officer's examination of the instruments to be recorded, as well as related documents, which may include, among other things, the promissory note or other instruments evidencing the underlying obligation, the guaranty or other agreements evidencing the indemnity obligation to be secured, or certifications by one or more of the parties to such documents.]*[434]

There is no IDOT exemption from the recordation tax; an IDOT merely affords a deferral of the tax. The recordation tax will become due in connection with the IDOT if after the date of execution and delivery thereof the IDOT grantor becomes primarily liable for the obligations secured by such documents. If recordation tax becomes due subsequent to the recordation of the IDOT, the Attorney General has opined that failure to pay the recordation tax will not render the IDOT unenforceable. At that time, the tax will be the obligation of the IDOT grantor, according to Tax-Property Article Section 12-105(f)(2) and the 1989 Opinion. In the 1989 Opinion, the Maryland Attorney General opined that the State of Maryland's claim for unpaid recordation tax

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433 If the IDOT and related documents were approved in advance by the clerk, County Attorney or Assistant Attorney General, that could be noted.

434 This paragraph is optional.

does not take precedence over payment of the debt due to the secured party and that the encumbrance and security interest created by the IDOT is not invalidated by reason of the non-payment of the recordation tax. Therefore, it follows from the views expressed by the Maryland Attorney General that the failure of an IDOT grantor to pay the recordation tax will not limit or impair the ability of the secured party to foreclose under the IDOT or to exercise any other remedies otherwise available to it under the Transaction Documents or the applicable laws of the State of Maryland.

{Also, Section 12-111 of the Tax-Property Article of the Annotated Code of Maryland provides that, by agreement, recordation tax may be paid by any party to the transaction. [We note that the {Credit Agreement} contains provisions under which grantor agrees to pay or reimburse the secured party for various costs and expenses, including all filing and recording costs and expenses and all taxes related thereto.] Based on that agreement and reported opinions of the Attorney General of Maryland, it is our opinion that the IDOT grantor, not the secured party, would be the party responsible for the payment of recordation tax, should recordation tax become due.}

Discussion:

Recordation Tax Opinions

Opinion givers in exclusively Maryland business transactions are not typically asked to opine as to the recordation taxes that will be due upon the recording of a deed of trust because the opinion recipient's lawyer is, or should be, familiar with the applicability of the recordation tax. Opinion givers serving as local counsel in multi-state transactions, however, are sometimes asked to opine as to Maryland recordation taxes. This is even more prevalent when an indemnity deed of trust is used so that a recordation tax is not paid when the document is recorded.

Section 12-102 of the Tax-Property Article of the Annotated Code of Maryland (the "Tax-Property Article") imposes a recordation tax on the recordation of an "instrument of writing"; deeds of trust and mortgages are included within the definition of "instrument of writing."[435] Section 12-108 of the Tax-Property Article sets forth exemptions from the recordation tax. If an exemption applies to the deed of trust with respect to which the opinion giver is delivering a recordation tax opinion, the opinion giver should be advised to refer to the applicable statutory exemption and to state that no recordation tax will be due based upon such exemption.

In Prince George's County, deeds of trust and mortgages are also subject to a county transfer tax, and there are certain exemptions to it.[436] No other Maryland jurisdiction imposes a transfer tax on a deed of trust or mortgage.

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[435] MD. CODE ANN., TAX-PROP. § 12-101(c)(2)(ii) (2001).

[436] Prince George's, Maryland County Code § 10-187 (1995).

The "recordation tax" opinion becomes more complicated when an indemnity deed of trust ("IDOT") is employed. Section 12-105(f) of the Tax-Property Article provides, in part, that if the total amount of debt secured by an instrument of writing has not been incurred at the time of recording or filing such instrument, the recordation tax is payable only on the principal amount of the debt incurred at that time. The Office of the Attorney General of the State of Maryland has interpreted Section 12-105(f) of the Tax-Property Article to permit a deferral of recordation tax on an IDOT (*i.e.*, a deed of trust that secures a guaranty or indemnity agreement with respect to a payment obligation of one other than the grantor of the IDOT, provided that the guaranty or indemnity agreement constitutes a contingent obligation). It must be noted, however, that Section 12-105(f) of the Tax-Property Article does not provide an exemption from the recordation tax; it is merely a deferral, although the deferral may be forever if the secured indebtedness is paid off without there having been a default under the transaction documents. In order to qualify for IDOT treatment, the loan documents may not provide that the IDOT grantor is primarily responsible for repayment of the debt. The IDOT grantor may guaranty the indebtedness, but the guaranty must provide that the IDOT grantor is not primarily liable; *i.e.*, the IDOT grantor may have no liability unless and until the debtor defaults in its obligations under the transaction documents. Also, the IDOT must secure the guaranty and not the note or loan agreement. A default under the guaranty should be an event of default under the IDOT, but a default under any other transaction document should not. The opinion regarding the application of recordation tax to an IDOT in the sample language is a reasoned opinion, which explains the considerations in reaching the conclusions that the IDOT *should* be recorded without payment of a recordation tax. Whether an IDOT will be admitted to record without the payment of recordation tax depends upon the determination of the filing officer to which such documents are presented, the applicable county attorney (in those counties in which the county has the responsibility to collect the recordation tax), or the Assistant Attorney General who represents the Clerks of the Courts.

Although there are a number of exemptions available to the Prince George's County transfer tax, there is no provision comparable to Section 12-105(f) of the Tax-Property Article. Therefore, the Prince George's County transfer tax needs to be paid when an IDOT is recorded in Prince George's County unless an exception is available.

It is a good practice to present the IDOT and related documents to the appropriate filing officer, County Attorney or Assistant Attorney General for prior review and approval before the form of these documents are finalized. Advance review could eliminate the imposition of the recordation tax.

9. No Violations

Sample Opinion Language:

> *The execution and delivery by the Company of the Transaction Documents and the performance by the Company of its [payment] obligations under the Documents do not violate any Applicable Laws. As used herein, "Applicable Laws" means those laws, rules and regulations of governmental authorities of the State (excluding those of counties, cities and other municipalities, and any local governmental agencies) ("Maryland Governmental Authorities") that we, in the exercise of customary professional diligence, would reasonably recognize as being applicable to [the Company and] the transactions contemplated by the Transaction Documents.*

Discussion:

a. Commentary on Purpose and Sample Language

The "no violations of law" opinion is generally intended to provide the opinion recipient with a level of comfort relating to the documents in the context of laws that may affect the transaction itself or the Company. In most instances, however, the opinion giver simply cannot know of all laws, orders, rules, and regulations applicable to the Company and cannot be expected to so opine. As the 1989 Report noted: "[t]he ability of a lawyer to effectively render such an opinion in any reasonable fashion is questionable at best. Consequently, such an opinion has little, if any, practical value."[437] The authors of *Legal Opinions in California Real Estate Transactions* expressed a similar view in their report when they wrote, "Too often . . . the requirement for the ['no violation'] opinion merely results in an almost endless attempt to 'prove the negative' which produces very little in the way of useful information."[438] Since the 1989 Report, it has been uncommon in Maryland for opinion recipients to request and for opinion givers to give opinions that the execution, delivery or performance of the Transaction Documents do not violate any existing laws or governmental rules and regulations. As a result, the Committee discourages the requesting and giving of the "no violations of law" opinion.

If, however, in a particular case, an opinion giver agrees to give such an opinion, the "no violations of law" opinion should be limited in its scope, as indicated below:

(i) the opinion should be interpreted to be limited to statutory law and regulations, which are contained in the Maryland Code and COMAR, respectively, as opposed to common law or case law;[439]

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437 *See* 1989 Report, *Commentary* , § 5.a.

438 *California Real Estate Report, supra* note 2, at 423.

439 *See* Accord, *supra* note 4, Inclusive Opinion, *supra* note 6, Glazer and FitzGibbon, *supra* note 11; *see* Business Law Section of the State Bar of California Report on the Third-Party Legal Opinion Report of the ABA Section of Business Law (May 1992), *reprinted as* Appendix Two D to Glazer and Fitzgibbon at app. 2:33; *see* North Carolina Report, *supra* note 10; *see* Pennsylvania Report, *supra* note 10; *see* Texas Report,

(ii) the opinion should only apply to statutes and regulations that are statewide in application, and it should not include local laws, ordinances, or regulations of political subdivisions of the state, such as zoning restrictions, building codes, and land use regulations;[440]

(iii) the opinion should be interpreted not to extend to all laws, as laws in the following areas are typically beyond the scope of opinions rendered to third parties in connection with loans or other business transaction: federal securities laws and regulations, state "Blue Sky" laws and regulations, Federal Reserve Board margin regulations, ERISA and other pension and employee benefit laws and regulations, federal and state antitrust laws, and federal and state tax laws and regulations;[441]

(iv) the opinion is limited to laws that might be violated only by the execution, delivery or performance of the terms of the Documents and does not address laws applicable generally to the Company or to the ongoing operation of the Company's business; and

(v) the application of law should be limited in a "no violations" opinion to what the opinion giver, in the exercise of customary professional diligence, would reasonably recognize as being applicable to the Company and the transactions contemplated by the Documents.[442] It is better practice to use this formulation than to limit the opinion to the applicability of laws "of which the opinion giver has knowledge" or similar language. This is because the term "knowledge" should be used in connection with factual matters rather than the opinion giver's "knowledge" of the law.[443]

An important question concerning the "no violations" opinion is, what action or activity of the Company is covered by it? The Accord, which was prepared by the Business Law Section of the American Bar Association and which focused on corporate transactions, extended the "no violations" opinion to "execution and delivery by the Client of, and performance by the Client of its agreements in, the specified Transaction Document. . . ." When the American College of Real Estate Lawyers and the ABA's Section of Real Property, Probate and Trust Law considered adapting the Accord for use with real estate secured transactions, they were concerned that "performance by the Client of its agreements" might be construed to extend to obligations of the

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supra note 10; *see* Washington Report, *supra* note 10. *Compare* Florida Report, *supra* note 10, at 1422-23, and TriBar Opinion Committee reports, *supra* note 9, which include decisional law.

440 *See* Accord, *supra* note 4, Inclusive Opinion, *supra* note 6, Glazer and FitzGibbon, *supra* note 11, the Georgia Report, the North Carolina Report, the Pennsylvania Report and the Texas Report, all *supra* note 10. *Compare* the Arizona Report, *supra* note 10, which provides that a lawyer who wants to exclude local laws from a "no violation" opinion must do so explicitly.

441 *See* particularly the Accord, *supra* note 4, and the Florida Report, *supra* note 10.

442 This limitation is very close to that of the Inclusive Opinion. The comparable language in the Accord, *supra* note 4, refers to what "a lawyer in the Opining Jurisdiction exercising customary professional diligence would reasonably recognize as being directly applicable to the Client, the Transaction, or both."

443 *See* the discussion of "knowledge" in Section D.16. "Knowledge," *infra*.

Company after the closing that are contained in the transaction documents, such as constructing, managing, leasing and operating a building in accordance with all laws.[444] Therefore, the 1994 Report limited the "no violations" opinion to the performance by the Company of its payment obligations under the Documents. The Committee believes that this is an appropriate formulation of the "no violations" opinion for a real estate secured transaction. In the sample opinion language, the word "payment" is surrounded by brackets, and it will generally not be used in transactions other than real estate secured transactions.

In other variations of the "no violations" opinion, instead of referring to "violat[ions of] Applicable Laws," the opinion given is that the performance of the transaction documents is not prohibited by applicable laws and will not subject the Company to a fine, penalty or other similar sanctions. This is not a material distinction from the sample opinion language above.[445]

b. Due Diligence

The "no violations of law" opinion, read literally, could require weeks of work by a legion of lawyers. In practice, however, the opinion giver is not expected to put anything approaching that amount of time into the opinion, and clients, in any event, would be unwilling to pay for it.[446] Customary practice does not require the opinion giver to scour statute books and regulatory codes for every statute, rule or regulation that conceivably might apply. Instead, customary practice simply requires the opinion giver to apply the knowledge it already has of the statutes, rules and regulations that are likely to be applicable, supplemented by whatever special research the circumstances may require. Customary practice has developed this way, even though it leaves open the possibility that the opinion meet the standard of conduct giver may meet the standard of conduct without addressing a statute, rule or regulation that applies to the Company or the transaction.[447]

In order to be able to render a "no violations of law" opinion, the opinion giver should be familiar with the laws that will affect the [payment] obligations of the Company pursuant to the Documents. The opinion giver's obligations in this regard appear to be self-limiting because of the language in the opinion that restricts the laws to those laws that the opinion giver "in the exercise of customary professional diligence, would reasonably recognize as being applicable to the Company and the transactions contemplated by the Documents." Although this language may enable an opinion giver to avoid responsibility for obscure or esoteric laws that are not generally well known in the legal community but that may have an impact on the performance of the transaction, the opinion giver must be aware of those laws with which practitioners in the area are familiar.

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444 *See* 1994 ABA/ACREL Report, *supra* note 5, § 14.

445 *See* Accord, *supra* note 4, §16.

446 Glazer and FitzGibbon, *supra* note 11, § 13.2.1.

447 Glazer and FitzGibbon, *supra* note 11, § 13.2.2.6.

Additionally, if the Company operates in a regulated industry or engages in certain types of activities, it may be subject to particular laws. The Committee recommends that the opinion giver either make an assumption that the Company does not operate in a regulated industry and does not engage in activities that would subject it to particular laws, or that the Company provide the opinion giver with a certificate to such effect. Of course, if the opinion giver is relying on a certificate, the opinion should so state.

10. No Conflicts

Sample Opinion Language:

> *The execution and delivery of the Transaction Documents, the performance of the Company's obligations under the Transaction Documents [and the issuance of the shares] [and the borrowing of the Loan] will not:*
>
> *(i) conflict with the [charter or bylaws[448]] of the Company, or*
>
> *[(ii) to our knowledge, constitute a material breach or default under any contract, mortgage, agreement or other document or instrument to which the Company is a party, or]*
>
> *[(ii) constitute a material breach or default under any of the Identified Agreements, or][449]*
>
> *(iii) to our knowledge (and without having ordered or reviewed any judgment, lien or other searches, either in the public domain or of the Company), conflict with or result in a material breach or default under any judgment, order, writ or decree of any court or governmental authority binding on the Company or to which the Company is subject and which is of specific application to the Company.*

Discussion:

a. The No Conflicts Opinion Generally

To give a "no conflicts" opinion is to attempt to capture a broad range of topics. In part, the opinion relates to the organizational documents of the Company. Another portion of the opinion provides assurance that the obligations being assumed will not result in a breach of covenant, misrepresentation or default under the terms of another transaction that the Company previously entered into or by which the Company is bound. Transactions and documents that affect the Company, but were entered into independent of the subject transaction, may vary a great deal from company to company, depending on the size and complexity of a company's business. Identifying potential conflicts will be much more difficult for an automobile manufacturer than for an auto repair shop, and for a national retail chain than for a single clothing store. The degree to which contradictory obligations are likely to be a risk in a transaction will depend on the size and complexity of the transaction itself. A corporate financing transaction with financial and operating covenants delves much more deeply into a company's business, and creates greater risks along these lines, than does a single-property, non-

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448 Insert appropriate organic documents for the Company's entity type.

449 These two clauses labeled "(ii)" are presented in the alternative, with the intent that one would be used without the other, depending on the circumstances. (*See* "Discussion" in this Section below.)

recourse mortgage loan. The "no conflicts" opinion, therefore, may require a greater degree of customization than many of the other opinions addressed in this Report.

b. Factual Certificates

Opinion-giving often presents the need to balance the degree to which the opinion giver relies on certifications or other assumptions with the breadth of the issues that the opinion giver is required to address. If the opinion giver relies too heavily on certificates from the Company, then the value of the opinion to the recipient is reduced. If, however, the opinion giver does not rely enough on the factual certificates to limit the scope of the opinion giver's inquiry, then the opinion giver takes on an inappropriate or unreasonable level of risk. Moreover, requests for overly broad opinions can burden the underlying transaction with costs and delays that are disproportionate to the transaction.

All "no conflicts" opinions are based on certain specified obligations of the Company, which are (i) the Company's organizational documents, (ii) the Company's contractual obligations, and (iii) court actions to which the Company is specifically bound. In order to opine on any of these areas, the opinion giver will need to establish the factual basis on which the opinion is given. This is accomplished through the use of certificates from responsible officers or other representatives of the Company. Inherent in this process are two basic assumptions: the assumption that the individual making the certification is in a position to do so (in terms of both knowledge and authority), and the assumption that the information contained in the certification is accurate and complete. In the opinion of the Committee, the opinion giver is deemed to make these assumptions implicitly about certificates from the Company, unless the opinion giver knows or has reason to believe that the assumptions are incorrect or that the person making the certification is not qualified to do so.

c. Organizational Documents

The opinion giver is required to determine whether the obligations of the Company in the subject transaction violate the limits placed on the Company through its governing documents. The organizational documents governing most entities are easy to identify and are generally not expensive to review, and they are typically less likely to reveal conflicts than contracts and other agreements (which are discussed below). Some of the organizational documents will be available by public record searches (*e.g.*, charter of a corporation or the articles of organization of a limited liability company), but some will not (*e.g.*, by-laws of a corporation or the operating agreement of a limited liability company). The Committee recommends that, in all cases, the organizational documents be defined and referenced specifically, rather than identified generically.

d. Contracts and Agreements

The sample opinion language includes two alternative provisions: one addressing the issue of whether the transaction breaches contracts binding on the Company generally, and the other addressing the issue of whether the transaction breaches certain specifically named contract documents. In either case, the opinion giver must read and analyze all of the applicable

documents. The Committee believes the latter clause to be preferable because it eliminates the potential ambiguity about what contracts the opinion giver has knowledge.

With respect to the first alternative, the opinion giver is asked to address all agreements to which the Company is a party and about which the opinion giver has knowledge. The opinion is further limited by requiring the breach to be material. In this context, the Committee defines materiality as that which is of importance to the opinion recipient, using an objective standard of reasonableness. The Committee believes that it is not reasonable to require from the opinion giver, nor can the opinion recipient reasonably rely on, an opinion that purports to cover every conceivable contract or agreement that could be potentially applicable to a large, long established company. In fact, the parties to the transaction are encouraged, wherever possible, to place further limitations on the scope of contracts and agreements covered by the opinion, such as limitations based on dollar amount (*e.g.*, loan agreements where the amount borrowed is in excess of $1,000,000) or based on subject matter (*e.g.*, contracts where the Company is restricted from selling its services to a specific type of purchaser or in a specific geographic area).

The determination of whether the first alternative or the second alternative is to be used will depend on a number of factors, such as the opinion giver's familiarity with the Company, the size and age of the Company and the complexity of its business, the size of the transaction, and other variables. Likewise, in many cases, the form of the opinion will be dictated in large measure by the extent of the opinion giver's representation of the Company. For instance, limiting the opinion to "Identified Agreements" would be more appropriate if the opinion giver is serving only as local counsel on a specific issue of local law, or if the opinion giver is serving as counsel on a single, isolated transaction for a large company that is represented regularly by other firms. On the other hand, where the opinion giver is "in-house" counsel, or is a firm that represents the Company with respect to a number of different matters and, therefore, has extensive familiarity with the Company, it may be more appropriate for the opinion giver to render the opinion with respect to all agreements to which the Company is a party and to include a knowledge limitation and the materiality qualification discussed above.

e. Court Orders and Decrees

This portion of the opinion is limited to certain specified court orders and other actions involving the Company as a party; it does not pertain to litigation or court actions generally or even litigation or court actions that involve entities similar to the Company if the Company is not named in the litigation or action. The sample opinion language limits the opinion on court orders and decrees to those of which the opinion giver has knowledge, and it provides that the opinion giver has not ordered or reviewed any judgment, lien, or other search relating to the Company, either by checking court dockets and public records or by examining the records of the Company itself.[450]

[450] *See also supra* Section D.12, "No Litigation."

11. No Consents and Approvals

Sample Opinion Language:

Based solely upon the certificates of the Company and our knowledge, no consent, approval, authorization, or other action by, or filing with, any governmental authority is required for the execution and delivery by the Company of the Transaction Documents [or, if required, the requisite consent, approval, or authorization has been obtained, the requisite filing has been accomplished, or the requisite action has been taken].

***Discussion*:**

a. Commentary on Purpose and Sample Language

In business transactions, the opinion recipient frequently asks for an opinion to the effect that the transaction does not require the consent or approval of any governmental entity.[451] The purpose of this opinion is to give the opinion recipient some assurance that there is no required governmental approval or consent, which has not been obtained that, could cause a legal impediment to the execution and delivery of the transaction documents. The concern is that the lack of some required consent, approval, or filing could make the entire transaction either void or voidable.[452]

The Committee concluded that it is not appropriate for a lawyer to give an opinion that encompasses all consents or approvals to which a company may be subject. The sample opinion language covers only governmental consents and approvals needed to enter into the transaction documents, and does not cover consents and approvals necessary to run the business or even to operate the property used as collateral for a loan. Although the Committee concluded that it is unnecessary to do so, if the opinion giver desires to include an express statement in the opinion to this effect, the following language may be added at the end of the "no consents and approvals" paragraph in the opinion letter:

> *We express no opinion as to any consent, approval, authorization, or other action or filing necessary for the ongoing operation of the [Collateral or the Company's business].*

This limitation, whether express or implied, would exclude from the opinion such matters as the issuance of all permits necessary to operate the company's business. If an opinion on any of these matters is required, it should be specifically requested and addressed in the opinion, if appropriate. If an opinion contains a qualification that it does not extend to local laws, certain, but not all, of the concerns that an opinion giver might have with this opinion in the absence of the foregoing qualification would be alleviated. It would also be appropriate to provide a qualification that the consents and other evidences of approval referred to in the

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451 Consents and approvals relating to (i) authorization, execution, and validity; (ii) zoning and subdivision approval; and (iii) environmental matters are treated elsewhere in this Report.

452 New York County Lawyers' Ass'n Special Committee, *supra* note 2, at 1920.

opinion do not include those of local governmental units or authority. The following language may be used for this purpose:

> *We express no opinion as to any consent, approval, authorization, or other action by, or filing with, any county, city, or other municipality or any local government agency.*

In the case of an interstate transaction, Maryland opinion giver may deem it necessary to rely on an opinion from out-of-state counsel regarding the lack of necessity for regulatory approval from out-of-state authorities.

The "no consents and approvals" opinion should be specifically limited to consents and approvals from governmental authorities that are necessary for the Company to execute and deliver the transaction documents. A proper due diligence examination should be performed, using the threshold questions set forth in this section, in order to rule out questions of regulatory approval that may not be obvious on their face. Lawyers should, however, avoid expanding this opinion to encompass matters that constitute approval of any activity the Company plans to undertake, as opposed to the approval of the transaction itself.

Activity approvals are more properly dealt with by specific rather than general opinion language.[453] When a company is subject to particular regulatory authorities affecting its operations, an opinion recipient may consider requesting assurances (in the form of an opinion or other evidence) that its operations have received approvals from such authorities.

One potential area of confusion with regard to the opinion is the meaning of the word "execution." In certain usages, the word "execution" encompasses the concept of performance. It is the view of the Committee that, for purposes of opinions discussed in this Report, the word "execution" should be deemed to mean "the act of signing, sealing, and delivering a legal instrument or giving it the form required to make it valid" and should not include the "performance" of the loan documents.

b. Due Diligence

The Committee recommends that certain threshold questions be posed in order to determine whether there are any regulatory concerns. These questions are as follows:

(i) Is the company subject to any governmental programs that require governmental consent prior to entering into the transaction?

(ii) Is the company subject to any court orders or decrees?

(iii) Does the company operate in a regulated industry?

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[453] For further discussion of certain types of activity approvals, *see* Section D.14, "Zoning, Subdivision and Land Use Opinions and Environmental Matters" and Section D.14, Environmental Matters, *infra*.

An affirmative answer to any of these questions should alert the lawyer to the need for further research into the company's business.

If the Company is subject to a governmental program requiring consent, the appropriate statutes should be reviewed in order to determine if specific approval is required and whether it has been obtained. If the company is subject to a court order or decree, including a bankruptcy order for relief, court approval may be required before the transaction can be completed.

If the Company is engaged in a regulated industry, specific regulatory approval may be required for it to enter into the transaction. Examples of this include a regulated utility that may require Public Service Commission approval to secure financing and a company issuing securities requiring approval of or filing with the Securities Exchange Commission or state securities commissioners.

The Committee recommends that the opinion giver obtain from the company certificates that cover the above questions and that the opinion be based upon such certificates. Alternatively, the opinion giver should include assumptions that provide what would be in the certificates.

In the case of an interstate transaction, the Maryland opinion giver may need to rely on an opinion from out-of-state counsel regarding the lack of necessity for regulatory approval from out-of-state authorities.

The "no consents and approvals" opinion should be specifically limited to consents and approvals from governmental authorities that are necessary for the company to execute and deliver the transaction documents. A proper due diligence examination should be performed, using the threshold questions set forth in this section, in order to rule out questions of regulatory approval that may not be obvious on their face. Lawyers should, however, avoid expanding this opinion to encompass matters that constitute approval of the activity the company plans to undertake rather than the approval of the transaction itself.

12. No Litigation

Sample Opinion Language:

To our knowledge, there is no action or proceeding pending before any court or administrative body, or overtly threatened in writing, against the Company, [except for the matters described in the [certificate] [schedule] of the Company].

Discussion:

a. Commentary on Purpose and Sample Language

Although it is customary for a lender, investor or acquirer to require the Company to represent and warrant in the transaction documents that there is no pending or threatened litigation against the Company or its properties, these parties often seek confirmation of the information or so-called "negative assurance" from the company's lawyer. The opinion giver's response as to the accuracy of the Company's disclosures regarding the existence or non-existence of litigation is factual in nature and, as such, is not a true legal opinion, but is rather a factual statement or confirmation of the opinion giver's state of knowledge as to the existence or non-existence of litigation. For that reason, in this discussion the opinion giver's response is referred to as a "certification" rather than an opinion, and the opinion giver is referred to as the "certification giver."

A request for a "no litigation" certification requires the certification giver to consider its ethical responsibilities to the company and to third parties. This involves weighing the duty to preserve the client's confidences and secrets with the duty to deal truthfully with third persons.[454]

A "no litigation" certification is not intended to analyze or comment upon the substance of pending or threatened litigation disclosed in the company's schedules, an officer's certificate or another list referred to by the certification giver. In those instances where pending or threatened litigation is disclosed and the certification giver is requested to evaluate the litigation, it may be appropriate for the certification giver to do so. Normally, the information the certification giver should provide will include identification of the litigation, the status of the proceedings, the matters in controversy, and the position asserted by the Company in connection with the proceedings. Except in unusual cases, the certification giver should refrain from offering a judgment as to the probable outcome of the litigation.[455] Accordingly, a certification giver should not, except in special circumstances, offer a judgment on whether an unfavorable

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454 *See supra* Section C.2, "Ethical Considerations."

455 *See* A.B.A. *Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information*, 31 BUS. LAW. 1709, 1712-14 and 1719-24 (1976).

outcome would have an adverse effect on the Company's financial status.[456] This is a determination the Company or the recipient of the certification should make.

