

UNIFORM COMMERCIAL CODE OPINIONS IN REAL ESTATE FINANCE TRANSACTIONS

A Report* of:

the American Bar Association Section of Real Property, Trust and Estate Law, Committee on Legal Opinions in Real Estate Transactions, the American College of Mortgage Attorneys, and the American College of Real Estate Lawyers, Attorneys' Opinions Committee

Reviewed and Approved by:

the American College of Commercial Finance Lawyers

Authors' Synopsis: This Report provides basic guidance for opinion practitioners in real estate finance transactions to consider in giving and reviewing opinions when there is a personal property security interest governed by the Uniform Commercial Code.

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INTRODUCTION

Committees of the American Bar Association Section of Real Property, Trust and Estate Law, the American College of Mortgage Attorneys, and the American College of Real Estate Lawyers have published the Real Estate Finance Opinion Report of 2012¹ and a supplement to the 2012 Report, titled Local Counsel Opinion Letters in Real Estate Finance Transactions.² Both the 2012 Report and the Local Counsel Report covered briefly the subject of legal opinions concerning security interests in fixtures that are governed by the Uniform Commercial Code (U.C.C.) in effect in the jurisdiction whose law applies to the opinion (the Opinion Jurisdiction).

In many routine real estate finance transactions, opinions given on security interests are limited to U.C.C. collateral that is fixtures.³ The 2012 Report notes that “[e]xpress opinions on security interests in personal property other than goods that . . . are to become fixtures are not appropriate in real estate secured financings unless the personal property is an important part of the collateral.”⁴ This Report considers more broadly

¹ See Joint Drafting Committee, *Real Estate Finance Opinion Report of 2012*, 47 REAL PROP. TR. & EST. L. J. 213 (2012) [hereinafter *2012 Report*].

² See Joint Drafting Committee, *Local Counsel Opinion Letters in Real Estate Finance Transactions*, 51 REAL PROP. TR. & EST. L. J. 167 (2016) [hereinafter *Local Counsel Report*]. As its title indicates, the Local Counsel Report focuses on opinions of lawyers covering the law of a specific jurisdiction, usually relating to a security interest in or lien on property where the security interest or lien is governed by the law of a jurisdiction other than that of the jurisdiction whose law governs the main transaction documents, or to a party organized in a jurisdiction other than the jurisdiction whose law governs the main transaction documents otherwise.

³ “Fixtures” are defined in U.C.C. section 9-102(a)(41) as “goods that have become so related to particular real property that an interest in them arises under [local] real property law.” U.C.C. § 9-102(a)(41) (AM. LAW INST. & UNIF. LAW COMM’N 2010). The 2012 Report and the Local Counsel Report included a discussion of “fixtures” because that is the subject related to the U.C.C. addressed most commonly by opinion letters in real estate finance transactions.

⁴ *2012 Report*, *supra* note 1, at 243; see also The Am. Coll. of Real Estate Lawyers Attorneys’ Opinion Comm. and ABA Section of Real Prop., Prob. and Tr. Law Comm. on Legal Opinions in Real Estate Transactions, *Real Estate Opinion Letter Guidelines*, 38 REAL PROP. PROB. & TR. J. 241, 252 (2003) [hereinafter *Real Estate Opinion Guidelines*]. Examples of circumstances where personal property collateral might be an important part of the collateral include financings in the hospitality and health care industries and financings requiring the use of lockbox and other cash management arrangements in which deposit and securities accounts are elements of the collateral. Another example may arise in the context of mezzanine financing where the collateral often consists of pledged equity interests in entities that, directly or indirectly, own real estate.

than its predecessor Reports opinions applying the U.C.C. to real estate and certain real estate-related collateral and also to personal property⁵ when they are an important part of the security for the loan, including deposit accounts and investment securities (which may include entity interests in non-corporate entities pledged in mezzanine financing).

This Report applies to both lead and local counsel opinion letters, and supplements both the 2012 Report and the Local Counsel Report. As evident in those predecessor Reports, the roles of lead and local counsel and the circumstances in which an opinion regarding U.C.C. collateral is to be provided will determine whether and what, if any, opinions may be appropriate on the subject. This Report provides general guidance to give opinion practitioners a clear basis by which to consider giving, and to prepare and review, opinions addressing security interests governed by the U.C.C. in an Opinion Jurisdiction. This Report is not a comprehensive guide to all U.C.C. opinions but presents building blocks for such opinions, the requirements to give them, and example expressions to provide them in typical real estate finance transactions. It also provides references for closer review of the subject matter.⁶ A working knowledge of the U.C.C. and relevant Official Comments is called for when giving opinions on security interests in U.C.C. collateral.