The sample language set forth above confirms customary practice, which recognizes that a "no litigation" certification is not based upon independent investigations or inquiries, but rather serves as confirmation that the lawyer does not have actual knowledge of facts concerning litigation that is different from the knowledge of the Company as expressed in a schedule to a transaction document, an officer's certificate or other listing.[457] To the extent that the lawyer has knowledge of litigation that is different from the information disclosed by the Company, it is misleading for the lawyer to make a contrary certification.[458]

If an independent investigation or inquiry is made, then the sample language set forth above contemplates that the certification giver will describe the scope of the investigation or inquiry by reference to the specific procedures that the certification giver has performed. For instance, if the certification giver searches court records, then the court records should be identified.

The term "action or proceeding" is intended to include any action, suit, arbitration, mediation, or similar proceeding whether at law or in equity.[459] The "no litigation" certification does not include a "materiality" standard. Thus, the certification giver should disclose any matters pertaining to the company or its properties, whether or not the amount in controversy is insubstantial, or its potential impact slight. The purpose of the "no litigation" certification is not to weigh or evaluate risks to the Company; it is up to the opinion recipient or its lawyer to make that judgment. It is customary practice for the certification to be limited to pending litigation[460] or litigation that has been overtly threatened in writing. If, however, the certification giver has actual knowledge of a credible oral threat of litigation that could be material to the company or the transaction, then it may be inappropriate to make the certification without appropriate disclosure.[461]

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456 For the same reasons, an opinion giver should decline a request to characterize litigation as "immaterial" unless the parties can agree on an acceptable definition of materiality. *See* TriBar 1998 Report, *supra* note 9, at 644 n.174.

457 *See* Section D.12.b, *supra*, as to the nature of the certification giver's inquiry. *See also* the discussion of "knowledge" and the scope of diligence the use of that term denotes in Section D.16, "Knowledge," *supra*. In the Committee's view the inclusion of the word "knowledge" or other formulations intended to limit the certification are unnecessary and do not affect the scope of the certification or the steps that are required by customary practice to render the certification.

458 *See Dean Foods v. Pappathanasi*, 18 Mass. L. Rptr. 598 (Mass. Super. 2004). *See also supra* Section C.2, "Ethical Considerations," for a discussion of § 4.1 of the Maryland Rules.

459 The Committee believes that it is generally not appropriate to request a certification as to the absence of pending governmental investigations.

460 "Pending" means any proceeding that has been docketed or filed against the Company or the Company's properties.

461 *See supra* Section C.2, "Ethical Considerations."

"Any court or administrative body" includes federal, state, or local courts, and administrative departments, commissions, boards, bureaus, agencies, or instrumentalities.

In addition to the information disclosed in the sample opinion language above, the certification giver may be asked to state whether there are any pending proceedings "affecting" the Company. Because the outcome of many proceedings, including those in which the Company is not a party, may affect the Company, such a request is overly broad and thus inappropriate. The parties may agree to expand the sample language to include reference to proceedings having as named parties persons or entities to which the Company has a particular relationship (*e.g.*, as a partner or guarantor).

b. Due Diligence

By customary practice, a lawyer's due diligence inquiry when giving a "no litigation" certification is limited. A certification giver will ordinarily be permitted to rely on the Company's schedules or on an officers' certificate as to litigation. Where the certification giver relies upon Company schedules or a certificate or other listing referenced in the opinion, the certification giver is presumed not to have made an independent inquiry or investigation of the facts, but is presumed to have checked with the relationship partner or other lawyer in the firm in charge of the Company's account and with those lawyers in the firm working on the transaction in order to determine what litigation, if any, is pending or overtly threatened in writing against the Company.[462] The Committee's view is that the certification giver need not expand this inquiry to include all lawyers in the firm or conduct a search of the firm's litigation docket. As a matter of customary practice, a lawyer need not conduct a search of court or other public records, and an express disclaimer to that effect is not required.[463]

Notwithstanding the limited scope of the certification giver's duties, customary practice requires that when the certification giver becomes aware of adverse information that may render the Company's disclosures incorrect, incomplete or misleading as of the date of the opinion letter or certificate, the certification giver should take further steps in order to determine whether the matter should be disclosed to the opinion recipient.[464] These further steps may include the certification giver making further inquiry with the Company or contacting other lawyers in the firm who are more familiar with the matter. In such a case, the certification giver should apprise the Company and/or other firm lawyers of the reasons for the request and that the information will be used as a basis for rendering a legal opinion.

If, through these or other appropriate steps, the certification giver finds that the Company's litigation disclosures are not accurate and complete, the certification giver should decline to give the certification unless the matter is disclosed. Alternately, in some circumstances, the certification giver may be able to limit the scope of the certification so long as

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462 *See infra* Section D.16, "Knowledge."

463 TriBar 1998 Report, *supra* note 9, at 664.

464 *Dean Foods v. Pappathanasi*, 18 Mass. L. Rptr. 598 (Mass. Super. 2004).

that would not mislead the recipient of the certification. For instance, if the certification covers government investigations and the certification giver becomes aware that a governmental investigation may be ongoing, it may choose to delete governmental investigations from the scope of its certification and alert the other parties to the transaction that it is not in a position to render negative assurance as to the absence of ongoing governmental investigations.

There may exist legitimate instances when a certification giver may be instructed to expand the nature of the inquiry beyond that required by customary practice. In those instances, the nature and extent of the investigation should be specifically identified during the process of negotiating the transaction documents. Similarly, if the opinion recipient wishes to know about pending or threatened litigation against any party other than the Company (*e.g.*, a general partner, a majority stockholder, or a related entity), the opinion recipient should specifically identify the other party.

13. Choice of Law Clauses

Sample Opinion Language:

> *The choice of law provisions contained in the Documents [other than the Deed of Trust] provide that they shall be construed and enforced in accordance with the substantive laws of _____ (the "Selected Jurisdiction"). Assuming that such provisions are valid and effective under the laws of the Selected Jurisdiction, we believe that the choice of law provisions should be upheld and enforced by the courts of the State and federal courts sitting in and applying the laws of the State of Maryland (in either case, a "Maryland Court"). It is our opinion that a Maryland Court in a case properly presented and argued to it should give effect to the designation by the parties of the law of the Selected Jurisdiction as the governing substantive law with respect to such agreements unless the Maryland Court were to determine that (i) the Selected Jurisdiction has no reasonable relationship to the transaction contemplated by the Documents, or (ii) the result obtained from applying the substantive law of the Selected Jurisdiction would be contrary to the fundamental public policy of the State of Maryland or another jurisdiction that has a materially greater interest than the Selected Jurisdiction relating to the Documents or the determination of the particular issue thereunder being considered by the Maryland Court. See Kronovet v. Lipchin, 288 Md. 30 (1980); Bethlehem Steel v. G.C. Zarnas & Co., 304 Md. 183 (1985); National Glass v. J.C. Penney Properties, 336 Md. 606 (1994); and Laboratory Corporation of America v. Hood, 395 Md. 608 (2006). Because choice of law issues are decided on a case by case basis depending upon the facts of the particular transaction, we are unable to conclude with certainty that a Maryland Court would give effect to those provisions designating the law of the Selected Jurisdiction as the governing law. Nevertheless, based on the Choice of Law Facts,* we believe that a Maryland Court should conclude that the Selected Jurisdiction has a reasonable relationship to the transaction. As noted above, however, a Maryland Court would likely not permit any provision or practice condoned or permitted by the laws of the Selected Jurisdiction that is determined to be against the fundamental public policy of the State of Maryland. [Additionally, a Maryland Court may apply the internal law of the State of Maryland to determine the perfection and effect of perfection or non-perfection of the liens created under the Documents and the application of remedies in enforcing such liens with respect to property located in Maryland.]*
>
> ** Note: "Choice of Law Facts" would need to be defined in the assumptions section of the opinion letter.*

Discussion:

Many business transactions involve parties from different states and documents that purport to be governed by the laws of different jurisdictions. In a typical secured loan transaction of this type, a deed of trust securing real property in Maryland will provide that its terms are governed by Maryland law, while the other loan documents will provide that they are made under and are to be controlled and interpreted by the law of another jurisdiction (the "Selected Jurisdiction"). In transactions of this kind, opinion recipients sometimes request

opinions that the selected choice of law provisions set forth in the documents will be respected. When given, choice of law opinions are not definitive opinions, unlike most of the opinions discussed in this Report. Instead, as stated in Section 4.9 of the Real Estate Guidelines:

> Choice of law opinions are often given as "reasoned" or "explained" opinions based upon factual assumptions bearing on the opinion conclusion and most often can be only a description of the approach likely to be taken by a court applying existing law in the opinion giver's jurisdiction.[465]

In order to give a choice of law opinion, even a reasoned opinion, an opinion giver must determine that there are sufficient contacts with the law of the Selected Jurisdiction, such as that the loan was negotiated in the Selected Jurisdiction, the opinion recipient's principal place of business is in the Selected Jurisdiction, and loan payments will be made to the Selected Jurisdiction. The opinion giver must also determine that the public policy of the State of Maryland would not require that Maryland law be controlling as to a particular substantive point.[466]

The opinion giver should set forth in the opinion letter, as assumptions, the facts on which the choice of law opinion relies. Following is an example of how such facts may be set out:

> *In connection with the choice of law [and usury] provisions set forth in the Documents and the opinions rendered in connection with those matters below, we have assumed without inquiry that:*
>
> *(A) the Documents were negotiated in part and delivered in the Selected Jurisdiction;*
>
> *(B) Lender has a principal place of business in the Selected Jurisdiction;*
>
> *(C) the Loan proceeds will be disbursed in the Selected Jurisdiction;*
>
> *(D) the parties to the Documents freely chose the law of the Selected Jurisdiction as the law governing the Loan other than with respect to the applicable mortgage law of each of the states wherein the respective properties are located;*
>
> *(E) the parties to the Loan are sophisticated business people and entities experienced in multi-jurisdictional loan transactions secured in part by real estate mortgages or liens on properties located in multiple states and are represented by experienced real estate counsel;*

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465 *See* Real Estate Guidelines, *supra* note 8.

466 *See Kronovet v. Lipchin*, 288 Md. 30 (1980); *Bethlehem Steel v. G.C. Zarnas & Co.*, 304 Md. 183 (1985); *National Glass v. J.C. Penney Properties*, 336 Md. 606 (1994); and *Laboratory Corporation of America v. Hood*, 395 Md. 608 (2006).

(F) the Loan and the Documents were negotiated at arm's length among the parties;

[(G) the Loan is being entered into solely to acquire or carry on a business or commercial enterprise, or to a business or commercial organization;] and

(H) the choice of law was selected for valid business reasons, and the parties are not engaged in fraudulent or misleading activities or avoidance of public policy requirements in the choice of law contained in the Documents.

*The foregoing assumptions (A) through ([H]) are sometimes hereinafter referred to as the "**Choice of Law Facts**."*

Although choice of law opinions are rendered on occasion in connection with real estate secured transactions, they are given infrequently in other contexts. Moreover, opinion givers often specifically disclaim any choice of law opinions when they have not undertaken the requisite analysis to give such opinions.[467]

[467] *See* Section C.3.k., "Foreign Law," *supra* regarding the situations that arise when the law selected to govern some or all of the documents (or provisions in documents) in a transaction is the law of a jurisdiction other than the State of Maryland. That subpart assumes that the selected law will control the interpretation of the applicable documents or provisions and provides alternatives for how a Maryland opinion giver may respond when an opinion recipient desires an opinion on a matter that is governed by the law of a jurisdiction other than Maryland.

14. Zoning, Subdivision and Land Use Opinions and Environmental Matters

A section of the 1989 Report was devoted to zoning opinions, and a separate section addressed environmental matters. Opinions of these types were requested and given with more frequency then than they are now. These types of opinions, however, are fundamentally different from the matters that are typically addressed in third party legal opinions and that are discussed in the other sections of this Report.[468] In addition, these matters are customarily addressed and satisfied early in the due diligence process prior to the discussion of legal opinions. They require certain substantive knowledge and expertise, and they should be given only under limited circumstances, and then by attorneys well versed in the subject matter, as discussed below. Moreover, neither zoning, subdivision, land use, nor environmental matters should be included, either by inference or implication in a lawyer's opinion.

a. Zoning, Subdivision and Land Use Opinions

Through the 1980s lawyers were sometimes requested to provide legal opinions on matters involving zoning, subdivision and land use (sometimes collectively called "zoning") in real estate lending transactions. The opinions were requested to be addressed to the lender, the title insurance underwriter, or both. As a result, the 1989 Report addressed zoning opinions and contained a sample of opinion language, commentary, and a discussion of the investigation, research and inquiry required to provide such an opinion. Very often, when raw ground was to be acquired and developed, these types of opinions were requested as a normal part of the lender's due diligence. Often, such opinions were requested to confirm that the use of the property and its improvements complied with applicable zoning and subdivision laws, codes and regulations.

The general and customary reliance on an opinion from a lawyer regarding zoning matters has significantly diminished during the last ten to fifteen years. Opinion givers began to rely so much on many assumptions and qualifications, as well as on reports, opinions and certifications of other professionals, public officials and even the borrowers, that the force and effect of the opinions were greatly reduced. Opinion recipients became more willing to accept and rely upon the reports and certifications of engineers, surveyors, architects, and land planners, sometimes called "PZRs," as well as upon public officials who had greater expertise and sometimes more objectivity. Zoning opinions also became more expensive because they are fact intensive and often require opinion givers to address areas outside of their customary practice. The final element in the reduction in the number of zoning opinions was title insurance. Fifteen

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468 *See* Section 4.3.a of the Real Estate Guidelines, *supra* note 8, which provides as follows:

> Opinions on zoning, land use and environmental matters are fundamentally different from the evaluations of other issues typically addressed in opinion letters in that they involve complex, technical matters that are not easily, or sometimes at all, susceptible to separation into factual and legal components. Opinions on such matters are not customary. Land use and environmental matters are normally considered to be the subject of the lender's due diligence, which frequently includes certificates from architects, engineers and other professionals and communications from relevant public agencies.

years ago title insurance underwriters would require a zoning opinion to the underwriter in order to provide zoning or subdivision coverage. Subsequently, title insurance underwriters then became satisfied in many cases with opinions or certificates from engineers, land planners, architects and public officials as the basis for zoning and subdivision endorsements. Opinion recipients, sometimes with encouragement from the persons required to provide and pay for opinions, now readily accept title insurance coverage for zoning, subdivision, and land use matters. First, the opinion requirement disappeared, then the significant additional premiums for zoning coverage were reduced and often eliminated, making title insurance the method of choice to provide zoning comfort.

Notwithstanding the foregoing, opinions concerning zoning matters can still have an important, if not as frequent, role in real estate transactions. Many questions regarding zoning and subdivision cannot be answered by only "yes" or "no." There are often issues regarding the interpretation or application of statutes, ordinances, and regulations. For example, there is significant legislation affecting land use and having broad legal and social consequences, in areas such as rent control, condominium conversion and affordable housing. Even the courts have limited land use by issuing opinions that affect or modify prior understandings, applications, and interpretation of the rules, regulations, ordinances and statutes. Some courts have gone so far as to require existing buildings that do not conform to land use requirements to be removed or seriously modified. Occasionally opinion givers are requested to evaluate and interpret covenants and restrictions, some of which may have existed for decades. While zoning opinions are not commonly provided, today they are much more reasoned, not susceptible to generality or certainty, and often involve and affect significant economic undertakings.[469]

In popular commercial usage, the term "zoning" is often used loosely to connote all aspects of land use. The opinion recipient may intend that an opinion dealing with zoning provide comfort in all areas of project planning, design, and construction, while the opinion giver may intend to speak only to the question of whether the project and its intended use, in general terms, are permitted on the property. To avoid this problem, the opinion giver should make the limits of the opinion clear, either by refraining from use of all-encompassing terms like "zoning" or "land use" and specifying what the opinion covers; or, if such terms are used, by carefully stating all assumptions made, reliance on the works or representations of others, and other qualifications to the opinion. In the area of a zoning opinion, it is important to disclose what is excluded from the opinion and sometimes the reason for such exclusions.

The opinion giver should not be required to be an additional warrantor of facts. To the extent that the existence of certain facts is necessary for the opinion to be given, those facts should be stated in the opinion as assumptions. In the proper circumstances, certificates from appropriate professionals (*e.g.*, architect, engineer, land planner or surveyor) or other persons with accurate knowledge of such facts, such as the owner, should be cited as the source of such facts. Both the scope and the degree of the assurances requested by the opinion recipient should be considered carefully during the initial stages of the business transaction (*e.g.*, when

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469 Even after the issuance of a building permit construction in compliance with the plans and permit may be suspended and existing improvements may be required to be altered. *Permanent Financial Corp. v. Montgomery County, Maryland*, 308 Md. 239 (1986).

negotiating the commitment letter or purchase agreement), in light of the size and complexity of the transaction, so that the opinion giver and client are not required to undertake work and incur expenses that are unduly burdensome in the context of the particular transaction.

An opinion giver may be asked to opine that the property complies with subdivision laws and regulations. In opining that no further subdivision is necessary for the conveyance of the subject property, the lawyer is implicitly stating either that the property is located on a recorded plat of subdivision, that the present boundaries of the property predate the subdivision requirements of the local jurisdiction, that an exception to the subdivision requirements existed at the time that the property was divided from a larger tract, or that subdivision has already been accomplished as a matter of law. To render such an opinion, the opinion giver will need either to obtain and review a copy of the record plat of or affecting the subdivision, to determine that the description of the property contained in the deed to the current landowner predates the establishment of the local subdivision ordinance, or to otherwise ascertain the facts that accomplish the subdivision or permit an exception to subdivision. It should be noted that additional levels of consideration regarding subdivision may be necessary. For example, in Montgomery County properties not affirmatively approved since 1982 may be subject to additional review before development will be permitted. It may, therefore, be appropriate for an interested person to obtain an opinion or other evidence of such approval.

In any case, the scope of the zoning opinion should be addressed and agreed upon in the early stages of the transaction. The opinion giver and its client should discuss with the opinion recipient and its lawyer the particular areas in which the recipient needs comfort and any possible alternative means of providing some comfort, such as a certification from the project architect or engineer, evidence afforded by permits, certificates from the local zoning, planning and/or building authorities, or affirmative title insurance endorsements that do not require supporting opinions from a lawyer.

The Committee recognizes that unusual situations may arise where comfort on zoning matters cannot feasibly be obtained from any other sources, as in the case of the refinancing of an existing building where the architect or engineer involved in the construction is either unable or unwilling to give an opinion, or the case of a small construction project on which no architect or engineer has been employed. In such an event, if the lawyer is required to give a zoning opinion, the opinion giver should obtain an explanation of the facts from the best available source – usually the client and public officials – and review those facts in light of the relevant zoning ordinances. In the opinion, the opinion giver should expressly state all of the facts upon which the opinion giver is relying, and the opinion giver should state which of the facts are based solely on certificates prepared for the transaction. These facts would include representations, based upon the best existing records, of zoning matters such as parking and floor area ratios, height and density requirements, and the like. The opinion giver should also expressly state any parts of the relevant zoning ordinance with respect to which the opinion giver is not rendering an opinion. This type of opinion should only be undertaken by lawyers who devote a substantial portion of their practice to zoning and land use matters and, preferably, only in consultation with similar experienced lawyers.

In summary, opinions concerning zoning and other land use matters should be tailored closely to the specifics of the business transaction in which they are given. Certain areas

of zoning and land use law and regulation may or may not be of real concern to the opinion recipient, depending upon the nature, size, and complexity of the transaction; the difficulty of performing the work necessary to render an opinion with respect to such matters; and the existence of other collateral or guaranties. In any business transaction in which an opinion dealing with zoning law is to be given, the opinion giver should take care to define any general terms used in the opinion, such as zoning or land use, to state expressly any areas of zoning or land use law and regulation with respect to which the opinion giver does not intend to opine (if the opinion uses the terms "zoning" or "land use"); and to state expressly any assumptions and qualifications that the opinion giver is making or any work of a third party upon which the lawyer is relying in rendering the opinion.

b. Environmental Matters

The 1989 Report contained a section dealing with environmental matters and included suggested illustrative opinion language and due diligence steps that would need to be taken before an opinion in this area could be given. At the time that the 1989 Report was prepared, opinion recipients occasionally requested that opinion givers render opinions regarding the environmental status of property that served as collateral for their loans. This is another area that has been addressed by title insurance. Maryland is a state where the "environmental endorsement" to the title insurance policy, insuring that no environmental liens have been filed, together with an appropriate environmental evaluation of the real property, is satisfactory to many opinion recipients.

Since that time, however, environmental opinions are rarely given by opinion givers as part of third party opinion letters relating to real estate secured transactions. Opinion recipients and other persons with interests in real property now obtain their knowledge about the environmental status of the real property from Phase I and Phase II environmental surveys as well as other tests and analyses prepared by engineers, scientists and environmental auditors. In many instances, if there are environmental issues that emerge as a result of such testing, the results of the test are referred to the Maryland Department of the Environment (MDE), and discussions take place with the MDE about the environmental issues. Lawyers with expertise in environmental matters may play a significant role in such discussions, and they often write opinion letters concerning environmental issues to the MDE, their clients, and their clients' lenders. Such letters vary considerably and are highly dependent on the facts and the particular circumstances. As noted above, these letters are almost always separate from third party opinion letters rendered in connection with the real estate secured transactions, which are the subject of this Report.

c. Overly Broad Opinions

In some transactions, opinions such as the following (an "Omnibus Zoning Opinion") are requested:

> *The improvements and the occupancy and use thereof [will] comply fully with applicable zoning, subdivision, and other land use laws [other than environmental laws], ordinances, rules, and regulations. The plans, drawings, and specifications for the project have been submitted to the*

appropriate public authorities in connection with application for all authorizations, approvals, and permits (federal, state, and local) necessary for the construction of the Project in accordance with such drawings and specifications; and all such permits have been issued by the appropriate public authority.

The Committee strongly recommends against a broad zoning opinion such as the Omnibus Zoning Opinion. It should neither be requested nor given absent very special circumstances. In the absence of the bracketed clause "other than environment laws," the opinion would reach to environmental matters as well, (and the opinion giver would be rendering an "Environmental Opinion") which would make the scope of the opinion entirely beyond the competence of most lawyers. If the "Project" involves land and improvements to be constructed, for example, the language implies that the opinion giver has reviewed and understands all aspects of the plans and specifications for the improvements, is familiar with all existing and proposed site conditions, and is qualified to analyze and apply the assembled facts and all relevant laws and regulations.

Further, lawyers should pay particular attention to assure that Omnibus Zoning or Environmental Opinions are not, in substance, included in other opinion language that is less direct in that the language may appear to be focused on directed at entity authority or regulated industry issues. Examples are:

(A) *. . . the performance by the Company of each of its obligations under the Transaction Documents will not violate any applicable laws or regulations of any governmental authority. . . .*

or

(B) . . . no consent or approval of, filing with, or other action by any governmental authority is required in connection with the execution and delivery of and performance by the Company of its obligations under the Transaction Documents . . . .

Use of the word "performance" in these examples may expand the scope of the opinion beyond the question of the company's basic authority to enter into and carry out the transaction at hand. Frequently, transaction documents contemplate or require the construction of improvements or the use of existing improvements for the conduct of a business. Because such "performance" may generate the need for a permit or license that has not yet been obtained and because contemplated or actual construction or operations may violate some applicable zoning, land use, or environmental law or regulation, an opinion in this form should not be given by a lawyer in a real estate secured transaction.

Furthermore, the Committee emphatically recommends that a lawyer should not give an opinion that directly, or by generality of its terms, encompasses an unspecified array of zoning, land use, and environmental matters and other regulatory issues without considering all relevant issues. Examples of opinion language of this type are the following:

(C) *. . . the Project is in compliance with all applicable laws and regulations. . . .*

or

(D) *. . . all permits, licenses and approvals of any governmental authority required for the construction, occupancy, and use of the Project have been obtained. . . .*

In the case of opinion (C) above, the language covers every conceivable compliance issue. If the "Project" involves land and improvements to be constructed, for example, the language implies that the opinion giver has reviewed and understands all aspects of the plans and specifications for the improvements, is familiar with all existing and proposed site conditions, and is qualified to analyze and apply the assembled facts and all relevant laws and regulations. Most lawyers are not qualified to analyze all of these factors together effectively or to provide well reasoned and sustainable conclusions about them.

The language of opinion (D) above specifically addresses occupancy and use. In the case of a construction loan, this would mean expanding the scope of the opinion beyond existing conditions and into anticipated project operations, a speculative venture. On the other hand, opinion (D) does not extend to those matters of environmental compliance that do not involve permits or approvals, and in this regard opinion (D) is narrower than opinion (C).[470]

Lawyers have at times sought to soften or limit the scope of an "all laws," "all permits," or "all consents" opinion by a general "knowledge" qualification. A general "knowledge" qualification, however, in and of itself, does not resolve the difficulties presented by the "all laws," "all permits," or "all consents" language. The Committee is of the view that the opinion giver should not give an omnibus opinion on compliance with "all laws," "all permits," or "all consents," even if the opinion is modified with a "knowledge" qualifier.[471][472]

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[470] For example, transformers containing polychlorinated biphenyls (PCBs) can be used under many circumstances without any environmental permits or approvals, but the applicable environmental regulations impose marking and inspection requirements with respect to the operation of such transformers.

[471] *See* Section 16, "Knowledge," *supra*.

[472] *See* Section 16, "Knowledge," *supra*.

15. Usury Matters

Sample Opinion Language:

Based solely upon the certificate of the Company and our knowledge, the Loan does not violate Maryland usury laws.

Discussion:

a. Commentary on Purpose and Sample Language

"Usury" means the charging of interest by a lender that is greater than that allowed by law. Under Maryland law, most commercial lending transactions, unlike consumer transactions, do not raise usury issues.[473]

The purpose of an opinion on usury is to provide the opinion recipient with assurance that usury laws have not been violated. If a loan violates Maryland usury laws, there are civil and criminal penalties that may be imposed on a lender ranging from damages equal to three times the amount of interest and charges collected in excess of the interest and charges allowed by law, to conviction of a misdemeanor punishable by a fine or imprisonment or both.[474]

An enforceability opinion implicitly includes an opinion that the loan evidenced by the transaction documents is not usurious because that opinion provides that "the Transaction Documents [are] enforceable against the company in accordance with their terms." If the transaction documents violated usury laws, the company's agreement to pay interest at the rate stated in the loan documents would not be enforceable, and the opinion giver would not be able to render the enforceability opinion. If a usury opinion is not intended to be given, it should be expressly excluded.[475]

It is not unusual for an explicit usury opinion to be requested and given, especially when the lender and its lawyer are located outside of Maryland. In such circumstances, the opinion above may be given. The opinion giver may assume, without stating, that the lender will not receive, directly or indirectly, any fees, charges, benefits or other compensation except as set forth in the transaction documents when a usury opinion is given or implied,[476] or the opinion giver may explicitly make such assumptions.

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473 The scope of this Report is commercial lending transactions, and this Report does not address usury issues in the consumer context.

474 MD. ANN. CODE , COM. LAW § 12-114 (2002 & Supp. 2006).

475 *See* Real Estate Guidelines, *supra* note 8 §4.0.b. *See also infra* Section D.17, "Assumptions, Qualifications and Other Limitations."

476 *Id.*

Section 12-103(e)(1)(i) of the Maryland Commercial Law Article allows a lender to charge interest at any rate if the loan is "a loan made to a corporation."[477] Therefore, if a borrower is a corporation (unless it was formed with the knowledge of the lender for the purpose of evading usury laws[478]), and the transaction is governed by Maryland law, the loan will not violate Maryland usury laws. As a matter of practice, an explicit opinion to such effect to an opinion recipient that is represented by a Maryland lawyer is superfluous.

Likewise, if a loan is governed by Maryland law and falls within the parameters of Section 12-103(e)(1)(ii) or (iii) of the Maryland Commercial Law Article (a commercial loan in excess of $15,000 not secured by residential real property and a commercial loan in excess of $75,000 secured by residential real property, respectively), the loan will not violate Maryland usury laws. Again, a usury opinion is not necessary when the opinion recipient is represented by a Maryland lawyer. A "commercial loan" is defined in Section 12-101(c) of the Maryland Commercial Law Article as a loan that is made " (1) [s]olely to acquire or carry on a business or commercial enterprise; or (2) [t]o any business or commercial organization." Unfortunately, the term "business or commercial organization" is not defined in the statute or in case law, but it certainly includes general and limited partnerships, limited liability companies, and REITs organized and existing for business or commercial purposes.

A more difficult question as to whether a loan is subject to Maryland usury limitations arises if the following circumstances exist: (a) the borrower is an individual or is a general partnership that is not a "business or commercial organization," (b) the transaction is governed by Maryland law, and (c) the loan is not clearly a commercial loan with respect to which the lender may charge any rate under the provisions of Section 12-103(e) of the Maryland Commercial Law Article. In such a case, the opinion giver will often be requested to issue a usury opinion since the usury determination will usually require some knowledge of the borrower and the borrower's purposes for obtaining the loan. Therefore, the opinion giver will want to obtain a certificate from the borrower as to these points.

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477 *Id*. § 12-103(e)(1)(i). Unless the lender has knowingly caused the creation of the borrower's corporation to avoid application of usury laws (see *Rabinowich v. Eliasberg*, 159 Md. 655 (1930) (in which the opinion of borrower's lawyer would not provide the lender with protection anyway), the corporate exemption should apply even if the borrower may have incorporated solely for the purpose of facilitating the loan.

It should also be borne in mind that the "corporate exemption" assumes that the loan has been made under Subtitle 1 of Title 12 of the Maryland Commercial Law Article ("Title 12"). While not a common practice, commercial loans also may be made under Subtitles 4, 9, and 10 of Title 12. Subtitle 4 of Title 12 governs loans secured by secondary mortgages on Maryland real estate on which a residence is located. § 12-401(i)(2)(i) of the Maryland Commercial Law Article provides that loans to corporations are exempt from the interest limits of Subtitle 4 thereof "unless the lender required the borrower to incorporate as a condition for obtaining the loan." In the unusual event that a lender elected to make a commercial loan under Subtitle 9 ("Credit Grantor Revolving Credit Provisions") or Subtitle 10 ("Credit Grantor Closed End Credit Provisions") of Title 12 , there is no corporate exemption. The lender making the unusual election to make such a loan would be aware, presumably, that there is no corporate exemption.

478 See MD. ANN. CODE, COM. LAW §12-401(i)(2)(i) (2002 & Supp. 2006), and *Rabinowich v. Eliasberg*, 159 Md. 655 (1930).

As noted above, in rendering an enforceability opinion, the opinion giver will be implicitly giving a usury opinion. Therefore, in transactions where a usury opinion has not been requested, the opinion giver should undertake the same due diligence steps as would be taken if the usury opinion were actually being given..

A usury opinion may also be appropriate if Maryland law is not applicable to a loan transaction. Such an opinion should address the choice of laws question and the designation of another state's law to govern the usury issue. Of course, in such a case, reliance on an out-of-state lawyer may be necessary.

b. Due Diligence

If the loan is governed by Maryland law, the opinion giver should first determine the statutory authority for the loan under Title 12 of the Maryland Commercial Law Article. As discussed above, the statutory authority will indicate whether usury is an issue and, if it is, the scope of due diligence necessary to support the usury opinion.

The opinion giver should establish the existence of facts and circumstances necessary to make the usury opinion accurate or, alternatively, should include in the opinion appropriate assumptions and qualifications. Investigation should include a determination of the type of entity making the loan, the type of entity to which the loan is being made, and the purpose of the loan. For example, the opinion giver should obtain copies of the corporate charter, limited liability company articles of organization, partnership agreement, trust agreement, or declaration of trust and a status/good standing certificate (if available). The opinion giver will also want to obtain a certificate from the borrower certifying how the proceeds of the loan are to be used if the reason that the loan is not subject to any interest rate limitation is that it is made solely to acquire or carry on a business or commercial enterprise.

16. Knowledge

In a number of places in this Report and in several of the particular opinions, reference is made to the "knowledge" of the opinion giver. In referring to "knowledge," various opinion letters use phrases such as "to the best of our knowledge," "to the best of our actual knowledge," "to our knowledge," "to our actual knowledge," "to the best of our knowledge after [specified] due and diligent inquiry," and other similar phrases. It is not clear whether the phrase "to the best of our knowledge" actually connotes a higher standard of inquiry than "to our knowledge." In order to avoid uncertainty concerning the meaning of the various formulations, the Committee recommends use of the formulation "to our knowledge."

Because the terms "knowledge" and "our knowledge" are imprecise, the Committee recommends that they be defined in the opinion letter. "Knowledge" should refer only to actual knowledge (*i.e.*, conscious awareness and not some form of implicit knowledge) without implication that any inquiry or investigation has been made beyond that explicitly stated in the opinion letter. "Our knowledge" should refer not to the law firm as a whole or every lawyer in it, but only to the "primary lawyer group," which may be defined to consist of the select group of lawyers in the opinion giver's firm who are involved in the preparation of the opinion, who are involved in the transaction, or who have worked on matters on behalf of the company within the prior twelve months and are currently at the firm.[479] If the terms "knowledge" or "our knowledge" are not defined in the opinion, the Committee believes they should be interpreted in accordance with the preceding two sentences.

The term "knowledge" should apply only to factual statements and should not be used to limit the opinion giver's "knowledge" of the law. If an opinion giver desires to indicate that the primary lawyer group does not have knowledge of all of the facts that may exist about a certain matter because of time or other due diligence limitations, then use of the term "to our knowledge" is appropriate. On the other hand, the opinion giver should not use a "knowledge" limitation if it desires to limit an opinion about the applicability of laws to its client or the transaction in one of the opinions because the opinion giver has not taken the time to determine the applicability of all of the laws that might affect the transaction or the company as to that issue. Instead, the opinion giver should 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 Transaction."[480]

The following is an example of a paragraph that defines "knowledge" and "our knowledge" and that may be included in an opinion letter:

> *In basing the opinions and other matters set forth herein on "our knowledge" and similar language used herein, the words "our knowledge" signify that, in the course of our representation of the Company in matters with respect to which we have been*

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479 *See* Real Estate Guidelines §3.4 & 3.4.a, *supra* note 8.

480 *See* Inclusive Opinion Report including the Inclusive Opinion, *supra* p. 2 and note 6, §§ 2.4 and 3.8; *see also* Section D.9, "No Violations."

engaged by the Company as counsel, no information has come to our attention that would give us actual knowledge or actual notice that any such opinions or other matters are not accurate or that any of the foregoing documents, certificates, reports, and information on which we have relied are not accurate and complete. Except as otherwise stated herein, we have undertaken no independent investigation or verification of such matters. The words "our knowledge" and similar language used herein are limited to the knowledge of the lawyers within our firm who are involved in the preparation of this opinion letter, who are involved in the Transaction, or who have worked on matters on behalf of the Company within the prior twelve months and are currently at the firm.

While the better practice is not to use the term "knowledge" to qualify the opinion giver's subjective knowledge of the law,[481] the Committee acknowledges that historically many opinion givers have done so with the intent that the opinion being given is actually limited to the subjective knowledge of that opinion giver or the subjective knowledge of the primary lawyer group. This situation might occur where either the "no consents and approvals"[482] or the "no violations"[483] opinion paragraphs are qualified by the phrase "to our knowledge." In such a case, the qualification should be read to mean the actual subjective knowledge of the law of the opinion giver or the primary lawyer group.[484] To interpret such a limitation otherwise would in most cases be inconsistent with the plain meaning of the definition of "knowledge" contained in most opinion letters. Opinion recipients who desire to obtain more comfort than that based simply on the subjective actual knowledge of the law of the opinion giver or primary lawyer group are advised to require the formulation presented above as representing the best practice. If, notwithstanding the foregoing, an opinion giver explicitly qualifies an opinion as to the law by using the subjective "to our knowledge," and an opinion recipient accepts that formulation, the opinion recipient should be aware that the subjective interpretation of the opinion giver's knowledge of the law will likely apply.

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481 *See* Glazer and FitzGibbon, *supra* note 11, § 13.2.2.6.

482 *See supra* Section D.9, "No Violations."

483 *See supra* Section D.10, "No Conflicts."

484 *See* Glazer and FitzGibbon, *supra* note 11, § 13.2.2.6. ("Knowledge limitations . . . on the law (as opposed to the facts) generally are regarded as inappropriate, establishing a subjective standard when as to matters of law the standard of care should be objective.")

17. Assumptions, Qualifications and Other Limitations

Among the most important parts of all transactional legal opinions are the assumptions, qualifications, and other limitations. These provisions are often as heavily negotiated as the legal opinions themselves, and sometimes more so. In some opinion letters, an effort is made to group together the assumptions and qualifications set forth in the opinion. In other opinion letters, the assumptions and qualifications are scattered throughout. Traditionally, the assumptions have preceded the actual opinion paragraphs, and the qualifications and limitations have followed these paragraphs, but certain qualifications, such as the bankruptcy and equitable principles limitations, have been included as part of the opinion paragraphs. In this Report, the Committee has made an effort to group all of the assumptions, qualifications and limitations used throughout the Report in this section for ease of reference. Further, the Illustrative Opinions included in this Report place the assumptions before the opinion paragraphs and the limitations and qualifications after the opinion paragraphs. Although it is sometimes difficult to distinguish between statements of fact and legal conclusions, assumptions are generally considered to concern factual matters, and qualifications are generally considered to relate to legal matters.

While there are certain basic assumptions and qualifications that frequently appear in transactional legal opinions (although the precise language may vary from opinion to opinion), other assumptions and qualifications are opinion-specific. Whenever a lawyer is rendering a legal opinion, that lawyer must carefully consider which assumptions and qualifications should be expressly included. This process will vary from opinion to opinion, depending upon the facts of each transaction and the legal opinions being rendered. In this Report, the Committee has made an effort to indicate which assumptions, qualifications and limitations should be "paired" with which opinion paragraphs. Thus, if an opinion is not requested or given in a particular transaction, the assumptions and qualifications that relate to would typically be paired with that opinion paragraph need not be included in the opinion letter.

Sample assumptions and qualifications are set forth and discussed throughout this Report. Many of the substantive legal issues discussed above in Section D of this Report include various suggested assumptions and qualifications necessary and appropriate to support the suggested legal opinions discussed therein. This discussion of assumptions and qualifications, and specific language used to express those assumptions and qualifications, is provided to help clarify the intended meaning and scope of assumptions and qualifications generally appearing in transactional legal opinions. It is intended that, by using the sample language for assumptions and qualifications set forth in this Report, those assumptions and qualifications will have the meanings and be interpreted as discussed in this Report. In order to further this goal, the Committee has specified that, unless stated otherwise in an opinion letter, it is implicit in every opinion, which indicates in the opinion letter that it is given as to the laws of the State of Maryland, that the opinion is to be interpreted in accordance with this Report. Accordingly, to the extent any opinion letter given under Maryland law uses sample language from this Report to express an assumption, qualification or limitation, that sample language should be interpreted in accordance with the discussion set forth in this Report.

The following assumptions and qualifications are intended to be a complete restatement of those contained throughout this Report. They are divided into those assumptions and qualifications that are implied according to customary practice and need not be expressly stated,

and those that are not implied and which, therefore, must be explicitly set forth in the text of the opinion letter.

The identification of an assumption or qualification as "Implicit" is intended to indicate that the assumption or qualification applies even though not expressed, unless it is expressly negated in the opinion letter. It should not, however, be interpreted to prevent an opinion giver from explicitly stating that assumption or qualification in the text of the opinion if the opinion giver prefers as a matter of style to express applicable assumptions and qualifications. Certain implicit assumptions or qualifications may only apply in certain types of transactions. Likewise, certain "Explicit or Optional" assumptions or qualifications may only be appropriate in certain types of transactions and should not be expressed if not applicable to the type of transaction or if provisions of the type addressed are not contained in the transaction documents.

The inclusion of any assumption or qualification in the "Explicit or Optional" section is not to be taken as an indication (in contrast to those contained in the "Implicit" sections) that the Committee has endorsed the use of those assumptions or qualifications in any particular transaction. Rather, it is intended to indicate that such assumptions or qualifications are commonly or occasionally expressed by opinion givers and accepted by many opinion recipients. In each particular transaction, it is for the opinion giver and opinion recipient to discuss and agree upon whatever "Explicit or Optional" assumptions and qualifications are appropriate and acceptable.

If an opinion giver expressly states an implicit assumption or qualification and therein modifies the substance of that assumption or qualification as stated in this Report, it is the view of the Committee that the opinion giver in so doing has negated the implied assumption or qualification in favor of the assumption or qualification as expressed. The use of the phrase "Unless otherwise expressly stated" as part of a qualification is intended by the Committee to indicate that one or more specific opinions in the letter are contrary to that qualification.

The lead-in language to the assumption section of the Illustrative Opinion Letters provides: "In reaching the opinions set forth below, we have assumed, and to our knowledge there are no facts inconsistent with, the following:." We note that the clause "to our knowledge there are no facts inconsistent with" is consistent with the opinion giver's ethical obligation under Rule 4.1 of the Maryland Rules not to make assumptions that are inconsistent with facts known to the opinion giver.[485] Notwithstanding the foregoing, the Committee recognizes that there are common situations in which the parties collectively agree that the opinion giver may assume, almost as a hypothetical, that certain facts or law, known by the parties not to be accurate or correct are, for purposes of the opinion letter, accurate or correct. One example is where the parties agree that an opinion giver may assume that the law of one state (typically the state identified as the governing law) is identical to the law of another state (typically the law of the state as to which the opinion giver is opining). The Committee concluded that such an assumption, even though known by the opinion giver and the opinion recipient to be factually untrue, is nonetheless appropriate. The key difference between such an assumption and one in

[485] *See supra* Section C.2, "Ethical Considerations," for a more complete discussion of the obligations of a lawyer not to make false statements of material fact or law to third persons.

which the opinion giver might assume a fact inconsistent with what that opinion giver knows to be the case is whether or not the opinion recipient also knows or should know the nature of the assumption. If the assumption is known by the opinion recipient to be literally untrue, but is nonetheless acceptable to the opinion recipient to be included, the opinion giver is not violating Rule 4.1. The Committee recommends, however, that assumptions of this nature not be included in the assumptions portion of the opinion after the lead in language referred to above, but, rather that they be addressed in the "qualifications" portion of the opinion, and the opinion letter should expressly indicate that the opinion recipient has consented to their use. An example in which this is done follows: "We have assumed, with your express permission, [or, with your permission] that the law of [insert governing law] is identical to the law of Maryland in all respects material to our opinion." By using the words "with your permission" or by including further explanation in a qualification, both the opinion giver and the opinion recipient recognize that they are in agreement about the use of such an assumption even though the assumption is known to both to be literally untrue.

a. Generic Assumptions

(i) Implicit:

(a) Each individual executing any of the Transaction Documents, whether on behalf of such individual or another person, is legally competent to do so.

(b) Each individual executing any of the Transaction Documents on behalf of a party (other than the Company) is duly authorized to do so.

(c) All documents submitted to us as originals are authentic. All documents submitted to us as certified or photo static copies conform to the original documents. All documents upon which we have relied are accurate and complete. All public records reviewed or relied upon by us or on our behalf are true and complete and remain so as if the date of this letter.

(d) The form and content of all Transaction Documents submitted to us as unexecuted drafts do not differ in any respect relevant to this opinion from the form and content of such Transaction Documents as executed and delivered.

(e) All representations, warranties, statements and information contained in the Transaction Documents are accurate and complete.

(f) All signatures on all Transaction Documents [other than the Company's] and any other documents submitted to us for examination are genuine.[486]

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486 Opinion recipients occasionally request that the portion of this assumption relating to the genuineness of signatures be limited to signatures other than those of the Company or the individuals executing the Transaction Documents. In effect, such a request requires the opinion giver to insure that the signatures of the opinion giver's client are not forgeries. In the view of the Committee, such an assurance is not an opinion of law but the guarantee of a fact that may be outside of the knowledge of the opinion giver. The

(g) There has been no oral or written modification of or amendment to any of the Transaction Documents, and there has been no waiver of any provision of any of the Transaction Documents, by action or omission of the parties or otherwise.

(h) Each individual executing a certificate is authorized to do so and has knowledge about all matters stated therein. Each such certificate is accurate and complete.

b. Enforceability Assumptions

(i) Implicit:

(a) Each of the parties (other than the Company) executing any of the Transaction Documents has duly and validly executed and delivered each of the Transaction Documents to which such party is a signatory, and such party's obligations set forth therein are legal, valid and binding and are enforceable in accordance with all stated terms.

(b) The [Lender][Acquirer][Investor] and its successors and assigns will comply with all requirements of applicable procedural and substantive law in exercising any rights or enforcing any remedies under the Transaction Documents.

(c) The exercise by [Lender][Acquirer][Investor] of any rights or enforcement of any remedies under the Transaction Documents would not be unconscionable, result in a breach of the peace or otherwise be contrary to public policy.

(d) [If giving a "duly organized" opinion:] The Board of Directors of the Company held an initial meeting at which the Board adopted bylaws and elected officers.

(e) The Transaction Documents accurately reflect the complete understanding of the parties with respect to the transaction contemplated thereby and the rights and obligations of the parties thereunder.

(f) The [Lender][Acquirer] and its successors and assigns will act in good faith and in a commercially reasonable manner in the exercise of any of its rights or enforcement of any of its remedies under the Transaction Documents and will not engage in any conduct in the exercise of any of its rights or enforcement of any of its remedies that would constitute other than fair dealing.

(ii) Explicit or Optional:

(a) Consideration that is fair and sufficient to support the Guaranty of the Guarantor has been and would be deemed by a court of competent jurisdiction to have been, duly received by the Guarantor.

Committee believes that such a request is inappropriate in most instances and that the language in brackets should be omitted.

(b) The provisions of the Transaction Documents intended to reduce interest and fees on the obligations so that the interest and fees do not exceed the maximum legal rate are given full force and effect.

c. No Violations Assumptions

(i) Implicit

None

(ii) Explicit or Optional[487]

(a) The Company is not engaged in an industry or activity that is regulated by any federal, state, or local governmental entity or agency.

d. No Consents and Approvals Assumptions

i. Implicit

None

ii. Explicit or Optional[488]

(a) The Company is not subject to any federal, state, or local governmental programs that require governmental consent prior to the Company's entering into [commercial loan transactions].

(b) The Company is not engaged in any industry or business activity that is specially regulated by any federal, state, or local governmental entity or agency that requires its consent prior to the Company's entering into [commercial loan transactions].

(c) There are no judicial, governmental, administrative or arbitral judgments, orders, injunctions, decrees, or awards outstanding against the Company, and there are no judicial or governmental actions, suits, or proceedings, or any arbitrations or mediations, pending or threatened against the Company or any of its properties {that (i) seek to affect the enforceability of the Transaction Documents, or (ii) come within [the objective standard established in the {Loan Agreement} for disclosure of such matters] [other objective threshold]}.

e. Perfection and Priority Assumptions

i. Implicit:

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487 Instead of making this point as an assumption, it may be contained in a certificate from the Company.

488 Instead of making these points as assumptions, they may be contained in a certificate from the Company.

(a) The Company currently has rights within the meaning of the Uniform Commercial Code of the State of Maryland (the "UCC") in all of the Collateral.

(b) All descriptions of real property, personal property or other items or interests, including, but not limited to, those subject to the UCC, in which a security interest or lien is created under the Transaction Documents, as contained in the Transaction Documents and in all Financing Statements, reasonably identify the real property, personal property, or other items or interests described or intended to be described.

(c) There is no agreement between the [Lender][Acquirer] and the Company postponing the time of attachment of any security interest granted under the Transaction Documents.

(d) Value has been given for all security interests and liens created under the Transaction Documents.

(e) Any search report referred to in the opinion letter is accurate and complete as of the date stated on it, and the governmental records searched were true and complete as of such date.

ii. Explicit or Optional:

(a) The [Lender][Acquirer] has taken, and will continue to maintain, in the State of Maryland, legal possession of all Collateral in which a security interest may [only] be perfected by possession.

(b) The executed certificates representing or evidencing all of the Company's right, title and interest in the [shares][membership interests][notes] (the "Pledged Securities") were delivered, in bearer form or in registered form issued or endorsed to the [Lender][Acquirer], or endorsed in blank, to, and are in the possession of, the [Lender][Acquirer] in the State of Maryland in pledge under and in accordance with the terms of the Transaction Documents, that the [Lender][Acquirer] will continuously maintain exclusive possession and control of the Pledged Securities and that the [Lender][Acquirer] will continuously maintain exclusive possession and control of the proceeds of the Pledged Securities, if any, in the State of Maryland to the extent possession of such proceeds is required in order to perfect the [Lender's][Acquirer's] security interest in such proceeds.

(c) [If the Company is a "registered organization" organized solely under Maryland law:] The proper place for filing to perfect a security interest in the Collateral of the Company under the UCC of the State(s) of {insert references to all UCCs of States other than Maryland where the Company is organized} is to be determined under the Maryland UCC.

(d) We note that Section ___ of the Security Agreement provides that the Security Agreement and all issues arising thereunder shall be governed by the laws of the State of _____, without regard to principles of conflicts of laws. We express no opinion as to whether the provisions of such Section ___ are enforceable or as to the law that is applicable to the Security Agreement or the transactions contemplated thereby, including any security interest created pursuant to the Security Agreement, and we express no opinion

regarding the laws of the State of _____; rather, with your permission, we have assumed, solely for purposes of our opinions herein, that Maryland law is applicable to the Security Agreement and the transactions contemplated thereby, including the creation of any security interest thereunder.

(e) The [Collateral] is located and delivered, within the meaning of Sections 9-301 and 9-305(a)(1) of the Maryland Uniform Commercial Code, only in the State of Maryland.

(f) We assume the following:

(1) [Name of Depository Institution] (the "Depository Institution") is a "bank," within the meaning of Section 9-102(a)(8), with which the deposit accounts described in [such paragraph] are maintained;

(2) The account described in the [Control Agreement] is a "deposit account" within the meaning of Section 9-102(a)(29);

(3) [Name of Securities Intermediary] (the "Securities Intermediary") is a "securities intermediary" as defined in Section 8-102; and

(4) The [Investment Account] (as defined in the [Security Agreement]) is a "securities account" as defined in Section 8-501(a) and all property from time to time credited to the [Investment Account] is a "financial asset" as defined in Section Section 8-102(a)(9).

(5) Deposit Accounts, Investment Property or Letter-of-Credit Rights. The [Collateral] is located, within the meaning of Sections 9-304, 9-305 and 9-306, only in the State of Maryland.

f. Equities Assumptions

i. Basic Opinion - Implicit:

None

ii. Basic Opinion - Explicit or Optional:

(a) The Shares will not be issued or transferred in violation of the restrictions or limitations contained in the Company's [Charter][Declaration of Trust][Partnership Agreement][Operating Agreement] and the [shares of capital stock] [partnership interests][membership interests][shares of beneficial interest] of the Company were not issued or transferred in violation of the restrictions or limitations contained in the Company's [Charter][Declaration of Trust][Partnership Agreement][Operating Agreement]. [Note: This assumption may be especially important for Companies with complex transfer restrictions, such as REITs.]

iii. Contingent Opinion - Implicit:

(a) There will be no changes in applicable law between the date of this opinion and any date of issuance or delivery of the [Stock][Partnership Interests][Membership Interests][Shares].

(b) At the time of delivery of the [Stock][Partnership Interests][Membership Interests][Shares], all contemplated additional actions will have been taken and the authorization of the issuance of the [Stock][Partnership Interests][Membership Interests][Shares] will not have been modified or rescinded.

(c) The issuance, execution and delivery of the [Stock][Partnership Interests][Membership Interests][Shares], and the compliance by the Company with the terms of the [Stock][Partnership Interests][Membership Interests][Shares], will not violate any then applicable law or result in a default under, breach of, or violation of any provision of any instrument or agreement then binding on the Company, or any restriction imposed by any court or governmental body having jurisdiction over the Company.

iv. Contingent Opinion – Explicit or Optional:

(a) The consideration received or proposed to be received for the issuance and sale of the [Stock][Partnership Interests][Membership Interests][Shares] is as contemplated by the [Registration Statement][Underwriting Agreement][Stock Purchase Agreement][Partnership Agreement][Operating Agreement].

(b) The aggregate number of shares of [Stock][Partnership Interests][Membership Interests][Shares] of the Company which would be outstanding after the issuance of any of the [Stock][Partnership Interests][Membership Interests][Shares]and any other contemporaneously issued or reserved [Stock][Partnership Interests][Membership Interests][Shares], together with the number of shares of [Stock][Partnership Interests][Membership Interests][Shares] previously issued and outstanding and the number of shares of [Stock][Partnership Interests][Membership Interests][Shares] previously reserved for issuance upon the conversion or exchange of other securities issued by the Company, does not exceed the number of then-authorized [shares of capital stock] [partnership interests][membership interests][shares of beneficial interest] of the Company.

v. Stock Certificates – Implicit:

(a) All [stock][unit][share] certificates issued for the [Stock][Partnership Interests][Membership Interests][Shares] are in substantially the same form as the form [stock][unit][share]certificate.

vi. Stock Certificates – Explicit or Optional:

(a) [When the stock or shares are uncertificated:] The information statement required to be delivered to holders of uncertificated [stock][shares] will be delivered to the purchasers.

g. Real Estate Assumptions

i. Explicit:

(a) The real property described in the Deed of Trust [Mortgage] is located in [_____ County/Baltimore City], Maryland;

ii. Implicit:

(a) We assume that the Deed of Trust [Mortgage] [has been/will be] properly recorded and indexed;

(b) Debtor owns and holds a [fee simple/leasehold] interest of record and in fact, in the real property described in the Deed of Trust and [owns/leases] that portion of the collateral described in the Deed of Trust that is composed of fixtures (as that term is defined in the Maryland Uniform Commercial Code); and

(c) The descriptions of the real and personal property constituting the collateral described in the Deed of Trust [Mortgage] and the description of the personal property constituting the collateral contained in, or attached as exhibits or schedules to the loan documents, reasonably identify the property described or intended to be described.

h. Generic Qualifications

i. Implicit:

None.

ii. Explicit or Optional:

(a) Except to the extent otherwise set forth above, we have not made an independent review of any contract or agreement that may have been executed by or may be binding upon the Company [or may affect the Assets], nor have we undertaken to review our internal files or any files of the Company relating to transactions to which the Company may be a party, or, other than as set forth above, to discuss the Company's transactions or business with any lawyers in our firm or with any officers, directors or stockholders of the Company.

i. Enforceability Qualifications – The Bankruptcy and Equitable Principles Qualifications

i. Implicit:

(a) The enforceability opinion is subject to the following:

(1) applicable bankruptcy, insolvency, reorganization, moratorium, and other laws affecting the rights of creditors generally; and

(2) the exercise of judicial discretion in accordance with general principles of equity.

ii. Explicit or Optional:

None.

j. Enforceability Qualifications - Additional

(i) Implicit:

(a) Enforceability may be limited to the extent that remedies are sought with respect to a breach that a court concludes is not material or does not adversely affect the [Lender][Acquirer][Investor] .