For purposes of this Report, the term “real estate collateral” refers generally to that collateral related to real estate to which the U.C.C. applies. Although fixtures are the most common U.C.C. collateral in a real estate finance transaction and are the primary focus of this Report, certain other collateral related to real estate about which specific provision is made in the U.C.C. is considered. The terms “non-real estate collateral” or “personal property collateral” (used interchangeably in this Report) refer

⁵ The U.C.C. covers many different types of personal property collateral. It generally does not cover real property (such as land, buildings, easements, leases, and (except as to agricultural liens, defined in U.C.C. section 9-102(a)(5)) rents or landlord’s liens) other than fixtures and certain other collateral related to real estate for which provision is expressly made. See U.C.C. § 9-109(a)(1)–(2); § 9-109(d)(1)–(2), (11).

⁶ For a comprehensive treatment of the subject of opinions on security interests in U.C.C. collateral, see generally The TriBar Opinion Committee, *Special Report of the TriBar Opinion Committee: U.C.C. Security Interest Opinions-Revised Article 9*, 58 BUS. LAW. 1451 (2003) [hereinafter *TriBar U.C.C. Report*]. For a discussion of personal property security in a real estate finance transaction, see generally Philip H. Ebling & Steven O. Weise, *What a Dirt Lawyer Needs to Know About New Article 9 of the U.C.C.*, 37 REAL PROP. PROB. & TR. J. 191 (2002). For a more general authoritative treatise on the Uniform Commercial Code, see generally JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE (6th ed. 2010).

to U.C.C. collateral that is not real estate collateral. The term “U.C.C. collateral” refers to either real estate collateral or personal property collateral or both, as the context warrants, in which a security interest may be created under the U.C.C. The term “collateral” as used in this Report and the Illustrative Opinion Letter means all collateral covered by a security instrument.⁷ An opinion letter may use the term or terms defined in the security instrument describing specific collateral where appropriate or a single collective term used in the security instrument, if appropriate, such as “Subject Property” or “Mortgaged Property,” substituted for the term “Collateral.” In this Report, reference to the Illustrative Opinion Letter, unless otherwise qualified, refers to the form attached to this Report as an Addendum.

When personal property is included in a real estate financing, a security agreement may be incorporated in a real estate security instrument (a mortgage, deed of trust, or similar instrument granting a consensual interest in real estate under applicable Opinion Jurisdiction law to secure payment or performance of an obligation, any of which is referred to in

⁷ With a few exceptions noted in U.C.C. section 9-109(d)(11), Article 9 of the U.C.C. does not apply to the creation of a lien on real property. Nevertheless, the U.C.C. recognizes that certain U.C.C. collateral is related to real property and seeks to reconcile security interests in personal property that may become real property. The definition of “goods” in U.C.C. section 9-102(a)(44) includes personal property that is related to or that may be encumbered as real estate—including fixtures and “standing timber that is to be cut and removed under a conveyance or contract for sale.” U.C.C. § 9-102(a)(44). The definition of “goods” excludes minerals prior to extraction, which are real estate, but includes them after extraction as “as-extracted collateral” if meeting the definition in U.C.C. section 9-102(a)(6). *See id.*; U.C.C. § 9-102(a)(6). Application of the U.C.C. to certain real estate-related collateral—as-extracted collateral and standing timber to be cut—is discussed in Part II.A(6) of this Report. As noted there, U.C.C. rules as to fixtures may apply to such other (non-fixture) real estate collateral, but other specific U.C.C. rules apply also. *See infra* Part II.A(6).