(b) Enforceability may be limited by any unconscionable or inequitable conduct on the [Lender's][Acquirer's] part, defenses arising from the [Lender's][Acquirer's] failure to act in accordance with the terms and conditions of the Transaction Documents, defenses arising as a consequence of the passage of time, or defenses arising as a result of the [Lender's][Acquirer's] failure to act reasonably or in good faith.

(c) The provisions regarding the remedies available to the [Lender][Acquirer] on default as set forth in the Transaction Documents are subject to certain procedural requirements, which, with regard to several of the remedies, are not reflected in the Transaction Documents. These procedural requirements affect and may restrict rights and remedies stated to be available to the [Lender][Acquirer].

(d) We express no opinion on the enforceability of the self-help, non-judicial remedies provided to the [Lender][Acquirer] in certain of the Transaction Documents, such as those regarding the [Lender's][Acquirer's] right, without judicial process, upon default, to enter upon; to take possession of; to collect, retain, use, and enjoy the rents, issues, and profits from; and to manage the Property subject to the liens created by the Transaction Documents.

(e) We express no opinion on the enforceability of any provisions of the Transaction Documents that entitle the [Lender][Acquirer], as a matter of right, to the appointment of a receiver after the occurrence of a default.

(f) We express no opinion on the enforceability of any provisions of the Transaction Documents imposing increased interest rates and/or late payment charges upon delinquency in payment or the occurrence of a default, liquidated damages or prepayment premiums, to the extent they are deemed to be penalties or forfeitures.

(g) We express no opinion on the enforceability of any provisions requiring the Company to waive procedural, judicial, or substantive rights, such as rights to notice, service of process, right to a jury trial, statutes of limitations, appraisal or valuation rights, and marshaling of assets.

(h) We express no opinion on the enforceability of any provisions requiring the Company to indemnify or make contribution to the [Lender][Acquirer][Investor] or its agents, officers, or directors or of any provisions exculpating the [Lender][Acquirer] [Investor] from liability for its actions or inaction to the extent such indemnification, contribution or exculpation is contrary to public policy or law.

(i) We express no opinion on the enforceability of any provisions permitting modifications of the Transaction Documents only if in writing.

(j) We express no opinion on the enforceability of any provision stating that the provisions of the Transaction Documents are severable.

(k) Unless otherwise expressly stated in the opinion, we express no opinion with respect to the laws and regulations relating to health and safety, labor, employment, employee benefits, or land use and subdivision; Federal Reserve Board margin regulations; anti-trust laws of the United States or any state; securities laws of the United States (including the Trust Indenture Act) or any state; or the tax laws of the United States or any state.

(l) Unless otherwise expressly stated in the opinion, we express no opinion on the attachment, validity, perfection or priority of any lien or security interest provided for in the Transaction Documents.

(m) Unless otherwise expressly stated in the opinion, we express no opinion on title to any real or personal property.

(n) Unless otherwise expressly stated in the opinion, we express no opinion as to the enforceability of the choice of law provision or the extent to which a court of competent jurisdiction would apply the law selected by the parties to any issue(s) before it.

(o) We express no opinion with respect to any documents defined or referred to in the Transaction Documents other than the Transaction Documents themselves.

(p) The opinions expressed herein are subject to the effect of any judicial decision that may permit the introduction of parol evidence to modify the terms or the interpretation of agreements.

ii. Explicit or Optional:

(a) The enforceability opinion is subject to the following:

in addition to the qualifications set forth in subparts (i) (a) and (b) above and to other qualifications set forth in this opinion letter, certain [remedies, waivers, and other] provisions of the Transaction Documents may not be enforceable for other reasons [the "Other Reasons"], nevertheless, the unenforceability of Provisions of the Transactions Documents for Other Reasons will not render the Transaction Documents invalid as a whole or preclude (x) the judicial enforcement of the obligation of the Company to repay the principal, together with interest thereon (to the extent not deemed a penalty) as provided in the Note, (y) the acceleration of the obligation of the Company to repay such principal, together with such interest, upon a material default by the Company in the payment of such principal or interest or upon a material default in any other material provision of the Transaction Documents, and (z) the foreclosure in accordance with applicable Law of the lien on and security interest in the Collateral created by the Transaction Documents upon maturity or upon acceleration pursuant to clause (y) above. [Note: If the opinion giver chooses to use the foregoing qualification the opinion giver generally need not list many of the other qualifications set forth below.]

(b) We express no opinion on the enforceability of any provision of the Transaction Documents that purport to give the [Lender] [Acquirer] [Investor] the power to accelerate obligations without any notice to the Company.

(c) We express no opinion on the enforceability of any provision of the Transaction Documents that purport to give the [Lender][Acquirer] [Investor] the power to foreclose upon collateral without any notice to the Company.

(d) We express no opinion on the enforceability of any provision of the Transaction Documents relating to non-competition or purporting to prevent a party from competing.

(e) We express no opinion on the enforceability of any provisions relating to or purporting to require arbitration.

(f) We express no opinion as to the availability of specific performance or injunctive relief in any proceeding to enforce, or declare valid and enforceable, any provision of the Transaction Documents.

(g) We express no opinion with respect to the enforceability of, or the compliance with any applicable law of, any provision set forth in the Transaction Documents purporting to confer jurisdiction upon any court to hear or resolve any suit, action or proceeding seeking to enforce any provision of or based upon any matter arising out of or in connection with the Transaction Documents.

(h) We express no opinion with respect to the enforceability of, or the compliance with any applicable law of, any provision set forth in the Transaction Documents purporting to grant to any party a power of attorney or purporting to otherwise authorize such party to act on behalf of the Company.

(i) We express no opinion with respect to the enforceability of provisions relating to dividends and distributions that may be limited by laws affecting the right to authorize, declare, make or receive dividends or other distributions.

(j) We express no opinion with respect to the enforceability of, or the compliance with any applicable law of, any provision of the Transaction Documents that (a) would require the Company to take any particular action after the date hereof that by law could only be undertaken upon the approval of the stockholders or the Board of Directors (or any committee thereof) of the Company or (b) would require the stockholders or a director or the Board of Directors (or any committee thereof) of the Company or any person or entity other than the Company to take, or to refrain from taking, any particular action after the date hereof.

(k) We express no opinion as to the enforceability of any provision of the Transaction Documents by or against any person not a party to such document.

(l) We express no opinion as to whether any interest rate set forth or calculated under the Transaction Documents violates any provision of law regulating the amount

of interest or fees as to which one party can charge another to the extent determined to be usurious.

(m) [Alternative choice of law assumption and qualification:] The parties have chosen the laws of the State of _____ to govern matters of interpretation and enforcement of the Transaction Documents. In rendering our opinion, we have assumed that a court of competent jurisdiction would honor the parties' choice of law and that _____ law would be applied. We express no opinion as to the enforceability of the choice of law provision or the extent to which a court of competent jurisdiction would apply _____ law to any issue(s) before it.

(n) [Another alternative choice of law assumption and qualification to be used when the governing law specified in the Transaction Documents is the law of a state other than Maryland:] The parties have chosen the laws of the State of _____ to govern matters of interpretation and enforcement. In rendering our opinion, we have assumed, with your express permission, that the law of _____ is identical to the law of Maryland in all respects material to our opinion. Further, we have assumed that a court of competent jurisdiction would honor the parties' choice of law and that _____ law would be applied. We express no opinion as to the enforceability of the choice of law provision or the extent to which a court of competent jurisdiction would apply _____ law to any issue(s) before it.

(o) We express no opinion with respect to the enforceability of any provision of any of the Transaction Documents that purports to authorize the Secured Party to purchase at a private sale collateral that is not subject to widely distributed standard price quotations or sold on a recognized market.

(p) We express no opinion regarding the enforceability of any provisions asserting that collateral is owned by or is property of a secured party prior to such secured party's foreclosure of such collateral in accordance with the Maryland Uniform Commercial Code or, in the case of cash collateral, the application of such cash collateral in payment of the secured obligations.

(q) We point out that Section 9-615(a) of the Maryland Uniform Commercial Code provides for the order of the cash proceeds of a disposition of collateral and supersedes inconsistent provisions of the Transaction Documents.

k. No Violations Qualifications

i. Implicit:

(a) We express no opinion as to the laws, ordinances, zoning restrictions, rules or regulations of any city, county or other municipality or any other local governmental agency.

(b) Unless otherwise expressly stated in the opinion, we express no opinion with respect to the laws and regulations relating to health and safety, labor, employment, employee benefits, or land use and subdivision; Federal Reserve Board margin

regulations; anti-trust laws of the United States or any state; securities laws of the United States (including the Trust Indenture Act) or any state; or the tax laws of the United States or any state.

ii. Explicit or Optional:

(a) Our opinion expressed in paragraph __ above [i.e., "no violations" opinion] is based upon our consideration of only those laws, decrees, rules or regulations of the State of Maryland, if any, that, that, in our experience, are reasonably applicable to the transactions of the type contemplated under the Transaction Documents.[489]

l. No Consents and Approvals Qualifications

i. Implicit:

(a) We express no opinion as to any consent, approval, authorization, or other action by, or filing with, any city, county or other municipality or any other local government agency necessary or required for the ongoing operation of the Company's business.

(b) We express no opinion as to any consent, approval, authorization, or other action by, or filing with any city, county or other municipality or any other local government agency.

ii. Explicit or Optional:

(a) Our opinion expressed in paragraph ___ above [i.e., no consents opinion] is based upon our consideration of only those consents, approvals, authorizations, orders, registrations, declarations or filings required under those statutes, rules or regulations of the State of Maryland, if any, that, in our experience, are reasonably applicable to the transactions of the type contemplated under the Transaction Documents.

m. Perfection and Priority Qualifications

i. Implicit:

(a) In rendering our opinion, we have relied upon a search of the [financing] records. We neither assume nor accept any liability for any inaccuracy in this letter due to the inaccuracy of any governmental records or the inaccuracy of any search.

(b) We express no opinion on the perfection or priority of any lien or security interest except as expressly stated herein.

(c) We express no opinion as to any provisions of the Transaction Documents that purport to create or perfect a security interest in and to either (a) any policy of insurance or the proceeds thereof or (b) any governmental permits or licenses.

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[489] This limitation is included in the form of opinion itself and does not need to be restated with the qualifications.

ii. Explicit or Optional:

Qualifications relating to creation and perfection:

(a) The opinions given above as to the creation and perfection of security interests do not cover real property and other property transactions excluded from the coverage of the Maryland Uniform Commercial Code pursuant to Section 9-109 {insert reference to the proper section of the UCC of any other applicable State}.

(b) We express no opinion with respect to title to any property, nor do we express any opinion with respect to the existence of encumbrances upon any property or the attachment, validity, perfection, or priority of any security interests or liens purported to be created under the Transaction Documents, except as set forth in paragraph __ of this opinion.

(c) We express no opinion as to the perfection of or priority of security interests in property of the debtor acquired after the date of this letter.

(d) We express no opinion with respect to any security interest created under the Transaction Documents that purports to secure any present or future obligations or liabilities of the Company to the [Lender][Acquirer][Investor] (other than the obligations and liabilities of the Company to the [Lender][Acquirer][Investor] created or arising under the Transaction Documents) that are determined, in the case of obligations or liabilities of the Company to the [Lender][Acquirer][Investor] created in the future, not to constitute "future advances" within the meaning of Section 9-204(c) of the Maryland Uniform Commercial Code, are determined not to have been within the contemplation of the Company and the [Lender][Acquirer][Investor] at the time the Transaction Documents were executed, or are determined not to be of the same character or class as the obligations and liabilities of the Company to the [Lender][Acquirer] [Investor] created or arising under the Transaction Documents.

(e) We express no opinion as to personal property affixed to real property in such a manner so as to become a fixture.

(f) We express no opinion as to the enforceability of the security interests under the Transaction Documents as against the competing interests of those third parties who would, in accordance with the provisions of the UCC or other applicable law, take free of any such security interest notwithstanding perfection thereof.

(g) We express no opinion as to the perfection of the security interest of the [Lender][Acquirer][Investor] in any portion of the Pledged Securities, the continuous possession of which is not maintained by the [Lender][Acquirer][Investor] in the State of Maryland. In addition, we call to your attention that perfection (and the effect of perfection and non-perfection) of the security interest of the [Lender][Acquirer] [Investor] in the Pledged Securities may be governed by laws other than those of the Maryland Uniform Commercial Code to the extent the Pledged Securities become located in a jurisdiction other than the State of Maryland.

(h) We call to your attention that in the case of the issuance of additional shares or other distributions in respect of the Pledged Securities, the security interests of the [Lender][Acquirer][Investor] therein will be perfected only if possession thereof is obtained or other action appropriate to the nature of the distribution is taken, in either case, in accordance with the provisions of the Maryland Uniform Commercial Code and other applicable law.

(i) We express no opinion regarding any security or other interests of the [Borrower] in property of another that secures the other's obligations to the [Borrower].

(j) We express no opinion as to whether (1) the [Borrower] has rights in the Article 9 Collateral or the right to transfer rights in the Article 9 Collateral to the [Secured Party], (2) value (as defined in Section 1-201(44) of the Maryland Uniform Commercial Code) has been given by the [Secured Party] to the [Borrower] for the security interests and other rights in and assignments of Article 9 Collateral described in or contemplated by the Security Agreement, or (3) provisions in the Loan Documents granting an absolute assignment of rights or interests will be construed as effecting an absolute assignment rather than a collateral assignment or security interest.

(k) The assignment of any contract, lease, license, or permit may require the approval of the issuer thereof or the other parties thereto.

(l) Except to the limited extent an Article 9 Security Interest may be created therein, we express no opinion with respect to any security interest in any accounts, chattel paper, documents, instruments or general intangibles with respect to which the account debtor or obligor is the United States, any state, county, city, municipality or other governmental body, or any department, agency or instrumentality thereof.

(m) Under the provisions of Section 9-108(c) of the Maryland Uniform Commercial Code, to the extent any provision of the [Loan Documents] purports to create a security interest in property described as "all assets," "all personal property" or otherwise in a supergeneric manner, such provision does not reasonably identify the collateral and is not sufficient to create a security interest in any collateral so described.

(n) We point out that:

(1) (A) Section 9-301(1) of the Maryland Uniform Commercial Code provides that, generally, the local law of the jurisdiction where a debtor is located governs perfection, the effect of perfection and non-perfection, and priority of a security interest in collateral and (B) Section 9-307(e) of the Maryland Uniform Commercial Code provides that a registered organization (as that term is defined in Section 9-102(71) of the Maryland Uniform Commercial Code) that is organized under the laws of a state is located in that state, but

(2) the Maryland Uniform Commercial Code elsewhere provides that (A) with respect to possessory security interests, the local law of jurisdiction where collateral is located governs, among other things, perfection, (B) the local law of the depository bank's jurisdiction governs perfection in deposit accounts; (C) the local law (if a state) where a security certificate is located governs, among other things, perfection other than perfection by

the filing of a financing statement, (D) the local law (if a state) of an issuer's jurisdiction governs, among other things, perfection in uncertificated securities other than perfection by the filing of a financing statement and the local law (if a state) of securities intermediary's jurisdiction governs perfection in a securities entitlement or securities account other than perfection by the filing of a financing statement; (E) except for security interests in letter-of-credit rights perfected only by Section 9-308(d) of the Maryland Uniform Commercial Code, the local law (if a state) of an issuer's or nominee's jurisdiction governs perfection in letter-of-credit rights; (F) with respect to goods that become fixtures, perfection and other matters are covered by the law of the jurisdiction where the real estate is located and (G) with respect to goods that are covered by a certificate of title, perfection and other matters are governed by the law of the jurisdiction issuing such certificate of title.

(o) Our opinions regarding the creation and perfection of security interests are subject to the effect of (1) the limitations on the existence and perfection of security interests in proceeds resulting from the operation of Sections 9-203(f) and 9-315 of the Maryland Uniform Commercial Code; (2) the limitations in favor of buyers imposed by Sections 9-320 and 9-330 of the Maryland Uniform Commercial Code and in favor of licensees imposed by Section 9-321 of the Maryland Uniform Commercial Code; (3) the limitations with respect to documents, instruments and securities imposed by Section 9-331 and Section 8-303 of the Maryland Uniform Commercial Code; (4) laws, other than the Maryland Uniform Commercial Code, that determine whether the [Company]'s rights in collateral may be voluntarily or involuntarily transferred; (5) other rights of persons in possession of goods, instruments, money, tangible chattel paper or investment property; and (6) other rights of persons in control of investment property, deposit accounts, letter-of-credit rights and electronic chattel paper.

(p) With respect to our opinion as to the perfection of the security interest, we offer no opinion as to the continued perfection of that security interest. Without implying any limitation on the foregoing, we point out that the continued perfection of any security interest in any collateral (1) may be affected by the removal of such collateral to another jurisdiction or upon the change of the name or the state of organization of any debtor, or (2) that is perfected by the filing of a financing statement, may be affected by the failure to file a timely continuation statement.

(q) We assume the following:

(1) [Name of Depository Institution] (the "Depository Institution") is a "bank," within the meaning of Section 9-102(a)(8), with which the deposit accounts described in [such paragraph] are maintained;

(2) The account described in the [Control Agreement] is a "deposit account" within the meaning of Section 9-102(a)(29);

(3) [Name of Securities Intermediary] (the "Securities Intermediary") is a "securities intermediary" as defined in Section 8-102;

(4) The [Investment Account] (as defined in the [Security Agreement]) is a "securities account" as defined in Section 8-501(a) and all property from time

to time credited to the [Investment Account] is a "financial asset" as defined in Section Section 8-102(a)(9).

(5) With respect to [Deposit Accounts, Investment Property or Letter-of-Credit Rights](as defined in the [Security Agreement]), the [Collateral] is located, within the meaning of Sections 9-304, 9-305 and 9-306, only in the State of Maryland.

(r) We note the following: security interests in chattel paper, instruments, documents, securities, financial assets, and security entitlements are subject to the rights and claims of holders, purchasers and other parties as provided in Sections 9-330 and 9-331. Rights to money or funds contained in a deposit account are subject to the rights of transferees under Section 9-327. Security interests in goods are subject to rights of holders of possessory liens under Section 9-333. Security interests in deposit accounts are subject to the rights of the depository bank under Section 9-340. Security interests in Collateral consisting of proceeds will be limited as provided in Section Section 9-315 and 9-322(c). Security interests in goods that are installed in, or attached or affixed to, any other goods may be subject to the provisions of Section 9-335 and may be subject to the provisions of Section 9-336 to the extent that such goods form part of a larger product or mass. We express no opinion as to the Secured Party's rights in the [Collateral] to the extent that the Secured Party has knowledge that its security interest in the [Collateral] violates the rights of another secured party.

(s) We note that Section ___ of the Security Agreement provides that the Security Agreement and all issues arising thereunder shall be governed by the laws of the State of _____, without regard to principles of conflicts of laws. We express no opinion as to whether the provisions of such Section ___ are enforceable or as to the law that is applicable to the Security Agreement or the transactions contemplated thereby, including any security interest created pursuant to the Security Agreement, and we express no opinion regarding the laws of the State of _____; rather, with your permission, we have assumed, solely for purposes of our opinions herein, that Maryland law is applicable to the Security Agreement and the transactions contemplated thereby, including the creation of any security interest thereunder.

Qualifications relating to priority:

(t) This opinion covers only the Revised Article 9 Collateral and does not address the priority of any other collateral or property referenced in any financing statement listed in the Search Report.

(u) [We express no opinion with respect to the effect of subsequently filed financing statements on the priority of any security interest perfected by the filing of the Financing Statements] [OR] [We express no opinion with respect to the priority of any security interest perfected by the filing of Financing Statements].

Qualifications relating to remedies:

(v) Certain rights of debtors and of other obligors and certain duties of secured parties referred to in Sections 1-102(3), 9-602 and Section 9-624 of the Maryland

Uniform Commercial Code may not be waived, released, varied or disclaimed by agreement except, in certain instances, following a default.

(w) Obligors, in addition to debtors, have rights and remedies established by the Maryland Uniform Commercial Code.

n. Equities Qualifications:

(i) Implicit:

None.

(ii) Explicit or Optional:

None.

o. Real Estate Qualifications:

(i) Implicit:

(a) We express no opinion with respect to (A)) the title to or the rights or interests of the Debtor in the collateral, (B)) the adequacy of the description of the collateral, or (C)) except as explicitly set forth herein, the creation, attachment, perfection or priority of any liens thereon and/or security interests therein. Such opinions are given only to the extent set forth in opinion paragraphs [___ - ___] and are subject to the additional exceptions, assumptions, qualifications and limitations applicable to such opinions set forth in this opinion.

(b) As to due recordation of the Deed of Trust [Mortgage] [and as to the due recording or filing of the Financing Statement in the Recording Office], you are relying upon the title insurance company that has issued a commitment for title insurance (the "Title Company"), and as to the priority of the Deed of Trust [Mortgage], you are relying upon title insurance to be provided by the Title Company.

(c) The real property described in the Deed of Trust [Mortgage] is located in [_____ County/Baltimore City], Maryland.

(d) Debtor owns and holds a [fee simple/leasehold] interest, of record and in fact, in the real property described in the Deed of Trust and [owns/leases] that portion of the collateral described in the Deed of Trust that is composed of fixtures (as that term is defined in the Maryland Uniform Commercial Code).

(e) The descriptions of the real and personal property constituting the collateral described in the Deed of Trust [Mortgage] and the description of the personal property constituting the collateral contained in, or attached as exhibits or schedules to the loan documents, reasonably identify the property described or intended to be described.

(f) We express no opinion as to the creation, attachment, perfection or priority of any lien or security interest where the Deed of Trust [Mortgage] has not been properly recorded and indexed.

(g) We call your attention to Section Section 3-104(g) of the Real Property Article of the Annotated Code of Maryland which provides, among other things, that each deed of trust or mortgage presented for recordation shall be accompanied by a completed State of Maryland Land Instrument Intake Sheet, on the form provided by the Administrative Office of the Courts. Please note, however, that such section also provides that the filing officer may not refuse to record an instrument because it is not accompanied by an Intake Sheet, and the lack of an Intake Sheet does not affect the validity of any conveyance, lien or lien priority based on recordation of an instrument.

(h) We do not opine as to the enforceability of any provision of the Deed of Trust [Mortgage] that purports to make an absolute assignment of the interest of debtor in the leases, rents and profits arising from the real property described in the Deed of Trust [Mortgage], rather than an assignment for security. We call your attention to Section Section 3-204 of the Real Property Articled of the Annotated Code of Maryland, which provides, in part, that an interest created by a deed (which term includes a deed of trust or mortgage) granting, assigning or otherwise transferring an interest in rents or profits arising from real property is perfected upon recordation as provided in Title Title 3 of the Real Property Article of the Annotated Code of Maryland, (A)) regardless of whether, by its terms or otherwise, the grant, assignment or transfer is operative immediately, or upon the occurrence of a specific event, or under any other circumstances, and (B)) without the grantee, assignee or transferee having to make any affirmative demand or take any further affirmative action.

ii. Explicit or Optional:

None.

The Committee determined that, unless expressly negated in the opinion letter, the above listed matters identified as implicit should be assumed to qualify transactional legal opinions even if they are not expressly stated.

p. Generic Limitations

i. Implicit

(a) The opinions rendered in this letter are made as of the date hereof. We assume no obligation to supplement our opinions if any applicable law changes after the date of this letter or if we become aware of any facts that might alter the opinions expressed in this letter after the date of this letter.

(b) The opinions expressed in this letter are limited to the matters set forth in this letter, and no other opinions shall be implied or inferred beyond the matters expressly stated.

ii. Explicit or Optional

(a) We express no opinion as to the laws of any jurisdiction other than the laws of the State of Maryland [and the federal law of the United States]. We express no opinion as to the principles of conflict of laws of any jurisdiction, including the laws of the State of Maryland [and the federal law of the United States].

(b) The opinions expressed in this letter are solely for the use of the addressee [and subsequent holders of the Note] [rating agencies] [and its/their counsel], and these opinions may not be relied on by any other persons without our prior written approval. [Subsequent holders of the Note may only rely on these opinions to the extent such reliance is actual and reasonable and is not based on different or changing facts or circumstances.]

(c) This opinion letter is to be interpreted in accordance with the 2007 Report on Lawyers' Opinions in Business Transactions by the Special Joint Committee of the Section of Business Law and the Section of Real Property, Planning and Zoning of the Maryland State Bar Association, Inc.

E. ILLUSTRATIVE OPINION LETTERS AND CERTIFICATE

1. Use of Illustrative Opinion Letters and Certificate

The Committee that wrote the 1989 Report considered whether or not to prepare a "model" opinion as part of this Report. In part because of the wide variety of commercial transactions concerning which opinion letters are requested, the Committee in 1989 concluded that a "model" opinion would be of only limited applicability. Furthermore, a "model" opinion might be used inappropriately, and too much significance might be attached to a form. There is no substitute for a lawyer thinking independently and thoroughly examining each transaction in order to determine what legal opinions can be given and what assumptions, qualifications, and limitations are appropriate. Therefore, the 1989 Committee decided that rather than prescribe one or more forms of legal opinions that could be considered to be "models," it would be preferable to draft "illustrative" opinions using the sample opinion language discussed in that Report.

As did the Committee in 1989, the Committee that prepared this Report concluded that "illustrative" opinions would be helpful to illustrate the issues discussed in this Report. Rather than attempt to draft one "illustrative" legal opinion with various alternative paragraphs, the Committee thought that "illustrative" opinion letters concerning a commercial loan transaction, a real estate loan transaction, and a share issuance would be useful. For the reasons set forth below, there are two Illustrative Real Estate Opinion Letters, a long form and a short form. In order to vary not only the nature of the transaction but also the parties, the Committee has used a Maryland corporate borrower in the Illustrative Business Transaction Opinion Letter, a Maryland limited liability company borrower in the two Illustrative Real Estate Loan Opinion Letters, and a Maryland REIT in the Illustrative Share Issuance Opinion Letter.

The illustrative opinion include certain alternative language to cover different situations, and they provide suggestions for different ways to approach some issues.

Also included in this Report is an Illustrative Certificate to be given by officers, partners, trustees, or members of the company in support of the Illustrative Opinion Letters: It may be used if the opinion giver's client is a corporation, a limited partnership a general partnership, a limited liability company, a REIT, or a business trust. The form and substance of the Certificate should be altered to conform to the actual opinions given in any transaction. Additionally, it may be appropriate for the opinion giver to obtain a certificate from a guarantor, selling shareholder, or other person or entity involved in a transaction to support the opinions.

It is not required or mandated that a lawyer use the Illustrative Opinion Letters or Certificate. Moreover, the Illustrative Opinion Letters should not be used without reading and understanding this Report.

This Report is intended to provide greater insights into the purpose and role of opinion letters and the meaning of certain terminology appearing in such letters in business transactions in Maryland. The Committee hopes that by virtue of this Report and the Illustrative Opinion Letters lawyers rendering legal opinions in business transactions in Maryland, and the recipients of such opinions will have a better understanding of the meaning and the scope of the

opinion letters being rendered. Each lawyer, however, must in all cases reach a professional judgment concerning what opinions are appropriate in the particular circumstances. The Illustrative Opinion Letters are intended to assist lawyers in this regard, but they are not intended to be exemplars to which all opinions are to be compared nor do they provide a required format for opinions delivered in Maryland.

a. General Comments about the Illustrative Opinion Letters

After an introductory paragraph in which the opinion giver identifies the capacity in which it is acting in rendering the opinion, the Illustrative Opinion Letters are divided into the following sections:

I. Documents Reviewed and Matters Considered

II. Definition of "Knowledge"

III. Assumptions

IV. Opinions

V. Qualifications

VI. Limitations

VII. Reference to Report

The last subparagraph of the section entitled Documents Reviewed and Matters Considered states that the opinion giver has reviewed "such other documents and matters as we have deemed necessary and appropriate to render the opinions set forth in this letter, subject to the limitations, assumptions, and qualifications noted below." This language is included as an acknowledgment that the list of documents reviewed and matters considered may not be exhaustive. A number of lawyers, however, prefer to not include this language so that they will not be held to have considered any matter that is not specifically enumerated.

The definition of "knowledge" in the Illustrative Opinion Letters is the same as included in Section D.16 of the Report. It limits the term to the actual knowledge or actual notice of a limited group of lawyers in the opinion giver's firm.

The Assumptions and Qualifications sections of opinion letters are frequently the most discussed portions of such letters. They should be broad enough so that the factual and legal bases and limitations of an opinion are set forth, yet at the same time they need to be tailored to the particular opinions that are being rendered. The assumptions and qualifications in the Illustrative Opinion Letters identify whether they are applicable to the Illustrative Opinion Letters generally or to particular opinions rendered. The Illustrative Opinion Letters also indicate whether each of the assumptions and qualifications is implicit — which as a matter of customary practice in Maryland should be read to be in the opinion letter even if not specifically stated - or explicit – and would not be deemed to be part of an opinion letter unless set forth therein.

The lead-in paragraph to the Opinions section provides that the particular opinions are rendered "as of the date of this letter." This clause may be included in the limitations section of the Illustrative Opinion Letters, but it is customary to include it before the opinions themselves.

In each of the Illustrative Opinion Letters that were included with the 1989 Report, the bankruptcy and equitable principles qualifications were included as part of the enforceability opinion itself. As a matter of form, the bankruptcy and equitable principals qualifications that are included with this Report are in the Qualifications section with the other qualifications applicable to the opinions rendered.

There are four paragraphs in the Limitations section. The first limits the opinion to Maryland law, and possibly law of the United States. The second provides that the opinion giver has no obligation to update or supplement the opinion letter even if there is a change in law or facts; it relates to the initial paragraph of the Opinions section, which states that the opinions are given as of the date of the letter. The third paragraph in the Limitations section states that the scope of the opinion letter is limited to the particular opinions specified, and that it extends to no other matters. The last paragraph of the Limitations section limits the persons who may rely on the opinion letter. This provision is intended to expressly limit the use of the opinion letter and the potential scope of liability of the opinion giver.[490] If an opinion giver intends that additional classes of persons should be entitled to rely on the opinion, the opinion giver should expressly state this qualification in the opinion and should specifically indicate those persons who are permitted to rely on the opinion. Notwithstanding the foregoing, in opinions rendered in connection with the issuance of securities pursuant to a registered public offering (so called Exhibit 5.1 Opinions), the Securities and Exchange Commission has specifically prevented opinion givers from limiting the class of people entitled to rely on the opinion, presumably so that purchasers of the security are entitled to rely on the opinion. Accordingly, if an opinion is given in connection with a regulated transaction in which a government agency or regulatory body has an established practice of regulating the persons to whom an opinion should be directed or as to whom an opinion may not be limited, no such implicit limitation should be interpreted to exist. In such cases, the opinion giver should include an express statement specifically directed to the classes of person who are entitled to rely on the opinion.

b. Illustrative Business Transaction Opinion Letter

The Illustrative Business Transaction Opinion Letter is specifically designed for a commercial loan secured by personal property to a corporate borrower when there is no guarantor. This form may be easily adapted to other types of business transactions.

The opinions in the Illustrative Business Transaction Opinion Letter regarding the company relate to its due incorporation, existence, good standing; power to enter into the transaction; and that all necessary corporate action has been take to authorize the execution, delivery, and performance of the transaction documents. The Illustrative Business Transaction

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[490] For a more complete discussion of issues relating to the liability of opinion givers, *see supra* Section C.4, "Liability."

Opinion Letter includes opinions that the transaction documents have been executed and delivered by the company, and that they are enforceable against the company.

The Illustrative Business Transaction Opinion Letter includes a "no conflicts" opinion, a "no consents and approvals" opinion, and a "no litigation" opinion. It does not contain a "no violations of law" opinion.

The Illustrative Business Transaction Opinion Letter does not include a specific usury opinion. Usury opinions are deemed to be included within enforceability opinions. Because the basis of the Illustrative Business Transaction Opinion Letter is a loan to a corporation, under Maryland law there is no limit on the rate of interest that may be charged.

With respect to the personal property security and the perfection thereof, there is an opinion that the financing statement is in appropriate form for filing at the SDAT and that the transaction documents and financing statement create a perfected security interest in the Article 9 Security, as defined in the opinion letter. The Illustrative Business Transaction Opinion Letter also includes opinion paragraphs relating to different types of collateral and different methods of perfection.

In addition to the enforceability and other qualifications also contained in the other Illustrative Opinion Letters, the Illustrative Business Transaction Opinion Letter includes a long list of qualifications that relate to the creation and perfection opinions included in that letter.

c. Illustrative Real Estate Loan Opinion Letter – Long Form

The Illustrative Real Estate Loan Letter – Long Form is designed for a real estate secured loan transaction to a limited liability company borrower with an individual guarantor.

The opinions regarding the company relate to its formation, existence, good standing; power to enter into the transaction; and that all necessary limited liability company action has been take to authorize the execution, delivery, and performance of the transaction documents. There are opinions that the transaction documents have been executed and delivered by the company and the guarantor, and that they are enforceable against the company and the guarantor.

The Illustrative Real Estate Opinion Letter – Long Form includes opinions that the deed of trust is in appropriate form to be recorded and to create an encumbrance and security interest in the collateral, and that the financing statement is in form to be recorded. The opinion letter contains an opinion that the deed of trust will serve as a fixture filing or, alternatively, an opinion that the financing statement is in form to be recorded in the land records and that when it is recorded it will perfect the lender's security interest in fixtures.

The Illustrative Real Estate Opinion Letter – Long Form includes a "no conflicts" opinion, a "no consents and approvals" opinion, a "no litigation" opinion, and a "no violations of law" opinion, although a footnote indicates that the Committee discourages the use of "no violations of law" opinions.

The Illustrative Real Estate Opinion Letter – Long Form does not include a specific usury opinion. As noted above, usury opinions are deemed to be included within enforceability opinions. The Illustrative Real Estate Opinion Letter – Long Form includes an assumption that the underlying loan transaction is a "Commercial Loan" as defined in Section l2-101(c) of the Commercial Law Article of the Annotated Code of Maryland, and therefore, under Maryland law there is no limit on the rate of interest that may be charged.

The Illustrative Real Estate Opinion Letter – Long Form includes alternative opinions about whether the deed of trust will be subject to a recordation tax (and transfer tax in Prince George's County). It does not include the opinion regarding the ability to record indemnity deeds of trust without paying a recordation tax, but it includes a reference to Section D.9 of the Report about that.

The Illustrative Real Estate Opinion Letter – Long Form includes a reasoned opinion regarding the enforceability of choice of law provisions for situations where the deed of trust is governed by Maryland law but some or all of the other loan documents state that they are governed by the law of another state.

The Illustrative Real Estate Opinion Letter that was included in the 1989 Report contained a limited zoning opinion. For the reasons stated in Section 14. of this Report, "Zoning, Subdivision and Land Use Opinions and Environment Matters," the Illustrative Real Estate Opinion Letter – Long Form that is included with this Report does not contain any zoning opinion. To the contrary, it contains a qualification disclaiming giving any opinion about zoning.

In addition to the enforceability qualifications contained in the Illustrative Business Transaction Opinion Letter, the Illustrative Real Estate Opinion Letter – Long Form contains a generic qualification that is based on the ACREL/ABA formulation in the Real Property Adaptation[491] and the Inclusive Opinion.[492]

The Illustrative Real Estate Loan Opinion Letter that was included in the 1989 Report contained a limited zoning opinion. For the reasons stated in Section 14, *infra*, the Illustrative Real Estate Loan Opinion Long Form that is part of this Report does not. On the other hand, the Illustrative Real Estate Loan Opinion Letter – Long Form that is part of this Report includes a recordation of transfer tax form, including an alternative for when an indemnity deed of trust is the security instrument in the transaction, while the 1989 Report did not**.**

d. Illustrative Real Estate Loan Opinion Letter – Short Form

The Illustrative Real Estate Loan Letter – Short Form is based on the same type of transaction involving the same type of parties as the basis of the Illustrative Real Estate Loan

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491 *See* 1994 ABA/ACREL Report, *supra* note 5.

492 *See* the Inclusive Opinion Report, *supra* note 6, § 3.6.

Letter – Long Form. The Short Form Opinion does not include those assumptions and qualifications that are identified as implicit in the Long Form Opinion, except that the Short Form Opinion does state the bankruptcy and principles of equity qualifications. Also, the Short Form Opinion does not include a choice of law opinion, so the "Choice of Law Facts" are not included in the assumptions.

The decision of an opinion giver to base an opinion on the Illustrative Real Estate Loan Letter – Short Form or the Illustrative Real Estate Loan Letter – Long Form is a matter of personal preference. If an opinion giver is comfortable not setting forth all of the assumptions and qualifications that are implicit in an opinion rendered in Maryland under Maryland law, then the Illustrative Real Estate Loan Letter – Short Form may be used. On the other hand, if an opinion giver feels the need to specify all of the implicit assumptions and qualifications on which the opinion letter is based, then the Illustrative Real Estate Loan Letter – Long Form should be used.

e. Illustrative Share Issuance Opinion Letter

The Illustrative Share Issuance Opinion Letter is designed for the issuance of shares of beneficial interest in a REIT. This form may be adapted to other issuances of equity, such as the issuance of shares of stock by a corporation.

The opinions in the Illustrative Share Issuance Opinion Letter, in addition to many covered by the other Illustrative Opinions, also include opinions as to the due authorization, valid issuance, full payment and nonassessability of the Shares. They include opinions as to the authorized capital of the Company, the absence of preemptive rights and the form of stock certificates. In may cases, the other opinions set forth in the Illustrative Share Issuance Opinions are abbreviated versions of the forms and their related qualifications and assumptions that appear in the other Illustrative Opinions to demonstrate how these opinions might appear in an actual transaction with certain of the alternatives pre-selected.

2. Illustrative Business Transaction Opinion Letter[1]

[Letterhead of Lawyer or Law Firm]

[DATE]

[Lender's name and address]

Re: $_____ Loan (the "Transaction") from Lender to ABC Corporation [a corporate borrower] Secured by [Personal Property]

Ladies and Gentlemen:

We have acted as counsel to ABC Corporation, a Maryland corporation (the "Company"), in connection with the Transaction contemplated by the credit agreement _____ (the "Agreement") by and between the Company and _____, (the "Lender"). This letter is furnished to satisfy [the condition set forth in Section ____ of the Agreement / your request dated _____]. All capitalized terms used in this letter that are not otherwise defined herein shall have the meanings assigned to them in the Transaction Documents (as hereinafter defined).

I. Documents Reviewed and Matters Considered

In our capacity as counsel to the Company and for purposes of this opinion, we have examined the following documents (all of which are collectively called [the "Documents"]):

(i) the Agreement, the Promissory Note dated _____ in the principal amount of $_____ from the Company to the order of the Lender, the security agreement dated _____ from the Company to the Lender (the "Security Agreement") [list other documents] (collectively, the "Transaction Documents");

(ii) a Uniform Commercial Code financing statement authorized by the Company (the "Financing Statement");

(iii) the charter and bylaws of the Company;

[1] This letter is drafted for a loan to a corporate client of the opinion giver. It may be adapted for other business transactions.

(iv) the records of the proceedings and actions of the Board of Directors of the Company with respect to the transactions between the Company and the Lender contemplated by the Transaction Documents;

(v) a Certificate of Status of the Maryland State Department of Assessments and Taxation ("SDAT") dated _____ to the effect that the Company is in good standing;

(vi) certificate of an officer of the Company, dated as of the date hereof, as to such matters as we deem necessary and appropriate to enable us to render this opinion letter;

[(vii) reports by [search firm] of financing statements filed with respect to the Company in the jurisdictions and as of the dates indicated in such reports (the "Reported Financing Statements");][2]

[(viii) reports by [search firm] of judgments, orders, and decrees outstanding against, actions, suits, or proceedings pending against, and tax liens filed with respect to, the Company in the jurisdictions and as of the dates indicated in such reports;]

[(ix) list other documents and certificates, if any, relied upon;] and

(x) such other documents and matters as we have deemed necessary and appropriate to render the opinions set forth in this letter, subject to the, assumptions, qualifications, and limitations noted below.

II. Definition of "Knowledge"

In basing the opinions and other matters set forth herein on "our knowledge," the words "our knowledge" and similar language used herein signify that, in the course of our representation of the Company in matters with respect to which we have been engaged by the Company as counsel, no information has come to our attention that would give us actual knowledge or actual notice that any such opinions or other matters are not accurate or that any of the foregoing documents, certificates, reports, and information on which we have relied are not accurate and complete. Except as otherwise stated herein, we have undertaken no independent investigation or verification of such matters. The words "our knowledge" and similar language used herein are limited to the knowledge of the lawyers within our firm who are involved in the Transaction or who have worked on matters on behalf of the Company within the prior twelve months and are presently at the firm.

III. Assumptions

In reaching the opinions set forth below, we have assumed, and to our knowledge there are no facts inconsistent with, the following:

[2] This item would only be included if the letter contains a priority opinion.

IMPLICIT GENERAL ASSUMPTIONS

(a) Each individual executing any of the Documents, whether on behalf of such individual or another person, is legally competent to do so.

(b) Each individual executing any of the Documents on behalf of a party (other than the Company) is duly authorized to do so.

(c) All Documents submitted to us as originals are authentic. All Documents submitted to us as certified or photostatic copies conform to the original documents. All Documents upon which we have relied are accurate and complete. All public records reviewed or relied upon by us or on our behalf are true and complete and remain so as of the date of this letter.

(d) The form and content of all Documents submitted to us as unexecuted drafts do not differ in any respect relevant to this opinion from the form and content of such Transaction Documents as executed and delivered.

(e) All representations, warranties, statements and information contained in the Transaction Documents are accurate and complete.

(f) All signatures on all Transaction Documents[3] and any other Documents submitted to us for examination are genuine.

(g) There has been no oral or written modification of or amendment to any of the Documents, and there has been no waiver of any of provision of any of the Documents, by actions or omission of the parties or otherwise.

(h) Each individual executing a certificate is authorized to do so and has knowledge about all matters stated therein. The contents of each such certificate is accurate and complete and remain so as of the date of this letter.

IMPLICIT ENFORCEABILITY ASSUMPTIONS

(i) Each of the parties (other than the Company) executing any of the Transaction Documents has duly and validly executed and delivered each of the Transaction Documents to

[3] Opinion recipients occasionally request that the portion of this assumption relating to the genuineness of signatures be limited to signatures other than those of the Company or the individuals executing the Transaction Documents. In effect, such a request requires the opinion giver to insure that the signatures of the opinion giver's client are not forgeries. In the view of the Committee, such an assurance is not an opinion of law but the guaranty of a fact that may be outside of the knowledge of the opinion giver. The Committee believes that such a request is inappropriate in most instances. If, however, the opinion giver is going to opine that the Transaction Documents have actually been signed by the Company, add "other than the Company's."

which such party is a signatory, and such party's obligations set forth therein are legal, valid, and binding and are enforceable in accordance with all stated terms.

(j) The Lender and its successors and assigns will comply with all requirements of applicable procedural and substantive law in exercising any rights or enforcing any remedies under the Transaction Documents.

(k) The exercise by Lender of any rights or enforcement of any remedies under the Transaction Documents would not be unconscionable, result in a breach of the peace or otherwise be contrary to public policy.

(l) The Transaction 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.

(m) The Lender and its successors and assigns will act in good faith and in a commercially reasonable manner in the exercise of any of its rights or enforcement of any of its remedies under the Transaction Documents and will not engage in any conduct in the exercise of any of its rights or enforcement of any of its remedies that would constitute other than fair dealing.[4]

EXPLICIT "NO VIOLATIONS" AND "NO CONSENTS AND APPROVALS" ASSUMPTIONS

(n) The Company is not subject to any federal, state, or local governmental programs that require governmental consent prior to the Company's entering into [commercial loan transactions].[5]

(o) The Company is not engaged in an industry or business activity that is specially regulated by any federal, state, or local governmental entity or agency.[6]

EXPLICIT "NO CONFLICTS" ASSUMPTION

(p) There are no judicial, governmental, administrative, or arbitral judgments, orders, injunctions, decrees, or awards outstanding against the Company, and there are no judicial or governmental actions, suits, or proceedings, or any arbitrations or mediations, pending or threatened against the Company or any of its properties [that (i) seek to affect the enforceability

[4] This is also regarded as an implicit perfection and priority assumption.

[5] Instead of making this point as an assumption, it may be contained in a certificate from the Company. *See* ***Paragraph I.(vi)*** above and the Illustrative Certificate.

[6] If giving a "consents and approvals" opinion and not a "no violation" opinion, add at the end of this assumption: "that requires its consent prior to the Company's entering into [commercial loan transactions]." Instead of making this point as an assumption, it may be contained in a certificate from the Company. *See* ***Paragraph I.(vi)*** above and the Illustrative Certificate.

of the Transaction Documents, or (ii) come within [the objective standard established in the [Transaction Documents] for disclosure of such matters] [other objective threshold]].[7]

IMPLICIT PERFECTION AND PRIORITY ASSUMPTIONS

(q) The Company currently has rights within the meaning of the Uniform Commercial Code in effect in the State of Maryland (the "UCC") in all of the collateral of the Company (the "Collateral").

(r) All descriptions of the real property, personal property or other items or interests, including, but not limited to, those subject to the UCC, in which a security interest or lien is created under the Transaction Documents, as contained in the Transaction Documents and in all Financing Statements, reasonably identify the real property, personal property or other items or interests described or intended to be described.

(s) There is no agreement between the Lender and the Company postponing the time of attachment of any security interest granted under the Transaction Documents.

(t) Value has been given for all security interests and liens created under the Transaction Documents.

(u) Any search report referred to in this letter is accurate and complete as of the date stated on it, and the governmental records searched were true and complete as of such date.

EXPLICIT PERFECTION AND PRIORITY ASSUMPTIONS

(v) The Lender has taken, and will continue to maintain, in the State of Maryland, legal possession of all Collateral in which a security interest may [only] be perfected by possession.

(w) The proper place for filing to perfect a security interest in the Collateral of the Company under the Uniform Commercial Code of the States of [insert references to all UCCs of States other than Maryland where the Collateral is located] is to be determined under the UCC.[8]

(x) The Company is not a "transmitting utility" (as defined in Section 9-102 of the UCC).

IV. Opinions

Based on our review of the foregoing and subject to the assumptions, qualifications, and limitations set forth herein, it is our opinion, as of the date of this letter, that:

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[7] Instead of making this point as an assumption, it may be contained in a certificate from the Company. *See* ***Paragraph I.(vi)*** above and the Illustrative Certificate.

[8] This assumes that the Company is a "registered organization" organized solely under Maryland law.

1. The Company is a corporation duly incorporated, validly existing, and in good standing under the laws of the State of Maryland.

2. The Company has the corporate power to enter into and perform its obligations under the Transaction Documents [and to own its current properties and conduct its business as described under the heading {heading name} in the {applicable document describing business and properties}].

3. All necessary corporate action has been taken to authorize the execution, delivery, and performance of the Transaction Documents by the Company.

4. The Transaction Documents have been duly executed and delivered by the Company.

5. The Transaction Documents constitute the valid and binding obligations of the Company, enforceable against the Company in accordance with their terms.

6. The execution and delivery of the Transaction Documents, the performance of the Company's obligations under the Transaction Documents and the borrowing of the Loan, will not:

(i) conflict with the charter or bylaws of the Company, or

(ii) constitute a material breach or default under any of the agreements to which the Company is a party and which are listed on _____,[9] or]

(iii) to our knowledge (and without having ordered or reviewed any judgment, lien or other searches, either in the public domain or of the Company or its properties)[10], conflict with or result in a material breach or default under any judgment, order, writ or decree of any court or governmental authority binding on the Company or to which the Company is subject and which is of specific application to the Company.

7. To our knowledge, no consent, approval, authorization, or other action by, or filing with, any governmental authority is required for the execution and delivery by the Company of the Transaction Documents, or, if required, the requisite consent, approval, or authorization has been obtained, the requisite filing has been accomplished, or the requisite action has been taken.

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[9] An alternative to this part of the opinion, under the appropriate circumstances, is: "to our knowledge, constitute a material breach or default under any contract, mortgage, agreement or other document or instrument to which the Company is a party."

[10] Delete parenthetical text if opinion giver has reviewed a search. *See* ***Paragraph I.(viii)***.

8. To our knowledge, there is no action or proceeding pending before any court or administrative body, or overtly threatened in writing, against the Company[, except for the matters described on Schedule __ of the Agreement].

9. The Transaction Documents are effective to create in favor of the Lender**,** as security for the Obligations, a security interest (the "Article 9 Security Interest") in the Collateral described in the Security Agreement in which a security interest may be created under Article 9 of the UCC (the "Article 9 Collateral").

10. Upon the filing of the Financing Statement with the SDAT [specify any other applicable filing office], the Article 9 Security Interest in that portion of the Article 9 Collateral in which a security interest may be perfected by the filing of a financing statement under the UCC will be perfected.

IF PERFECTION CAN BE OBTAINED BY POSSESSION:

11. The security interest in the Collateral will be perfected upon the Lender's taking possession of the Collateral.

IF THE COLLATERAL IS CERTIFICATED SECURITIES:

12. Upon the delivery in the State of Maryland to the Lender of the stock certificates listed on Exhibit ___ hereto (the "Pledged Stock") and the related stock powers pursuant to the Security Agreement and assuming that the Lender had no notice of an adverse claim (within the meaning of Section 8-105 of the UCC) with respect to the Pledged Stock at the time the Pledged Stock is delivered to the Lender, the security interest in the Pledged Stock created in favor of the Lender under the Security Agreement will constitute a perfected security interest in the Pledged Stock, free of any "adverse claim" (as defined in Section 8-102 of the UCC).

IF PERFECTION CAN BE OBTAINED BY CONTROL OTHER THAN POSSESSION OR DELIVERY:

13. The security interest in the Collateral will be perfected upon the execution and delivery of the Control Agreement by the Company, the Lender, and the Depository Bank.

V. Qualifications

In addition to the other matters set forth in this letter, the opinions set forth herein are also subject to the following qualifications:

IMPLICIT ENFORCEABILITY QUALIFICATIONS

(i) Our opinion in Paragraph IV.5 regarding enforceability is subject to applicable bankruptcy, insolvency, reorganization, moratorium, and other laws affecting the rights of creditors generally.

(ii) Our opinion in Paragraph IV.5 regarding enforceability is subject to the exercise of judicial discretion in accordance with general principles of equity;

(iii) Enforceability may be limited to the extent that remedies are sought with respect to a breach that a court concludes is not material or does not adversely affect the Lender.

(iv) Enforceability may be limited by any unconscionable or inequitable conduct on the Lender's part, defenses arising from the Lender's failure to act in accordance with the terms and conditions of the Transaction Documents, defenses arising as a consequence of the passage of time, or defenses arising as a result of the Lender's failure to act reasonably or in good faith.

(v) The provisions regarding the remedies available to the Lender on default as set forth in the Transaction Documents are subject to certain procedural requirements, which, with regard to several of the remedies, are not reflected in the Transaction Documents. These procedural requirements affect and may restrict rights and remedies stated to be available to the Lender.

(vi) We express no opinion on the enforceability of the self-help, non-judicial remedies provided to the Lender in certain of the Transaction Documents.

(vii) We express no opinion on the enforceability of any provisions of the Transaction Documents that entitle the Lender, as a matter of right, to the appointment of a receiver after the occurrence of a default.

(viii) We express no opinion on the enforceability of any provisions of the Transaction Documents imposing increased interest rates and/or late payment charges upon delinquency in payment or the occurrence of a default, liquidated damages, or prepayment premiums, to the extent they are deemed to be penalties or forfeitures.

(ix) We express no opinion on the enforceability of any provisions requiring the Company to waive procedural, judicial, or substantive rights, such as rights to notice, service of process, right to a jury trial, statutes of limitations, appraisal or valuation rights, and marshaling of assets.

(x) We express no opinion on the enforceability of any provisions requiring the Company to indemnify or make contribution to the Lender or its agents, officers, or directors or of any provisions exculpating the Lender from liability for its actions or inaction to the extent such indemnification, contribution or exculpation is contrary to public policy or law.

(xi) We express no opinion on the enforceability of any provisions permitting modifications of the Transaction Documents only if in writing.

(xii) We express no opinion on the enforceability of any provision stating that the provisions of the Transaction Documents are severable.

(xiii) Unless otherwise expressly stated in the opinion, we express no opinion with respect to the laws and regulations relating to health and safety, labor, employment, employee benefits, or land use and subdivision; Federal Reserve Board margin regulations; anti-trust laws

of the United States or any state; securities laws of the United States (including the Trust Indenture Act) or any state; or the tax laws of the United States or any state.

(xiv) We express no opinion as to the enforceability of the choice of law provision or the extent to which a court of competent jurisdiction would apply the law selected by the parties to any issue before it.

(xv) We express no opinion with respect to any documents defined or referred to in the Transaction Documents, other than the Transaction Documents themselves.

(xvi) The opinions expressed herein are subject to the effect of any judicial decision that may permit the introduction of parol evidence to modify the terms or the interpretation of agreements.

(xvii) Certain rights of debtors and of other obligors and certain duties of secured parties referred to in Sections 1-102(3), 9-602 and Section 9-624 of the UCC may not be waived, released, varied or disclaimed by agreement except, in certain instances, following a default.

IMPLICIT CONSENTS AND APPROVALS QUALIFICATIONS

(xviii) We express no opinion as to any consent, approval, authorization, or other action or filing necessary or required for the ongoing operation of the Company's business.

(xix) We express no opinion as to any consent, approval, authorization, or other action by, or filing with any county, city, or other municipality or any local government agency.

EXPLICIT CONSENTS AND APPROVALS QUALIFICATION

(xx) Our opinion in Paragraph IV.7 regarding consents and approvals is based upon our consideration of only those consents, approvals, authorizations, orders, registrations, declarations or filings required under those statutes, rules or regulations of the State of Maryland, if any, that, in our experience, are reasonably applicable to transactions of the type contemplated under the Transaction Documents.

IMPLICIT CREATION AND PERFECTION QUALIFICATIONS

(xxi) We express no opinion with respect to (a) the title to or the rights or interests of the Company in the Collateral, (b) the adequacy of the description of the Collateral, or (c) except as explicitly set forth herein, the creation, attachment, perfection or priority of any liens thereon and/or security interests therein. Opinions as to creation, attachment, perfection and priority are given only to the extent set forth in opinion Paragraphs IV. 10 and 11 and are subject to the additional assumptions, qualifications and limitations applicable to such opinions set forth in this letter.

(xxii) We express no opinion as to any provisions of the Transaction Documents that purport to create or perfect a security interest in and to either (a) any policy of insurance or the proceeds thereof or (b) any governmental permits or licenses.

(xxiii) The opinions given above as to the creation and perfection of security interests do not cover real property and other property transactions excluded from the coverage of the UCC pursuant to Section 9-109 [insert reference to the proper section of the Uniform Commercial Code of any other applicable State].

(xxiv) We express no opinion as to the perfection of or priority of security interests in property of the Company acquired after the date of this letter.

(xxv) We express no opinion with respect to any security interest created under the Transaction Documents that purports to secure any present or future obligations or liabilities of the Company to the Lender (other than the obligations and liabilities of the Company to the Lender created or arising under the Transaction Documents) that are determined, in the case of obligations or liabilities of the Company to the Lender created in the future, not to constitute "future advances" within the meaning of Section 9-204(c) of the UCC, are determined not to have been within the contemplation of the Company and the Lender at the time the Transaction Documents were executed, or are determined not to be of the same character or class as the obligations and liabilities of the Company to the Lender created or arising under the Transaction Documents.

(xxvi) We express no opinion as to personal property affixed to real property in such a manner so as to become a fixture.

(xxvii) We express no opinion as to the enforceability of the security interests under the Transaction Documents as against the competing interests of those third parties who would, in accordance with the provisions of the UCC or other applicable law, take free of any such security interest notwithstanding perfection thereof.

(xxviii)We express no opinion as to the perfection of the security interest of the Lender in any portion of the Pledged Securities, the continuous possession of which is not maintained by the Lender in the State of Maryland. In addition, we call to your attention that perfection (and the effect of perfection and non-perfection) of the security interest of the Lender in the Pledged Securities may be governed by laws other than those of the UCC to the extent the Pledged Securities become located in a jurisdiction other than the State of Maryland.

(xxix) We call to your attention that in the case of the issuance of additional shares or other distributions in respect of the Pledged Securities, the security interests of the Lender therein will be perfected only if possession thereof is obtained or other action appropriate to the nature of the distribution is taken, in either case, in accordance with the provisions of the UCC and other applicable law.

(xxx) We express no opinion regarding any security or other interests of the Company in property of another that secures the other's obligations to the Company.

(xxxi) We express no opinion as to whether (1) the Company has the right to transfer rights in the Article 9 Collateral to the Lender, or (2) provisions in the Loan Documents granting an absolute assignment of rights or interests will be construed as effecting an absolute assignment rather than a collateral assignment or security interest.

(xxxii) The assignment of any contract, lease, license, or permit may require the approval of the issuer thereof or the other parties thereto.

(xxxiii)Except to the limited extent an Article 9 Security Interest may be created therein, we express no opinion with respect to any security interest in any accounts, chattel paper, documents, instruments or general intangibles with respect to which the account debtor or obligor is the United States, any state, county, city, municipality or other governmental body, or any department, agency or instrumentality thereof.

(xxxiv)Under the provisions of Section 9-108(c) of the UCC, to the extent any provision of the Transaction Documents purports to create a security interest in property described as "all assets," "all personal property" or otherwise in a supergeneric manner, such provision does not reasonably identify the Collateral and is not sufficient to create a security interest in any Collateral so described.

(xxxv) We point out that:

(a) Section 9-301(1) of the UCC provides that, generally, the local law of the jurisdiction where a debtor is located governs perfection, the effect of perfection and non-perfection, and priority of a security interest in Collateral and (B) Section 9-307(e) of the UCC provides that a registered organization (as that term is defined in Section 9-102(71) of the UCC) that is organized under the laws of a state is located in that state, but

(b) the UCC elsewhere provides that (A) with respect to possessory security interests, the local law of jurisdiction where Collateral is located governs, among other things, perfection, (B) the local law of the depository bank's jurisdiction governs perfection in deposit accounts; (C) the local law (if a state) where a security certificate is located governs, among other things, perfection other than perfection by the filing of a financing statement, (D) the local law (if a state) of a issuer's jurisdiction governs, among other things, perfection in uncertificated securities other than perfection by the filing of a financing statement and the local law (if a state) of securities intermediary's jurisdiction governs perfection in a securities entitlement or securities account other than perfection by the filing of a financing statement; (E) except for security interests in letter-of-credit rights perfected only by Section 9-308(d) of the UCC, the local law (if a state) of a issuer's or nominee's jurisdiction governs perfection in letter-of-credit rights; (F) with respect to goods that become fixtures, perfection and other matters are covered by the law of jurisdiction where the real estate is located; and (G) with respect to goods that are

covered by a certificate of title, perfection and other matters are governed by the law of the jurisdiction issuing such certificate of title.

(xxxvi) Our opinions regarding the creation and perfection of security interests are subject to the effect of (1) the limitations on the existence and perfection of security interests in proceeds resulting from the operation of Sections 9-203(f) and 9-315 of the UCC; (2) the limitations in favor of buyers imposed by Sections 9-320 and 9-330 of the UCC and in favor of licensees imposed by Section 9-321 of the UCC; (3) the limitations with respect to documents, instruments and securities imposed by Section 9-331 and Section 8-303 of the UCC; (4) laws, other than the UCC, that determine whether the Company's rights in Collateral may be voluntarily or involuntarily transferred; (5) other rights of persons in possession of goods, instruments, money, tangible chattel paper or investment property; and (6) other rights of persons in control of investment property, deposit accounts, letter-of-credit rights and electronic chattel paper.

(xxxvii) We also note the following: (1) Rights to money or funds contained in a deposit account are subject to the rights of transferees under Section 9-327 of the UCC. (2) Security interests in goods are subject to rights of holders of possessory liens under Section 9-333 of the UCC. (3) Security interests in deposit accounts are subject to the rights of the depositary bank under Section 9-340 of the UCC. (4) Security interests in Collateral consisting of proceeds will be limited as provided in Section 9-315 and 9-322(c) of the UCC. (5) Security interests in goods that are installed in, or attached or affixed to any other goods may be subject to the provisions of Section 9-335 of the UCC, and may be subject to the provisions of Section 9-336 of the UCC to the extent that such goods form part of a larger product or mass.

(xxxviii) We express no opinion as to the Lender's rights in the Collateral to the extent that the Lender has knowledge that its security interest in the Collateral violates the rights of another secured party.

(xxxix) With respect to our opinion as to the perfection of the security interest, we offer no opinion as to the continued perfection of that security interest. Without implying any limitation on the foregoing, we point out that the continued perfection of any security interest in any Collateral (1) may be affected by the removal of such Collateral to another jurisdiction or upon the change of the name or the state of organization of any debtor, or (2) that is perfected by the filing of a financing statement, may be affected by the failure to file a timely continuation statement.

EXPLICIT PERFECTION BY CONTROL QUALIFICATIONS

(xl) *If an opinion is given regarding perfection of a security interest by means of the Lender's control of the Collateral, add, as applicable, depending on the type of Collateral*:

(A) *Depository Institution*. [Name of Depository Institution] (the "Depository Institution") is a "bank", within the meaning of Section 9-102(a)(8), with which the deposit accounts described in [such paragraph] are maintained;

(B) *Deposit Accounts*. The account described in the [Pledge Agreement] is a Deposit Account within the meaning of Section 9-102(a)(29);

(C) *Securities Intermediary*. [Name of Securities Intermediary] (the "Securities Intermediary") is a "securities intermediary" as defined in Section 8-102; and

(D) *Investment Accounts*. The [Investment Accounts] (as defined in the [Security Agreement]) are "securities accounts" as defined in Section 8-501(a) and all property from time to time credited to the [Investment Accounts] are "financial assets" as defined in Section 8-102(a)(9).

(E) *Deposit Accounts, Investment Property or Letter-of-Credit Rights*. The [Collateral] is located, within the meaning of Sections 9-304, 9-305 and 9-306, only in the State of Maryland.

VI. Limitations

(A) We express no opinion as to the laws of any jurisdiction other than the laws of the State of Maryland [and the federal law of the United States]. We express no opinion as to the principles of conflict of laws of any jurisdiction, including the laws of the State of Maryland [and the federal laws of the United States].

(B) We assume no obligation to supplement our opinions if any applicable law changes after the date of this letter or if we become aware of any facts that might change the opinions expressed in this letter after the date of this letter.

(C) The opinions expressed in this letter are limited to the matters set forth in this letter, and no other opinions shall be implied or inferred beyond the matters expressly stated.

(D) The opinions expressed in this letter are solely for the use of the Lender, subsequent holders of the Note, and their counsel, and these opinions may not be relied on by any other persons without our prior written approval. Subsequent holders of the Note may only rely on these opinions to the extent such reliance is actual and reasonable and is not based on different or changing facts or circumstances.

VII. Reference to Report

This letter is to be interpreted in accordance with the 2007 Report on Lawyers' Opinions in Business Transactions by the Special Joint Committee of the Section of Business Law and the Section of Real Property, Planning and Zoning of the Maryland State Bar Association, Inc.

Very truly yours,

[Signature of Lawyer/Law Firm
representing the Company]

NOTE: Provisions noted as "IMPLICIT" are deemed part of the opinion letter whether or not they are specifically set forth therein.

3. Illustrative Real Estate Loan Opinion Letter – Long Form

[Letterhead of Lawyer or Law Firm]

[DATE]

[Lender's name and address]

Re: $_____ Loan from Lender to [Limited Liability Company Borrower] Secured by the land and improvements erected and to be erected thereon, located in _____ City/County, Maryland and Guaranteed by [Individual Guarantor] (the "Loan")

Ladies and Gentlemen:

We have acted as counsel to _____, a Maryland limited liability company (the "Borrower") and John Doe (the "Guarantor") in connection with the captioned transaction (the "Transaction"). This letter is furnished to satisfy [the condition set forth in Section _____ of _____/your request dated_____]. All capitalized terms used in this letter that are not otherwise defined herein shall have the meanings assigned to them in the Transaction Documents (as hereinafter defined).

I. Documents Reviewed and Matters Considered

In our capacity as counsel to the Borrower and the Guarantor and for purposes of this opinion, we have examined the following documents (all of which are collectively called the "Documents"):

(i) the [describe commitment/loan agreement] dated _____ between the Borrower and _____ (the "Lender"), the Deed of Trust and Security Agreement dated _____ from the Borrower to _____ and _____, as trustees (the "Deed of Trust"), the Promissory Note dated _____, in the principal amount of $_____ from the Borrower to the order of the Lender (the "Note"), the Assignment of Rents dated _____ from the Borrower to the Lender (the "Assignment"), and the Guaranty Agreement dated _____ from the Guarantor for the benefit of the Lender (collectively the "Transaction Documents");

(ii) a Uniform Commercial Code financing statement authorized by the Borrower (the "Financing Statement");

(iii) Status Certificate of the Borrower from the Maryland State Department of Assessments and Taxation (the "SDAT") dated _____ to the effect that the Borrower is existing under and by virtue of the laws of the State of Maryland and is in good standing to transact business;

(iv) certified copy of the Articles of Organization of the Borrower [and all amendments thereto];

(v) the Operating Agreement of the Borrower [and all amendments thereto];

(vi) certificates of an officer of the Borrower and from the Guarantor, dated as of the date hereof, as to such matters as we deem necessary and appropriate to enable us to render this opinion letter;

(vii) representations of each of the Borrower and the Guarantor set forth in the Transaction Documents that the Loan is a "Commercial Loan" (as defined in Section l2-101(c) of the Commercial Law Article of the Annotated Code of Maryland;

(viii) the commitment for an ALTA lender's policy of title insurance issued to you by _____ (the "**Title Company**") in the amount of $_____ dated _____;

[(ix) list other documents and certificates, if any, relied upon; and]

(x) such other documents and matters as we have deemed necessary and appropriate to render the opinions set forth in this letter, subject to the assumptions, qualifications, and limitations noted below.

II. Definition of "Knowledge"

In basing the opinions and other matters set forth herein on "our knowledge," the words "our knowledge" and similar language used herein signify that, in the course of our representation of the Borrower and the Guarantor in matters with respect to which we have been engaged by the Borrower and the Guarantor as counsel, no information has come to our attention that would give us actual knowledge or actual notice that any such opinions or other matters are not accurate or that any of the foregoing documents, certificates, reports, and information on which we have relied are not accurate and complete. Except as otherwise stated herein, we have undertaken no independent investigation or verification of such matters. The words "our knowledge" and similar language used herein are limited to the knowledge of the lawyers within our firm who are involved in the Transaction, or who have worked on matters on behalf of the Borrower or the Guarantor within the prior twelve months and are presently at the firm.

III. Assumptions

In reaching the opinions set forth below, we have assumed, and to our knowledge there are no facts inconsistent with, the following:

IMPLICIT GENERAL ASSUMPTIONS

(a) Each individual executing any of the Documents, whether on behalf of such individual or another person, is legally competent to do so.

(b) Each individual executing any of the Documents on behalf of a party (other than the Borrower and the Guarantor) is duly authorized to do so.

(c) All Documents submitted to us as originals are authentic. All Documents submitted to us as certified or photostatic copies conform to the original documents. All Documents upon which we have relied are accurate and complete. All public records reviewed or relied upon by us or on our behalf are true and complete and remain so as of the date of this letter.

(d) The form and content of all Documents submitted to us as unexecuted drafts do not differ in any respect relevant to this opinion from the form and content of such Transaction Documents as executed and delivered.

(e) All representations, warranties, statements and information contained in the Transaction Documents are accurate and complete.

(f) All signatures on all Transaction Documents[1]] and any other documents submitted to us for examination are genuine.

(g) There has been no oral or written modification of or amendment to any of the Documents, and there has been no waiver of any of provision of any of the Documents, by actions or omission of the parties or otherwise.

[1] Opinion recipients occasionally request that the portion of this assumption relating to the genuineness of signatures be limited to signatures other than those of the Borrower and the Guarantor or the individuals executing the Transaction Documents. In effect, such a request requires the opinion giver to insure that the signatures of the opinion giver's client are not forgeries. In the view of the Committee, such an assurance is not an opinion of law but the guaranty of a fact that may be outside of the knowledge of the opinion giver. The Committee believes that such a request is inappropriate in most instances. If, however, the opinion giver is going to opine that the Transaction Documents have actually been signed by the Borrower and the Guarantor, add "other than the Borrower's and the Guarantor's."

(h) Each individual executing a certificate is authorized to do so and has knowledge about all matters stated therein. The contents of each such certificate is accurate and complete and remain so as of the date of this letter.

IMPLICIT ENFORCEABILITY ASSUMPTIONS

(i) Each of the parties (other than the Borrower and the Guarantor) executing any of the Transaction Documents has duly and validly executed and delivered each of the Transaction Documents to which such party is a signatory, and such party's obligations set forth therein are legal, valid, and binding and are enforceable in accordance with all stated terms.

(j) Consideration that is fair and sufficient to support the Guaranty of the Guarantor has been and would be deemed by a court of competent jurisdiction to have been, duly received by the Guarantor.

(k) The Lender and its successors and assigns will comply with all requirements of applicable procedural and substantive law in exercising any rights or enforcing any remedies under the Transaction Documents.

(l) The exercise by Lender of any rights or enforcement of any remedies under the Transaction Documents would not be unconscionable, result in a breach of the peace or otherwise be contrary to public policy.

(m) The Transaction Documents accurately reflect the complete understanding of the parties with respect to the transaction contemplated thereby and the rights and obligations of the parties thereunder.

(n) The Lender and its successors and assigns will act in good faith and in a commercially reasonable manner in the exercise of any of its rights or enforcement of any of its remedies under the Transaction Documents and will not engage in any conduct in the exercise of any of its rights or enforcement of any of its remedies that would constitute other than fair dealing.

EXPLICIT ENFORCEABILITY ASSUMPTIONS

(o) The provisions of the Transaction Documents intended to reduce interest and fees on the obligations so that the interest and fees do not exceed the maximum legal rate are given full force and effect.

(p) The Loan is being entered into solely to acquire or carry on a business or commercial enterprise, or to a business or commercial organization.

IMPLICIT REAL ESTATE ASSUMPTIONS

(q) The descriptions of the real and personal property constituting the collateral described in the Deed of Trust and the description of the personal property constituting the collateral contained in, or attached as exhibits or schedules to the Transaction Documents, reasonably identify the property described or intended to be described.

(r) As to due recordation of the Deed of Trust [and as to the due recording and/or filing of the Financing Statement] in the land records of the county/Baltimore City in which the real property described in the Deed of Trust is located (the "Recording Office"), you are relying upon the Title Company, and as to the priority of the Deed of Trust, you are relying upon title insurance to be provided by the Title Company, in accordance with its commitment which is referred to in ***Paragraph I.(xi)***, and we assume that the Deed of Trust [has been/will be] properly recorded and indexed.

(s) Borrower owns and holds a [fee simple/leasehold] interest, of record and in fact, in the real property described in the Deed of Trust and [owns/leases] that portion of the collateral described in the Deed of Trust that is composed of fixtures (as that term is defined in the Uniform Commercial Code in effect in the State of Maryland (the "UCC").

EXPLICIT REAL ESTATE ASSUMPTION

(t) The real property described in the Deed of Trust is located in _____ City/County, Maryland.

EXPLICIT "NO VIOLATIONS" AND "NO CONSENTS AND APPROVALS" ASSUMPTIONS

(u) The Borrower is not subject to any federal, state, or local governmental programs that require governmental consent prior to the Borrower's entering into [commercial loan transactions].[2]

(v) The Borrower is not engaged in an industry or business activity that is specially regulated by any federal, state, or local governmental entity or agency.[3]

[2] Instead of making this point as an assumption, it may be contained in a certificate from the Borrower. *See* ***Paragraph I.(vi)*** above and the Illustrative Certificate.

[3] If giving a "consents and approvals" opinion and not a "no violation" opinion, add at the end of this assumption: "that requires its consent prior to the Borrower's entering into [commercial loan transactions]." Instead of making this point as an assumption, it may be contained in a certificate from the Borrower. *See* ***Paragraph I.(vi)*** above and the Illustrative Certificate.

EXPLICIT "NO CONFLICTS" ASSUMPTION

(w) There are no judicial, governmental, administrative, or arbitral judgments, orders, injunctions, decrees, or awards outstanding against the Borrower, and there are no judicial or governmental actions, suits, or proceedings, or any arbitrations or mediations, pending or threatened against the Borrower or any of its properties [that (i) seek to affect the enforceability of the Transaction Documents, or (ii) come within [the objective standard established in the [Transaction Documents] for disclosure of such matters] [other objective threshold]].[4]

IMPLICIT PERFECTION AND PRIORITY ASSUMPTIONS

(x) The Borrower currently has rights within the meaning of the UCC in all of the collateral of the Borrower (the "Collateral").

(y) All descriptions of the real property, personal property or other items or interests, including, but not limited to, those subject to the UCC, in which a security interest or lien is created under the Transaction Documents, as contained in the Transaction Documents and in all Financing Statements, reasonably identify the real property, personal property or other items or interests described or intended to be described.

(z) There is no agreement between the Lender and the Borrower postponing the time of attachment of any security interest granted under the Transaction Documents.

(aa) Value has been given for all security interests and liens created under the Transaction Documents.

(bb) Any search report referred to in this letter is accurate and complete as of the date stated on it, and the governmental records searched were true and complete as of such date.

EXPLICIT PERFECTION AND PRIORITY ASSUMPTIONS

(cc) The Borrower is not a "transmitting utility" (as defined in Section 9-102 of the UCC).

CHOICE OF LAW ASSUMPTIONS

In connection with the choice of law provisions set forth in the Transaction Documents and the opinions rendered in ***Paragraph IV.14***, we have assumed without inquiry the matters set forth in ***Paragraphs III.(dd) through (jj)***, which are hereinafter referred to as the "Choice of Law Facts":

[4] Instead of making this point as an assumption, it may be contained in a certificate from the Borrower. *See* ***Paragraph I.(vi)*** above and the Illustrative Certificate.

(dd) the Transaction Documents were negotiated in part and delivered in the Selected Jurisdiction, as hereinafter defined;

(ee) Lender has a principal place of business in the Selected Jurisdiction;

(ff) the Loan proceeds will be disbursed in the Selected Jurisdiction;

(gg) the parties to the Transaction Documents freely chose the law of the Selected Jurisdiction as the law governing the Loan other than with respect to the applicable mortgage law of each of the states wherein the respective properties are located;

(hh) the parties to the Loan are sophisticated business people and entities experienced in multi-jurisdictional loan transactions secured in part by real estate mortgages or liens on properties located in multiple states and are represented by experienced real estate counsel;

(ii) the Loan and the Transaction Documents were negotiated at arm's length among the parties;

(jj) the choice of law was selected for valid business reasons, and the parties are not engaged in fraudulent or misleading activities or avoidance of public policy requirements in the choice of law contained in the Transaction Documents.

IV. Opinions

Based on our review of the foregoing and subject to the assumptions, qualifications, and limitations set forth herein, it is our opinion that, as of the date of this letter:

1. The Borrower is a limited liability company duly formed, validly existing, and in good standing under the laws of the State of Maryland.

2. The Borrower has the limited liability company power to enter into and perform its obligations under the Transaction Documents [and to own its current properties and conduct its business pursuant to its Articles of Organization and Operating Agreement as described under the heading {heading name} in the {applicable document describing business and properties}].

3. All necessary limited liability company action has been taken to authorize the execution, delivery, and performance of the Transaction Documents by the Borrower.

4. The Transaction Documents have been duly executed and delivered by the Borrower and the Guarantor (as the case may be).

5. The Transaction Documents constitute the valid and binding obligations of the Borrower and the Guarantor (as the case may be), enforceable against the Borrower and the Guarantor (as the case may be) in accordance with their terms.

6. The Deed of Trust is in appropriate form to permit due recordation in the Recording Office and, upon proper recording and indexing, to create the encumbrance and security interest that it purports to create on all right, title and interest of the grantor named therein in the real property described therein. [_____ County/Baltimore City], Maryland, is the county [jurisdiction] in which the Deed of Trust must be properly recorded and indexed in order to cause the encumbrance and security interest that the Deed of Trust purports to create to be effective as against creditors of and purchasers from the grantor of the Deed of Trust. No instrument other than the Deed of Trust is required to be filed in the Recording Office in order to create the aforesaid encumbrance and security interest.

7. The Deed of Trust creates a security interest in favor of the Lender, as security for the obligations described therein, in all of the Collateral described in the Deed of Trust that is composed of fixtures (as that term is defined in the Maryland UCC) and goods that are to become fixtures. Upon recordation of the Deed of Trust in the Recording Office and proper indexing there, the security interest created by the Deed of Trust in that portion of the collateral described in the Deed of Trust that is composed of fixtures and goods that are to become fixtures will be perfected.[5]

8. The Financing Statement is in appropriate form for due filing among the financing statement records of the SDAT pursuant to the Maryland UCC.

9. The execution and delivery by the Borrower of the Transaction Documents and the performance by the Borrower of its payment obligations under the Transaction Documents do not violate any Applicable Laws. As used herein, "Applicable Laws" means those laws, rules and regulations of governmental authorities of the State (excluding those of counties, cities, and other municipalities) ("Maryland Governmental Authorities") that we, in the exercise of customary professional diligence, would reasonably recognize as being applicable to [the Borrower and] the transactions contemplated by the Transaction Documents.[6]

10. The execution and delivery of the Transaction Documents, the performance of the Borrower's obligations under the Transaction Documents and the borrowing of the Loan will not:

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[5] Opinion 7 provides that the deed of trust serves as a fixture filing. If the financing statement is to be filed as a fixture filing, use the following in lieu of opinion 7:

> 7. The Financing Statement is in appropriate form for filing in the Recording Office. The Deed of Trust creates a security interest in favor of the secured party, as security for the obligations described therein, in all of the collateral described in the Deed of Trust that is composed of fixtures and goods that are to become fixtures. Upon the acceptance and filing of the Financing Statement in the Recording Office, the security interest created by the Deed of Trust in that portion of the collateral described in the Financing Statement that is composed of fixtures and goods that are to become fixtures will be perfected.

[6] The Committee discourages the requesting or giving of this opinion. *See* Section D.9 of the Report.

(i) conflict with the Articles of Organization or the Operating Agreement of the Borrower, or

(ii) constitute a material breach or default under any of the agreements to which the Borrower or the Guarantor is a party and which are listed on _____[7]], or

(iii) to our knowledge (and without having ordered or reviewed any judgment, lien or other searches, either in the public domain or of the Borrower or the Guarantor or the properties of either),[8] conflict with or result in a material breach or default under any judgment, order, writ or decree of any court or governmental authority binding on the Borrower or the Guarantor, or the properties of either, or to which the Borrower or the Guarantor is subject and which is of specific application to the Borrower or the Guarantor (as the case may be).

11. To our knowledge, no consent, approval, authorization, or other action by, or filing with, any governmental authority is required for the execution and delivery by the Borrower or the Guarantor of the Transaction Documents, or, if required, the requisite consent, approval, or authorization has been obtained, the requisite filing has been accomplished, or the requisite action has been taken.

12. To our knowledge, there is no action or proceeding pending before any court or administrative body, or overtly threatened in writing, against the Borrower or the Guarantor, or any of their properties except for matters described on _____.

13A. IF A RECORDATION TAX IS DUE:

Other than the recordation tax imposed pursuant to Title 12 of the Tax-Property Article of the Annotated Code of Maryland, and nominal per page or per document filing fees due on recordation of the Deed of Trust, no fees, taxes or other charges are due or payable in the State of Maryland in connection with the execution, delivery and recording of the Deed of Trust [Mortgage] and the filing of the Financing Statement in the Recording Office.

13B. IF NO RECORDATION TAX IS DUE BECAUSE OF AN EXEMPTION:

Subject to the qualifications set forth below, pursuant to Sections 12-108(__) and 13-207(__) of the Tax-Property Article, Annotated Code of Maryland [and the relevant section of the county code where the property is located, if applicable], no fees, taxes or other charges are due or payable in the State of Maryland in connection with the execution, delivery and

[7] An alternative to this part of the opinion, under the appropriate circumstances, is: "to our knowledge, constitute a material breach or default under any contract, mortgage, agreement or other document or instrument to which the Company is a party."

[8] Deleted parenthetical text is opinion giver has reviewed a search.

recording of the Deed of Trust or the filing of the Financing Statement in the Recording Office, other than nominal per page or per document filing fees.[9]

14. The choice of law provisions contained in the Transaction Documents [other than the Deed of Trust] provide that they shall be construed and enforced in accordance with the substantive laws of _____ (the "Selected Jurisdiction"). Assuming that such provisions are valid and effective under the laws of the Selected Jurisdiction, we believe that the choice of law provisions should be upheld and enforced by the courts of the State of Maryland and federal courts sitting in and applying the laws of the State (in either case, a "Maryland Court"). It is our opinion that a Maryland Court in a case properly presented and argued to it should give effect to the designation by the parties of the law of the Selected Jurisdiction as the governing substantive law with respect to such agreements unless the Maryland Court were to determine that (i) the Selected Jurisdiction has no reasonable relationship to the transaction contemplated by the Documents, or (ii) the result obtained from applying the substantive law of the Selected Jurisdiction would be contrary to the fundamental public policy of the State of Maryland or another jurisdiction that has a materially greater interest than the Selected Jurisdiction relating to the Documents or the determination of the particular issue thereunder being considered by the Maryland Court. *See Kronovet v. Lipchin*, 288 Md. 30 (1980); *Bethlehem Steel v. G.C. Zarnas & Co.*, 304 Md. 183 (1985); *National Glass v. J.C. Penney Properties*, 336 Md. 606 (1994); and *Laboratory Corporation of America v. Hood*, 395 Md. 608 (2006). Because choice of law issues are decided on a case by case basis depending upon the facts of the particular transaction, we are unable to conclude with certainty that a Maryland Court would give effect to those provisions designating the law of the Selected Jurisdiction as the governing law. Nevertheless, based on the Choice of Law Facts, we believe that a Maryland Court should conclude that the Selected Jurisdiction has a reasonable relationship to the transaction. However, as noted above, a Maryland Court would likely not permit any provision or practice condoned or permitted by the laws of the Selected Jurisdiction that is determined to be against the fundamental public policy of the State of Maryland Additionally, a Maryland Court may apply the internal law of the State of Maryland to determine the perfection and effect of perfection or non-perfection of the liens created under the Transaction Documents and the application of remedies in enforcing such liens with respect to property located in Maryland.

V. Qualifications

In addition to the qualifications set forth above, the opinions set forth herein are also subject to the following qualifications:

[9] If no recordation tax is due because the instrument is an indemnity deed of trust, add the applicable opinion in Section D.8 of the Report.

IMPLICIT ENFORCEABILITY QUALIFICATIONS

(i) Our opinion in ***Paragraph IV.5*** regarding enforceability is subject to applicable bankruptcy, insolvency, reorganization, moratorium, and other laws affecting the rights of creditors generally.

(ii) Our opinion in ***Paragraph IV.5*** regarding enforceability is subject to the exercise of judicial discretion in accordance with general principles of equity;

EXPLICIT ENFORCEABILITY QUALIFICATION

(iii) In addition to the qualifications set forth in ***Paragraphs V.(i) and (ii)***, and to other qualifications set forth in this opinion letter, certain remedies, waivers, and other provisions of the Transaction Documents may not be enforceable for other reasons (the "Other Reasons"); nevertheless, unenforceability of provisions of the Transaction Documents for Other Reasons will not render the Transaction Documents invalid as a whole or preclude (a) the judicial enforcement of the obligation of the Borrower to repay the principal, together with interest thereon (to the extent not deemed a penalty) as provided in the Note, (b) the acceleration of the obligation of the Borrower to repay such principal, together with such interest, upon a material default by the Borrower in the payment of such principal or interest or upon a material default in any other material provision of the Transaction Documents, (c) the enforcement of the obligations of Guarantor under the Guaranty, and (d) the foreclosure in accordance with applicable Law of the lien on and security interest in the collateral described in and created by the Transaction Documents upon maturity or upon acceleration pursuant to clause (b) above.

IMPLICIT ENFORCEABILITY QUALIFICATIONS

(iv) We express no opinion with respect to (a) the title to or the rights or interests of the Borrower in the collateral, (b) the adequacy of the description of the collateral, or (c) except as explicitly set forth herein, the creation, attachment, perfection or priority of any liens thereon and/or security interests therein. Such opinions are given only to the extent set forth in opinion ***Paragraphs IV. 6 and 7*** and are subject to the additional exceptions, assumptions, qualifications and limitations applicable to such opinions set forth in this opinion.

(v) We express no opinion as to the creation, attachment, perfection or priority of any lien or security interest where the Deed of Trust has not been properly recorded and indexed.

(vi) We call your attention to Section 3-104(g) of the Real Property Article of the Annotated Code of Maryland, which provides, among other things, that each deed of trust or mortgage presented for recordation shall be accompanied by a completed State of Maryland Land Instrument Intake Sheet, on the form provided by the Administrative Office of the Courts. Please note, however, that such section also provides that the filing officer may not refuse to record an instrument because it is not accompanied by an Intake Sheet, and the lack of an Intake Sheet does not affect the validity of any conveyance, lien or lien priority based on recordation of an instrument.

(vii) We do not opine as to the enforceability of any provision of the Deed of Trust or the Assignment that purports to make an absolute assignment of the interest of debtor in the leases, rents and profits arising from the real property described in the Deed of Trust or the Assignment, rather than an assignment for security.

(viii) We call your attention to Section 3-204 of the Real Property Article of the Annotated Code of Maryland, which provides, in part, that an interest created by a deed (which term includes a deed of trust or mortgage) granting, assigning or otherwise transferring an interest in rents or profits arising from real property is perfected upon recordation as provided in Title 3 of the Real Property Article of the Annotated Code of Maryland, (a) regardless of whether, by its terms or otherwise, the grant, assignment or transfer is operative immediately, or upon the occurrence of a specific event, or under any other circumstances, and (b) without the grantee, assignee or transferee having to make any affirmative demand or take any further affirmative action.

(ix) The opinions expressed herein are subject to the effect of any judicial decision that may permit the introduction of parol evidence to modify the terms or the interpretation of agreements.

(x) Enforceability may be limited to the extent that remedies are sought with respect to a breach that a court concludes is not material or does not adversely affect the Lender.

(xi) Enforceability may be limited by any unconscionable or inequitable conduct on the Lender's part, defenses arising from the Lender's failure to act in accordance with the terms and conditions of the Transaction Documents, defenses arising as a consequence of the passage of time, or defenses arising as a result of the Lender's failure to act reasonably or in good faith.

(xii) The provisions regarding the remedies available to the Lender on default as set forth in the Transaction Documents are subject to a certain procedural requirements, which, with regard to several of the remedies, are not reflected in the Transaction Documents. These procedural requirements affect and may restrict rights and remedies stated to be available to the Lender.

(xiii) We express no opinion on the enforceability of the self-help, non-judicial remedies provided to the Lender in certain of the Transaction Documents, such as those regarding the Lender's right, without judicial process, upon default, to enter upon; to take possession of; to collect, retain, use, an enjoy the rents, issues, and profits from; and to manage the Property subject to the liens created by the Transaction Documents.

(xiv) We express no opinion on the enforceability of any provisions of the Transaction Documents that entitle the Lender, as a matter of right, to the appointment of a receiver after the occurrence of a default.

(xv) We express no opinion on the enforceability of any provisions of the Transaction Documents imposing increased interest rates and/or late payment charges upon delinquency in

payment or the occurrence of a default, liquidated damages, or prepayment premiums, to the extent they are deemed to be penalties or forfeitures.

(xvi) We express no opinion on the enforceability of any provisions requiring the Borrower to waive procedural, judicial, or substantive rights, such as rights to notice, service of process, right to a jury trial, statutes of limitations, appraisal or valuation rights, and marshaling of assets.

(xvii) We express no opinion on the enforceability of any provisions requiring the Borrower to indemnify or make contribution to the Lender or its agents, officers, or directors or of any provisions exculpating the Lender from liability for its actions or inaction to the extent such indemnification, contribution or exculpation is contrary to public policy or law.

(xviii) We express no opinion on the enforceability of any provisions permitting modifications of the Transaction Documents only if in writing.

(xix) We express no opinion on the enforceability of any provision stating that the provisions of the Transaction Documents are severable.

(xx) Unless otherwise expressly stated in the opinion, we express no opinion with respect to the laws and regulations relating to health and safety, labor, employment, employee benefits, or land use and subdivision; Federal Reserve Board margin regulations; antitrust laws of the United States or any state; securities laws of the United States (including the Trust Indenture Act) or any state; or the tax laws of the United States or any state.

(xxi) We express no opinion as to the laws, ordinances, zoning restrictions, rules or regulations of any city, county or other municipality or any other local governmental agency.

(xxii) Unless otherwise expressly stated in the opinion, we express no opinion as to the enforceability of the choice of law provision or the extent to which a court of competent jurisdiction would apply the law selected by the parties to any issue(s) before it.

(xxiii) We express no opinion with respect to any documents defined or referred to in the Transaction Documents, other than the Transaction Documents themselves.

IMPLICIT CONSENTS AND APPROVALS QUALIFICATIONS

(xxiv) We express no opinion as to any consent, approval, authorization, or other action or filing necessary or required for the ongoing operation of the Borrower’s business.

(xxv) We express no opinion as to any consent, approval, authorization, or other action by, or filing with any county, city or other municipality or any other local government agency.

EXPLICIT CONSENTS AND APPROVALS QUALIFICATION

(xxvi) Our opinion in ***Paragraph IV.11*** regarding consents and approvals is based upon our consideration of only those consents, approvals, authorizations, orders, registrations, declarations or filings required under those statutes, rules or regulations of the State of Maryland, if any, that, in our experience, are normally applicable to the transactions of the type contemplated under the Transaction Documents.

VI. Limitations

(A) We express no opinion as to the laws of any jurisdiction other than the laws of the State of Maryland [and the federal law of the United States]. We express no opinion as to the principles of conflict of laws of any jurisdiction, including the laws of the State of Maryland [and the federal laws of the United States] [except as specifically set forth herein].

(B) We assume no obligation to supplement our opinions if any applicable law changes after the date of this letter or if we become aware of any facts that might change the opinions expressed in this letter after the date of this letter.

(C) The opinions expressed in this letter are limited to the matters set forth in this letter, and no other opinions shall be implied or inferred beyond the matters expressly stated.

(D) The opinions expressed in this letter are solely for the use of the Lender and subsequent holders of the Note and their counsel], and these opinions may not be relied on by any other persons without our prior written approval. Subsequent holders of the Note may only rely on these opinions to the extent such reliance is actual and reasonable and is not based on different or changing facts or circumstances.

VII. Reference to Report

This letter is to be interpreted in accordance with the 2007 Report on Lawyers' Opinions in Business Transactions by the Special Joint Committee of the Section of Business Law and the Section of Real Property, Planning and Zoning of the Maryland State Bar Association, Inc.

Very truly yours,

[Signature of Lawyer/Law Firm
representing Borrower and Guarantor]

NOTE: Provisions noted as "IMPLICIT" are deemed part of the opinion letter whether or not they are specifically set forth therein.

4. Illustrative Real Estate Loan Opinion Letter – Short Form

[Letterhead of Lawyer or Law Firm]

[DATE]

[Lender's name and address]

Re: $_____ Loan from Lender to [Limited Liability Company Borrower] Secured by the land and improvements erected and to be erected thereon, located in _____ City/County, Maryland and Guaranteed by [Individual Guarantor] (the "Loan")

Ladies and Gentlemen:

We have acted as counsel to _____, a Maryland limited liability company (the "Borrower") and John Doe (the "Guarantor") in connection with the captioned transaction (the "Transaction"). This letter is furnished to satisfy [the condition set forth in Section _____ of _____/your request dated_____]. All capitalized terms used in this letter that are not otherwise defined herein shall have the meanings assigned to them in the Transaction Documents (as hereinafter defined).

I. Documents Reviewed and Matters Considered

In our capacity as counsel to the Borrower and the Guarantor and for purposes of this opinion, we have examined the following documents (all of which are collectively called the "Documents"):

(i) the [describe commitment/loan agreement] dated _____ between the Borrower and _____ (the "Lender"), the Deed of Trust and Security Agreement dated _____ from the Borrower to _____ and _____, as trustees (the "Deed of Trust"), the Promissory Note dated _____, in the principal amount of $_____ from the Borrower to the order of the Lender (the "Note"), the Assignment of Rents dated _____ from the Borrower to the Lender (the "Assignment"), and the Guaranty Agreement dated _____ from the Guarantor for the benefit of the Lender (collectively the "Transaction Documents");

(ii) a Uniform Commercial Code financing statement authorized by the Borrower (the "Financing Statement");

(iii) Status Certificate of the Borrower from the Maryland State Department of Assessments and Taxation (the "SDAT") dated _____ to the effect that the

Borrower is existing under and by virtue of the laws of the State of Maryland and is in good standing to transact business;

(iv) certified copy of the Articles of Organization of the Borrower [and all amendments thereto];

(v) the Operating Agreement of the Borrower [and all amendments thereto];

(vi) certificates of an officer of the Borrower and from the Guarantor, dated as of the date hereof, as to such matters as we deem necessary and appropriate to enable us to render this opinion letter;

(vii) representations of each of the Borrower and the Guarantor set forth in the Transaction Documents that the Loan is a "Commercial Loan" (as defined in Section l2-101(c) of the Commercial Law Article of the Annotated Code of Maryland;

(viii) the commitment for an ALTA lender's policy of title insurance issued to you by _____ (the "**Title Company**") in the amount of $_____ dated _____;

[(ix) list other documents and certificates, if any, relied upon; and]

(x) such other documents and matters as we have deemed necessary and appropriate to render the opinions set forth in this letter, subject to the assumptions, qualifications, and limitations noted below.

II. Definition of "Knowledge"

In basing the opinions and other matters set forth herein on "our knowledge," the words "our knowledge" and similar language used herein signify that, in the course of our representation of the Borrower and the Guarantor in matters with respect to which we have been engaged by the Borrower and the Guarantor as counsel, no information has come to our attention that would give us actual knowledge or actual notice that any such opinions or other matters are not accurate or that any of the foregoing documents, certificates, reports, and information on which we have relied are not accurate and complete. Except as otherwise stated herein, we have undertaken no independent investigation or verification of such matters. The words "our knowledge" and similar language used herein are limited to the knowledge of the lawyers within our firm who are involved in the Transaction, or who have worked on matters on behalf of the Borrower or the Guarantor within the prior twelve months and are presently at the firm.

III. Assumptions

In reaching the opinions set forth below, we have assumed, and to our knowledge there are no facts inconsistent with, the following:

EXPLICIT ENFORCEABILITY ASSUMPTIONS

(a) The provisions of the Transaction Documents intended to reduce interest and fees on the obligations so that the interest and fees do not exceed the maximum legal rate are given full force and effect.

(b) The Loan is being entered into solely to acquire or carry on a business or commercial enterprise, or to a business or commercial organization.

EXPLICIT REAL ESTATE ASSUMPTION

(c) The real property described in the Deed of Trust is located in _____ City/County, Maryland.

EXPLICIT "NO VIOLATIONS" AND "NO CONSENTS AND APPROVALS" ASSUMPTIONS

(d) The Borrower is not subject to any federal, state, or local governmental programs that require governmental consent prior to the Borrower's entering into [commercial loan transactions].[1]

(e) The Borrower is not engaged in an industry or business activity that is specially regulated by any federal, state, or local governmental entity or agency.[2]

EXPLICIT "NO CONFLICTS" ASSUMPTION

(f) There are no judicial, governmental, administrative, or arbitral judgments, orders, injunctions, decrees, or awards outstanding against the Borrower, and there are no judicial or governmental actions, suits, or proceedings, or any arbitrations or mediations, pending or threatened against the Borrower or any of its properties [that (i) seek to affect the enforceability of the Transaction Documents, or (ii) come within [the objective standard established in the [Transaction Documents] for disclosure of such matters] [other objective threshold]].[3]

EXPLICIT PERFECTION AND PRIORITY ASSUMPTIONS

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[1] Instead of making this point as an assumption, it may be contained in a certificate from the Borrower. *See* ***Paragraph I.(vi)*** above and the Illustrative Certificate.

[2] If giving a "consents and approvals" opinion and not a "no violation" opinion, add at the end of this assumption: "that requires its consent prior to the Borrower's entering into [commercial loan transactions]." Instead of making this point as an assumption, it may be contained in a certificate from the Borrower. *See* ***Paragraph I.(vi)*** above and the Illustrative Certificate.

[3] Instead of making this point as an assumption, it may be contained in a certificate from the Borrower. *See* ***Paragraph I.(vi)*** above and the Illustrative Certificate.

(g) The Borrower is not a "transmitting utility" (as defined in Section 9-102 of the UCC).

IV. Opinions

Based on our review of the foregoing and subject to the assumptions, qualifications, and limitations set forth herein, it is our opinion that, as of the date of this letter:

1. The Borrower is a limited liability company duly formed, validly existing, and in good standing under the laws of the State of Maryland.

2. The Borrower has the limited liability company power to enter into and perform its obligations under the Transaction Documents [and to own its current properties and conduct its business pursuant to its Articles of Organization and Operating Agreement as described under the heading {heading name} in the {applicable document describing business and properties}].

3. All necessary limited liability company action has been taken to authorize the execution, delivery, and performance of the Transaction Documents by the Borrower.

4. The Transaction Documents have been duly executed and delivered by the Borrower and the Guarantor (as the case may be).

5. The Transaction Documents constitute the valid and binding obligations of the Borrower and the Guarantor (as the case may be), enforceable against the Borrower and the Guarantor (as the case may be) in accordance with their terms.

6. The Deed of Trust is in appropriate form to permit due recordation in the Recording Office and, upon proper recording and indexing, to create the encumbrance and security interest that it purports to create on all right, title and interest of the grantor named therein in the real property described therein. [_____ County/Baltimore City], Maryland, is the county [jurisdiction] in which the Deed of Trust must be properly recorded and indexed in order to cause the encumbrance and security interest that the Deed of Trust purports to create to be effective as against creditors of and purchasers from the grantor of the Deed of Trust. No instrument other than the Deed of Trust is required to be filed in the Recording Office in order to create the aforesaid encumbrance and security interest.

7. The Deed of Trust creates a security interest in favor of the Lender, as security for the obligations described therein, in all of the Collateral described in the Deed of Trust that is composed of fixtures (as that term is defined in the Maryland UCC) and goods that are to become fixtures. Upon recordation of the Deed of Trust in the Recording Office and proper indexing there, the security interest created by the Deed of Trust in that portion of the collateral

described in the Deed of Trust that is composed of fixtures and goods that are to become fixtures will be perfected.[4]

8. The Financing Statement is in appropriate form for due filing among the financing statement records of the SDAT pursuant to the Maryland UCC.

9. The execution and delivery by the Borrower of the Transaction Documents and the performance by the Borrower of its payment obligations under the Transaction Documents do not violate any Applicable Laws. As used herein, "Applicable Laws" means those laws, rules and regulations of governmental authorities of the State (excluding those of counties, cities, and other municipalities) ("Maryland Governmental Authorities") that we, in the exercise of customary professional diligence, would reasonably recognize as being applicable to [the Borrower and] the transactions contemplated by the Transaction Documents.[5]

10. The execution and delivery of the Transaction Documents, the performance of the Borrower's obligations under the Transaction Documents and the borrowing of the Loan will not:

(i) conflict with the Articles of Organization or the Operating Agreement of the Borrower, or

(ii) constitute a material breach or default under any of the agreements to which the Borrower or the Guarantor is a party and which are listed on _____[6]], or

(iii) to our knowledge (and without having ordered or reviewed any judgment, lien or other searches, either in the public domain or of the Borrower or the Guarantor or the properties of either),[7] conflict with or result in a material breach or default

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[4] Opinion 7 provides that the deed of trust serves as a fixture filing. If the financing statement is to be filed as a fixture filing, use the following in lieu of opinion 7:

> 7. The Financing Statement is in appropriate form for filing in the Recording Office. The Deed of Trust creates a security interest in favor of the secured party, as security for the obligations described therein, in all of the collateral described in the Deed of Trust that is composed of fixtures and goods that are to become fixtures. Upon the acceptance and filing of the Financing Statement in the Recording Office, the security interest created by the Deed of Trust in that portion of the collateral described in the Financing Statement that is composed of fixtures and goods that are to become fixtures will be perfected.

[5] The Committee discourages the requesting or giving of this opinion. *See* Section D.9 of the Report.

[6] An alternative to this part of the opinion, under the appropriate circumstances, is: "to our knowledge, constitute a material breach or default under any contract, mortgage, agreement or other document or instrument to which the Company is a party."

[7] Deleted parenthetical text is opinion giver has reviewed a search.

under any judgment, order, writ or decree of any court or governmental authority binding on the Borrower or the Guarantor, or the properties of either, or to which the Borrower or the Guarantor is subject and which is of specific application to the Borrower or the Guarantor (as the case may be).

11. To our knowledge, no consent, approval, authorization, or other action by, or filing with, any governmental authority is required for the execution and delivery by the Borrower or the Guarantor of the Transaction Documents, or, if required, the requisite consent, approval, or authorization has been obtained, the requisite filing has been accomplished, or the requisite action has been taken.

12. To our knowledge, there is no action or proceeding pending before any court or administrative body, or overtly threatened in writing, against the Borrower or the Guarantor, or any of their properties except for matters described on _____.

13A. IF A RECORDATION TAX IS DUE:

Other than the recordation tax imposed pursuant to Title 12 of the Tax-Property Article of the Annotated Code of Maryland, and nominal per page or per document filing fees due on recordation of the Deed of Trust, no fees, taxes or other charges are due or payable in the State of Maryland in connection with the execution, delivery and recording of the Deed of Trust [Mortgage] and the filing of the Financing Statement in the Recording Office.

13B. IF NO RECORDATION TAX IS DUE BECAUSE OF AN EXEMPTION:

Subject to the qualifications set forth below, pursuant to Sections 12-108(__) and 13-207(__) of the Tax-Property Article, Annotated Code of Maryland [and the relevant section of the county code where the property is located, if applicable], no fees, taxes or other charges are due or payable in the State of Maryland in connection with the execution, delivery and recording of the Deed of Trust or the filing of the Financing Statement in the Recording Office, other than nominal per page or per document filing fees.[8]

V. Qualifications

In addition to the qualifications set forth above, the opinions set forth herein are also subject to the following qualifications:

IMPLICIT ENFORCEABILITY QUALIFICATIONS

(i) Our opinion in ***Paragraph IV.5*** regarding enforceability is subject to applicable bankruptcy, insolvency, reorganization, moratorium, and other laws affecting the rights of creditors generally.

[8] If no recordation tax is due because the instrument is an indemnity deed of trust, add the applicable opinion in Section D.8 of the Report.

(ii) Our opinion in ***Paragraph IV.5*** regarding enforceability is subject to the exercise of judicial discretion in accordance with general principles of equity;

EXPLICIT ENFORCEABILITY QUALIFICATION

(iii) In addition to the qualifications set forth in ***Paragraphs V.(i) and (ii)***, and to other qualifications set forth in this opinion letter, certain remedies, waivers, and other provisions of the Transaction Documents may not be enforceable for other reasons (the "Other Reasons"); nevertheless, unenforceability of provisions of the Transaction Documents for Other Reasons will not render the Transaction Documents invalid as a whole or preclude (a) the judicial enforcement of the obligation of the Borrower to repay the principal, together with interest thereon (to the extent not deemed a penalty) as provided in the Note, (b) the acceleration of the obligation of the Borrower to repay such principal, together with such interest, upon a material default by the Borrower in the payment of such principal or interest or upon a material default in any other material provision of the Transaction Documents, (c) the enforcement of the obligations of Guarantor under the Guaranty, and (d) the foreclosure in accordance with applicable Law of the lien on and security interest in the collateral described in and created by the Transaction Documents upon maturity or upon acceleration pursuant to clause (b) above.

EXPLICIT CONSENTS AND APPROVALS QUALIFICATION

(iv) Our opinion in ***Paragraph IV.11*** regarding consents and approvals is based upon our consideration of only those consents, approvals, authorizations, orders, registrations, declarations or filings required under those statutes, rules or regulations of the State of Maryland, if any, that, in our experience, are normally applicable to the transactions of the type contemplated under the Transaction Documents.

VI. Limitations

(A) We express no opinion as to the laws of any jurisdiction other than the laws of the State of Maryland [and the federal law of the United States]. We express no opinion as to the principles of conflict of laws of any jurisdiction, including the laws of the State of Maryland [and the federal laws of the United States] [except as specifically set forth herein].

(B) We assume no obligation to supplement our opinions if any applicable law changes after the date of this letter or if we become aware of any facts that might change the opinions expressed in this letter after the date of this letter.

(C) The opinions expressed in this letter are limited to the matters set forth in this letter, and no other opinions shall be implied or inferred beyond the matters expressly stated.

(D) The opinions expressed in this letter are solely for the use of the Lender and subsequent holders of the Note and their counsel], and these opinions may not be relied on by any other persons without our prior written approval. Subsequent holders of the Note may only

rely on these opinions to the extent such reliance is actual and reasonable and is not based on different or changing facts or circumstances.

VII. Reference to Report

This letter is to be interpreted in accordance with the 2007 Report on Lawyers' Opinions in Business Transactions by the Special Joint Committee of the Section of Business Law and the Section of Real Property, Planning and Zoning of the Maryland State Bar Association, Inc.

Very truly yours,

[Signature of Lawyer/Law Firm
representing Borrower and Guarantor]

NOTE: Provisions noted as "IMPLICIT" are deemed part of the opinion letter whether or not they are specifically set forth therein.

5. Illustrative Share Issuance Opinion Letter

[Letterhead of Lawyer or Law Firm]

[DATE]

[Investor's name and address]

Re: Agreement of Sale and Purchase (the "Transaction"), dated _____, between ABC Property Trust and _____

Ladies and Gentlemen:

We have acted as counsel to ABC Property Trust, a Maryland real estate investment trust (the "Company"), in connection with the Transaction contemplated by the Agreement of Sale and Purchase, dated as of _____ (the "Agreement"), by and between the Company and _____ (the "Investor"). This letter is furnished to satisfy [the condition set forth in Section ____ of the Agreement (as hereinafter defined)] your request dated _____]. All capitalized terms used in this letter that are not otherwise defined herein shall have the meanings assigned to them in the Transaction Documents (as hereinafter defined).

I. Documents Reviewed and Matters Considered

In our capacity as counsel to the Company and for purposes of this opinion, we have examined the following documents (all of which are collectively referred to as the "Documents"):

(i) the Agreement, whereby the Investor will purchase _____ [common] shares (the "Shares") of beneficial interest, par value $____ per share (the "Common Shares"), of the Company, and [list other documents] (collectively, the "Transaction Documents");

(ii) the declaration of trust of the Company, as amended and supplemented through the date of this opinion, and the bylaws of the Company;

(iii) the records of the proceedings and actions of the Board of Trustees of the Company with respect to the transactions between the Company and the Investor contemplated by the Transaction Documents;

(iv) a Certificate of Status of the Maryland State Department of Assessments and Taxation ("SDAT") dated _____ to the effect that the Company is in good standing in the State of Maryland;

(v) certificate of an officer of the Company as to such matters as we deem necessary and appropriate to enable us to render this opinion letter, dated as of the date hereof;:

[(vi) reports by [search firm] of judgments, orders, and decrees outstanding against, actions, suits, or proceedings pending against, and tax liens filed with respect to the Company in the jurisdictions and as of the dates indicated in such reports;]

[(vii) the form of certificate evidencing a Share (the "Form Share Certificate");]

[(viii) list other documents and certificates relied upon;] and

(ix) such other documents and matters as we have deemed necessary and appropriate to render the opinions set forth in this letter, subject to the assumptions, qualifications and limitations noted below.

II. Definition of "Knowledge"

In basing the opinions and other matters set forth herein on "our knowledge," the words "our knowledge" and similar language used herein signify that, in the course of our representation of the Company in matters with respect to which we have been engaged by the Company as counsel, no information has come to our attention that would give us actual knowledge or actual notice that any such opinions or other matters are not accurate or that any of the foregoing documents, certificates, reports, and information on which we have relied are not accurate and complete. Except as otherwise stated herein, we have undertaken no independent investigation or verification of such matters. The words "our knowledge" and similar language used herein are limited to the knowledge of the lawyers within our firm who are involved in the Transaction or who have worked on matters on behalf of the Company within the prior twelve months and are presently at the firm.

III. Assumptions

In reaching the opinions set forth below, we have assumed, and to our knowledge there are no facts inconsistent with, the following:

IMPLICIT GENERAL ASSUMPTIONS

(a) Each individual executing any of the Documents, whether on behalf of such individual or another person, is legally competent to do so.

(b) Each individual executing any of the Documents on behalf of a party (other than the Company) is duly authorized to do so.

(c) All Documents submitted to us as originals are authentic. All Documents submitted to us as certified or photostatic copies conform to the original documents. All Documents upon which we have relied are accurate and complete. All public records reviewed

or relied upon by us or on our behalf are true and complete and remain so as of the date of this letter.

(d) The form and content of all Documents submitted to us as unexecuted drafts do not differ in any respect relevant to this opinion from the form and content of such Transaction Documents as executed and delivered.

(e) All representations, warranties, statements and information contained in the Documents are accurate and complete.

(f) All signatures on all Documents submitted to us for examination are genuine.

(g) There has been no oral or written modification of or amendment to any of the Documents, and there has been no waiver of any of provision of any of the Documents, by actions or omission of the parties or otherwise.

(h) Each individual executing a certificate is authorized to do so and has knowledge about all matters stated therein. The contents of each such certificate are accurate and complete and remain so as of the date of this letter.

IMPLICIT ENFORCEABILITY ASSUMPTIONS

(i) Each of the parties (other than the Company) executing any of the Transaction Documents has duly and validly executed and delivered each of the Transaction Documents to which such party is a signatory, and such party's obligations set forth therein are legal, valid, and binding and are enforceable in accordance with all stated terms.

(j) The Investor and its successors and assigns will comply with all requirements of applicable procedural and substantive law in exercising any rights or enforcing any remedies under the Transaction Documents.

(k) The Transaction 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.

EXPLICIT EQUITIES ASSUMPTION

(l) The Shares will not be issued or transferred in violation of the restrictions or limitations contained in the Company's declaration of trust and the outstanding shares of beneficial interest of the Company were not issued or transferred in violation of the restrictions or limitations contained in the Company's declaration of trust.

EXPLICIT "FORM OF CERTIFICATE" ASSUMPTION

(m) All share certificates evidencing the Shares are in substantially the same form as the Form Share Certificate.

IV. Opinions

Based on our review of the foregoing and subject to the assumptions, qualifications and limitations set forth herein, it is our opinion, as of the date of this letter, that:

1. The Company is a real estate investment trust duly formed, validly existing and in good standing under the laws of the State of Maryland.

2. The Company has the trust power to enter into and perform its obligations under the Transaction Documents.

3. All necessary trust action has been taken to authorize the execution, delivery, and performance of the Transaction Documents by the Company.

4. The Transaction Documents have been duly executed and delivered by the Company.

5. The Transaction Documents constitute the valid and binding obligations of the Company, enforceable against the Company in accordance with their terms.

6. The issuance of the Shares has been duly authorized and the Shares are validly issued, fully paid and nonassessable.

7. The authorized shares of the Company consist of [_____] common shares of beneficial interest, par value $[_____] per share.

8. There are no preemptive rights with respect to the Shares under the Maryland REIT Law, the declaration of trust, or the bylaws.

9. The share certificates evidencing the Shares comply in all material respects with the Maryland REIT Law, the declaration of trust and the bylaws.

10. The execution and delivery of the Transaction Documents, the performance of the Company's obligations under the Transaction Documents and the issuance of the Shares will not:

(i) conflict with the declaration of trust or bylaws of the Company, or

[(ii) to our knowledge, constitute a material breach or default under any contract, mortgage, agreement or other document or instrument to which the Company is a party, or

(iii) to our knowledge, conflict with or result in a material breach or default under any judgment, order, writ or decree of any court or governmental authority binding on the Company or to which the Company is subject and which is of specific application to the Company.

11. To our knowledge, no consent, approval, authorization, or other action by, or filing with, any governmental authority is required for the execution and delivery by the Company of the Transaction Documents.

12. To our knowledge, there is no action or proceeding pending before any court or administrative body, or overtly threatened in writing, against the Company.

V. Qualifications

In addition to the other matters set forth in this letter, the opinions set forth herein are also subject to the following qualifications:

EXPLICIT GENERIC QUALIFICATION

(i) Except to the extent otherwise set forth above, we have not made an independent review of any contract or agreement that may have been executed by or may be binding on the Company, nor have we undertaken to review our internal files or any files of the Company relating to transactions to which the Company may be a party, or, other than as set forth above, to discuss the Company's transactions or business with any lawyers in our firm or with any officers, trustees or shareholders of the Company.

IMPLICIT ENFORCEABILITY QUALIFICATIONS

(ii) Our opinion in Paragraph IV.5 regarding enforceability is subject to the following:

(a) applicable bankruptcy, insolvency, reorganization, moratorium, and other laws affecting the rights of creditors generally;

(b) the exercise of judicial discretion in accordance with general principles of equity.

(iii) Enforceability may be limited to the extent that remedies are sought with respect to a breach that a court concludes is not material or does not adversely affect the Investor.

(iv) We express no opinion on the enforceability of any provisions requiring the Company to waive procedural, judicial, or substantive rights, such as rights to notice, service of process, right to a jury trial and statutes of limitations.

(v) We express no opinion on the enforceability of any provisions requiring the Company to indemnify or make contribution to the Investor or its agents, officers, or directors or of any provisions exculpating the Investor from liability for its actions or inaction to the extent such indemnification, contribution or exculpation is contrary to public policy or law.

(vi) We express no opinion on the enforceability of any provisions permitting modifications of the Transaction Documents only if in writing.

(vii) We express no opinion on the enforceability of any provision stating that the provisions of the Transaction Documents are severable.

(viii) Unless otherwise expressly stated in the opinion, we express no opinion with respect to the laws and regulations relating to health and safety, labor, employment, employee benefits, or land use and subdivision; Federal Reserve Board margin regulations; anti-trust laws of the United States or any state; securities laws of the United States (including the Trust Indenture Act) or any state; or the tax laws of the United States or any state.

(ix) We express no opinion with respect to any documents defined or referred to in the Transaction Documents other than the Transaction Documents themselves.

(x) The opinions expressed herein are subject to the effect of any judicial decision that may permit the introduction of parol evidence to modify the terms or the interpretation of agreements.

(xi) We express no opinion as to the laws, ordinances, zoning restrictions, rules or regulations of any city, county or other municipality or any other local governmental agency.

EXPLICIT ENFORCEABILITY QUALIFICATIONS

(xii) We express no opinion with respect to the enforceability of, or the compliance with any applicable law of, any provision set forth in the Transaction Documents purporting to confer jurisdiction upon any court to hear or resolve any suit, action or proceeding seeking to enforce any provision of or based upon any matter arising out of or in connection with the Transaction documents.

(xiii) We express no opinion with respect to the enforceability of provisions relating to dividends and distributions that may be limited by laws affecting the right to authorize, declare, make or receive dividends or other distributions.

(xiv) We express no opinion with respect to the enforceability of, or the compliance with any applicable law of, any provision of the Transaction Documents that (a) would require the Company to take any particular action after the date hereof that by law could only be undertaken upon the approval of the stockholders or the Board of Trustees (or any committee thereof) of the Company or (b) would require the shareholders, a trustee or the Board of Trustees (or any committee thereof) of the Company or any person or entity other than the Company to take, or to refrain from taking, any particular action after the date hereof.

(xv) The parties have chosen the laws of the State of _____ to govern matters of interpretation and enforcement. In rendering our opinion, we have assumed, with your express permission, that the law of _____ is identical to the law of Maryland in all respects material to our opinion. Further, we have assumed that a court of competent jurisdiction would honor the parties' choice of law and that _____ law would be applied. We express no opinion as to the enforceability of the choice of law provision or to the

extent to which a court of competent jurisdiction would apply _____ law to any issue(s) before it.

IMPLICIT CONSENTS AND APPROVALS QUALIFICATIONS

(xvi) We express no opinion as to any consent, approval, authorization or other action or filing necessary or required for the ongoing operation of the Company's business.

(xvii) We express no opinion as to any consent, approval, authorization, or other action by, or filing with any city, county or other municipality or any other local government agency.

EXPLICIT CONSENTS AND APPROVALS QUALIFICATION

(xviii) Our consents and approvals opinion is based upon our consideration of only those consents, approvals, authorizations, orders, registrations, declarations or filings required under those statutes, rules or regulations of the State of Maryland, if any, that, in our experience, are reasonably applicable to the transactions of the type contemplated under the Transaction Documents.

VI. Limitations

(A) We express no opinion as to the laws of any jurisdiction other than the laws of the State of Maryland and the federal law of the United States. We express no opinion as to the principles of conflict of laws of any jurisdiction, including the laws of the State of Maryland and the federal laws of the United States.

(B) We assume no obligation to supplement our opinions if any applicable law changes after the date of this letter or if we become aware of any facts that might change the opinions expressed in this letter after the date of this letter.

(C) The opinions expressed in this letter are limited to the matters set forth in this letter, and no other opinions shall be implied or inferred beyond the matters expressly stated.

(D) The opinions expressed in this letter are solely for the use of the Investor and its counsel, and these opinions may not be relied on by any other persons without our prior written approval.

VII. Reference to Report

This letter is to be interpreted in accordance with the 2007 Report on Lawyers' Opinions in Business Transactions by the Special Joint Committee of the Section of Business Law and the Section of Real Property, Planning and Zoning of the Maryland State Bar Association, Inc.

Very truly yours,

[Signature of Lawyer/Law Firm
representing Company]

NOTE: Provisions noted as "IMPLICIT" are deemed part of the opinion letter whether or not they are specifically set forth herein.

6. Illustrative Corporation, General Partnership, Limited Partnership, Limited Liability Partnership, Company, or Real Estate Investment Trust or Business Trust Certificate

(Accompanies the Maryland Illustrative Transaction Opinion Letters)

Re: [Insert description of the Transaction][the ("Transaction")]

The undersigned, being the [officer/partner/member] of [ABC Corporation, a Maryland corporation] [ABC General Partnership, a Maryland general partnership] [ABC Limited Partnership, a Maryland limited partnership] [ABC Limited Liability Company, a Maryland limited liability company] [ABC Property Trust, a Maryland real estate investment trust] [ABC Business Trust, a Maryland business trust] ("ABC"), does hereby certify that, to the best of [his/her /their] knowledge, information, and belief:

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

[Insert list of Transaction Documents]

2. ABC is subject to the following [federal/state/local] governmental programs and no others [is engaged in an industry or business activity that is specially regulated by any federal, state, or local governmental entity or agency] that require governmental consent prior to entering into the Transaction and executing, delivering and performing the Transaction Documents.

a. _____

b. _____

c. _____

-or-

[2. ABC is not subject to any governmental programs that require governmental consent prior to entering into the Transaction and executing, delivering and performing the Transaction Documents [is not engaged in an industry or business activity that is specially regulated by any federal, state, or local governmental entity or agency].]

3. Except as set forth on **Schedule 1** attached hereto and made a part hereof, there are no judicial, governmental, administrative or arbitral judgments, orders, injunctions, decrees, or awards outstanding against ABC, and there are no judicial or governmental or administrative actions, suits, or proceedings, or any arbitrations or mediations, pending or threatened against ABC or any of its properties [that (i) seek to affect the enforceability of the Transaction Documents, or (ii) come within [the objective standard established in the Transaction Documents for disclosure of such matters] [other objective threshold]].

4. Attached hereto as **Schedule 2** and made a part hereof is an accurate and complete list of all indentures, mortgages, deeds of trust, security agreements, leases, contracts, and other

agreements and instruments to which ABC is a party, or which are otherwise binding on ABC as a guarantor, endorser, assignee, or otherwise, 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 ABC.

5. Attached hereto as **Schedule 3** and made a part hereof is an accurate and complete list of all jurisdictions in which ABC owns or leases tangible personal property; owns or leases real property; employs individuals on ABC's payroll; pays state taxes; maintains advertising, telephone listings, offices, agents, research and development facilities, warehouses, or bank accounts; or performs extensive or pervasive activities, including without limitation management functions, contract execution, distribution, and solicitation.

6. Attached hereto as **Schedule 4** and made a part hereof is an accurate and complete list of current [principal] properties owned or leased, and current [principal] businesses conducted, by ABC, and their locations.

[7. For commercial loan transactions: The proceeds of the Transaction are to be used solely [to acquire/conduct] the [business[es]/commercial enterprise[s]] of _____.]

[8. For real estate loans and real estate transactions: [ABC intends to construct] [The subject property is presently improved by] an office building for sole use as business and professional offices [upon the subject property].]

[paragraphs 9 through 14 below are for a corporation]

9. ABC's charter, as amended to date, is attached hereto as **Exhibit A** and is in full force and effect as of the date hereof, and there has been no amendment or proceedings relating to the amendment or correction of the charter filed or authorized since [date], and no action has been taken or is contemplated regarding any such amendment.

10. ABC's bylaws, as amended to date, are attached hereto as **Exhibit B** and are in full force and effect as of the date hereof, were in effect on the dates of adoption of the Corporate Resolutions of ABC's Board of Directors referred to herein, and there has been no amendment or proceedings relating to the amendment of the bylaws, and no action has been taken or is contemplated regarding any such amendment.

11. Attached hereto as **Exhibit C** and made a part hereof is an incumbency certificate regarding the officers of ABC certified by the secretary of ABC.

12. Attached hereto as **Exhibit D** and made a part hereof is a certified copy of the corporate resolutions of the Board of Directors of ABC authorizing the execution, delivery and performance of the Transaction Documents (the "Corporate Resolutions"). The Corporate Resolutions were adopted at a duly called meeting of the Board at which a quorum of incumbent directors was present throughout. The Corporate Resolutions have not been modified or rescinded, and there are no other corporate resolutions relating to the Transaction Documents.

13. As of the date hereof, no judicial proceeding has been instituted by the Attorney General of the State of Maryland alleging that ABC has abused, misused, or failed to use its powers and franchises in a manner which, in the public interest, would make proper the forfeiture of the charter of ABC or the dissolution of ABC; no articles of dissolution have been filed with the Maryland State Department of Assessments and Taxation; no petition has been filed in any court of competent jurisdiction to dissolve ABC; and no proceedings with a view to the liquidation or dissolution of ABC are contemplated.

14. No proceedings by or against ABC 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 ABC 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 ABC.

[paragraphs 15 through 18 below are for a general partnership]

15. ABC's partnership agreement, as amended to date, is attached hereto as **Exhibit A** and is in full force and effect as of the date hereof, and there has been no amendment or proceedings relating to the amendment of the partnership agreement authorized since [date] and no partnership action has been taken or contemplated regarding any such amendment.

16. Attached hereto as **Exhibit B** is a certified copy of the [unanimous] written consent of partners of ABC authorizing the execution, delivery and performance of the Transaction Documents (the "Consent"), which Consent constitutes all [necessary consents] [required votes] of the partners of ABC required to approve the Transaction. The Consent has not been modified or rescinded, and there are no other consents relating to the Transaction Documents.

17. No proceedings by or against ABC or any partner of ABC 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 ABC or any partner of ABC made an assignment for the benefit of creditors, admitted in writing an inability to pay debts generally as they become due, or filed or had filed against it or [him/her] any action seeking an order appointing a trustee or receiver of all or a substantial part of the property of ABC or any such partner.

18. No judicial proceeding has been filed or is pending for the dissolution of ABC, and no circumstances have occurred or exist that have triggered or will trigger a dissolution of ABC under the partnership agreement of ABC or under the Maryland Revised Uniform Partnership Act, and no proceedings with a view to the liquidation or dissolution of ABC are contemplated.

[paragraphs 19 through 25 below are for a limited partnership]

19. ABC's limited partnership agreement, as amended to date, is attached hereto as **Exhibit A** and is in full force and effect as of the date hereof, and there has been no amendment

or proceedings relating to the amendment of the limited partnership agreement authorized since [date], and no limited partnership action has been taken or contemplated regarding any such amendment.

20. Attached hereto as **Exhibit B** is a copy of the certificate of limited partnership [and all amendments] of ABC.

21. [For a limited partnership formed prior to July 1, 1982: ABC has elected to be governed by the Maryland Revised Uniform Limited Partnership Act and has appointed a resident agent,] [and] [T]here have been no amendments to the certificate of limited partnership of ABC other than those reflected on the long form Status Certificate of ABC obtained from the Maryland State Department of Assessments and Taxation dated _____, 20__.

22. Attached hereto as **Exhibit C** is a certified copy of the [unanimous] written consent of partners of ABC authorizing the execution, delivery and performance of the Transaction Documents (the "Consent"), which Consent constitutes all [necessary consents] [required votes] of the partners of ABC required to approve the Transaction. The Consent has not been modified or rescinded, and there are no other consents relating to the Transaction Documents.

23. No proceedings by or against ABC or any general partner of ABC 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 ABC or any general partner of ABC made an assignment for the benefit of creditors, admitted in writing an inability to pay debts generally as they become due, or filed or had filed against it or [him/her] any action seeking an order appointing a trustee or receiver of all or a substantial part of the property of ABC or any such general partner.

24. No judicial proceeding has been filed or is pending for the dissolution of ABC, and no circumstances have occurred or exist which have triggered or will trigger a dissolution of ABC under the limited partnership agreement of ABC or certificate of limited partnership of ABC or under the Maryland Revised Uniform Limited Partnership Act, and no proceedings with a view to the liquidation of ABC are contemplated.

[paragraphs 25 through 30 below are for a limited liability company]

25. Attached hereto as **Exhibit A** is a copy of the certificate of articles of organization [and all amendments] of ABC.

26. There have been no amendments to the articles of organization of ABC other than those reflected on the long form Status Certificate of ABC obtained from the Maryland State Department of Assessments and Taxation dated _____, 20__.

27. ABC's operating agreement, as amended to date, is attached hereto as **Exhibit B** and is in full force and effect as of the date hereof, and there has been no amendment or proceedings relating to the amendment of the operating agreement authorized since [date], and no limited liability company action has been taken or contemplated regarding such an amendment [or, for an LLC that does not have a written operating agreement: ABC does not

have a written operating agreement, but under the oral operating agreement of ABC _____ has the authority to approve transactions such as the Transaction and to execute the Transaction Documents on behalf of ABC].

28. Attached hereto as **Exhibit C** is a certified copy of the [unanimous] written consent of the [members] [managers] of ABC authorizing the execution, delivery and performance of the Transaction Documents (the "Consent"), which Consent constitutes all [necessary consents] [required votes] of the [members] [managers] of ABC required to approve the Transaction. The Consent has not been modified or rescinded, and there are no other consents relating to the Transaction Documents.

29. No proceedings by or against ABC or any member of ABC 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 ABC or any member of ABC made an assignment for the benefit of creditors, admitted in writing an inability to pay debts generally as they become due, or filed or had filed against it or [him/her] any action seeking an order appointing a trustee or receiver of all or a substantial part of the property of ABC or any such member.

30. No judicial proceeding has been filed or is pending for the dissolution of ABC, and no circumstances have occurred or exist that have triggered or will trigger a dissolution of ABC under the articles of organization or the operating agreement of ABC or under the Maryland Limited Liability Company Act (for example, there has been no period of 90 consecutive days during which ABC has had no members), and no proceedings with a view to the liquidation of ABC are contemplated.

[paragraphs 31 through 36 below are for a real estate investment trust]

31. ABC's declaration of trust, as amended to date, is attached hereto as **Exhibit A** and is in full force and effect as of the date hereof, and there has been no amendment or proceedings relating to the amendment or correction of the declaration of trust filed or authorized since [date], and no action has been taken or is contemplated regarding any such amendment.

32. ABC's bylaws, as amended to date, are attached hereto as **Exhibit B** and are in full force and effect as of the date hereof, were in effect on the dates of adoption of the REIT Resolutions of ABC's Board of Trustees referred to herein, and there has been no amendment or proceedings relating to the amendment of the bylaws, and no action has been taken or is contemplated regarding any such amendment.

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

34. Attached hereto as **Exhibit D** and made a part hereof is a certified copy of the resolutions of the Board of Trustees of ABC authorizing the execution, delivery, and performance of the Transaction Documents (the "REIT Resolutions"). The REIT Resolutions were adopted at a duly called meeting of the Board at which a quorum of incumbent trustees was

present throughout. The REIT Resolutions have not been modified or rescinded, and there are no other resolutions relating to the Transaction Documents.

35. As of the date hereof, no judicial proceeding has been instituted by the Attorney General of the State of Maryland alleging that ABC has abused, misused, or failed to use its powers and franchises in a manner which, in the public interest, would make proper the forfeiture of the Declaration of Trust of ABC or the dissolution of ABC; no notice of termination has been filed with the Maryland State Department of Assessments and Taxation; and no petition has been filed in any court of competent jurisdiction to dissolve ABC.

36. No proceedings by or against ABC 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 ABC 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 ABC.

[paragraphs 37 through 41 below are for a business trust]

37. ABC's certificate of trust, as amended to date, is attached hereto as **Exhibit A** and is in full force and effect as of the date hereof, and there has been no amendment or proceedings relating to the amendment of the certificate of trust authorized since [date], and no trust action has been taken or contemplated regarding any such amendment.

38. ABC's Governing Instrument, as amended to date, is attached hereto as **Exhibit B** and is in full force and effect as of the date hereof, was in effect on the dates of adoption of the Trust Resolutions referred to herein, and there has been no amendment or proceedings relating to the amendment of the Governing Instrument, and no action has been taken or contemplated regarding any such amendment.

39. Attached hereto as **Exhibit C** and made a part hereof is a certified copy of the resolutions of the Board of Trustees authorizing the execution, delivery, and performance of the Transaction Documents (the "Trust Resolutions"). The Trust Resolutions were adopted at a duly called meeting of the Board at which a quorum of incumbent trustees was present throughout. The Trust Resolutions have not been modified or rescinded, and there are no other trust resolutions relating to the Transaction Documents.

40. As of the date hereof, no judicial proceeding has been instituted by the Attorney General of the State of Maryland alleging that ABC has abused, misused, or failed to use its powers and franchises in a manner which, in the public interest, would make proper the forfeiture of the Declaration of Trust of ABC or the dissolution of ABC; no notice of termination has been filed with the Maryland State Department of Assessments and Taxation; and no petition has been filed in any court of competent jurisdiction to dissolve ABC.

41. No proceedings by or against ABC 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 ABC 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 ABC.

42. No judicial proceeding has been filed or is pending for the dissolution of ABC, and no circumstances have occurred or exist that have triggered or will trigger a dissolution of ABC under the certificate of trust or the governing instrument of ABC.

[paragraphs 43 through 46 below are additional certifications if issuing an opinion as to the issuance of equity. These paragraphs are specifically drafted for a corporation, so appropriate adjustments should be made for other entities.]

43. Attached hereto as Exhibit E is a true and complete copy of resolutions adopted by the Board of Directors of ABC (the "Issuance Resolutions"), relating to the sale and issuance of _____ shares (the "Shares") of common stock, [$.01] par value per share (the "Common Stock") of ABC, certified as of the date hereof by the Secretary of ABC. The Issuance Resolutions were adopted at a duly called meeting of the Board at which a quorum of incumbent directors was present throughout. The Issuance Resolutions have not been modified or rescinded, and there are no other resolutions relating to the issuance of the Shares.

44. ABC actually received the consideration for the Shares contemplated by the Issuance Resolutions

45. ABC is not a party to any contract or agreement granting any of the holders of the Shares preemptive rights.

46. Attached hereto as Exhibit F is an accurate and complete copy of the form of stock certificate of ABC. The stock certificate has been duly and validly executed and, at the closing of the Transaction, will be delivered to the Investors.

This Certificate may be relied upon by [ABC's lawyer/law firm] in [his/her/its] opinions addressed to _____ in connection with the Transaction Documents.

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

WITNESS:

_____ _____

[Officer] of ABC Corporation,
a Maryland corporation

or

_____ _____

[Partner] of ABC General Partnership,
a Maryland general partnership

or

_____ _____

[General Partner] of ABC Limited Partnership,
a Maryland limited partnership

or

_____ _____

[Member/Manager] of ABC Limited Liability
Company, a Maryland limited liability company

or

_____ _____

[Officer] of ABC Property Trust,
a Maryland real estate investment trust

or

_____ _____

[Officer] of ABC Business Trust,
a Maryland business trust

[Attach each of the Schedules and Exhibits referred to in the Certificate]

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