The definition of “goods” also includes “crops grown, growing, or to be grown” (also defined as part of “farm products” in U.C.C. section 9-102(a)(34)), including those “produced on trees, vines, or bushes” that remain affixed to the ground (and which may themselves be “fixtures” under local law). U.C.C. § 9-102(a)(34), (44). Crops are non-real estate collateral at all stages of their existence, and a U.C.C. security interest in them may be perfected only as goods by central filing. *See infra* Part II.B. Due to the varying matrix of statutory nonpossessory liens on farm products throughout the country, opinions on crops should exclude such liens or be rendered by a practitioner familiar with the law of the Opinion Jurisdiction. This Report does not provide specific guidance for opinions on farm products or agriculture financing generally. The term “collateral” is defined in U.C.C. section 9-102(a)(12) as “property subject to a security interest or agricultural lien.” U.C.C. § 9-102(a)(12). The potential unintended breadth of reference in use of the term generally indicates caution in its use.

this Report and in U.C.C. section 9-102(a)(55) as a “mortgage”), which is to serve as both a mortgage of real property and a security agreement not only as to fixtures but also as to personal property collateral. Alternatively, the security interest in personal property collateral may be covered in a separate document that is a security agreement focusing more specifically on personal property collateral. Frequently, each type of document is a separate transaction document, and counsel is sometimes asked to provide opinions as to security interests in both real estate collateral and non-real estate collateral under one or both such documents. In this Report, a mortgage or a security agreement is referred to generically as a “security instrument.”

When given, opinions about creation, attachment, and perfection of U.C.C. collateral security interests are usually separately expressed in a third-party opinion letter. They are not implicit in an enforceability opinion.⁸

This Report does not take a position with respect to the appropriateness of opinions as to non-real estate collateral but recognizes that they are sometimes requested. The discussion below seeks to inform the opinion practitioner about how to make and address certain opinion requests. If the opinion giver cannot respond to a request for a U.C.C. collateral opinion in the manner discussed below, the opinion giver should consider declining to provide the opinion, or refer the request to other counsel.

Extra-Jurisdictional U.C.C. Opinions. Because the Uniform Commercial Code is a law enacted in substantially similar form in every state, and state variations are readily accessible through recognized sources, an opinion giver may be asked, and may be inclined, to give an opinion about a security interest under the law of a state on which the opinion giver would not generally render an opinion. It may be thought to be cost-beneficial for counsel already engaged but not admitted in that state to provide the opinion, rather than retain qualified local counsel to do so. These opinions are often limited in scope to the means by which and the location in which to perfect a security interest, and to perfection by filing a financing statement. In giving such an opinion, the opinion giver would have to conclude that it is sufficiently knowledgeable to do so competently. The *TriBar U.C.C. Report* suggests that in such a case the opinion giver should describe the limited extent to which it has reviewed the law of the jurisdiction,⁹ such as by referring to an official statutory

⁸ See *TriBar U.C.C. Report*, *supra* note 6, at 1460.

⁹ See *id.* at 1511.

compilation. By doing so, the opinion giver makes clear that it has not undertaken the degree of review that a lawyer who regularly gives such opinions in the jurisdiction would conduct, putting the recipient on notice that the opinion given is not the equivalent of one prepared by a local counsel.

The subject of whether giving an opinion about the law of another jurisdiction would constitute the practice of law in that jurisdiction is discussed at length in Restatement (Third) of the Law Governing Lawyers § 3 cmt. e (2003), which concludes that “[t]here is no per se bar against such a lawyer giving a formal opinion based in whole or in part on the law of another jurisdiction, but a lawyer should do so only if the lawyer has adequate familiarity with the relevant law.”¹⁰ The same conclusion should be reached in jurisdictions that have adopted Rule 5.5(c)(4) of the American Bar Association Model Rules of Professional Conduct.¹¹

Extra-jurisdictional opinions represent a departure from normal opinion-giving practice. This Report does not take a position concerning extra-jurisdictional U.C.C. opinions other than to note that considerations such as those described above need to be taken into account in the cost-benefit analysis about giving them.

Reader please note: This Report is based on the Official Text and the Official Comments of the Uniform Commercial Code, 2017–2018 Edition (Thomson-Reuters). Variations from the Official Text often occur in state legislative adoptions of the Code. Opinion preparers should review the text adopted in applicable Opinion Jurisdictions and be aware of how variations under applicable law, including non-U.C.C. law, affect the analysis of a given subject and the ability to formulate an opinion about it.

I. U.C.C. CONCEPTS APPLICABLE TO OPINIONS

The U.C.C. provides a specific statutory context for how to create a security interest (creation), how the security interest may become effective against particular collateral (attachment), and how to establish the security interest so that it is effective against third persons (perfection). The U.C.C. also provides highly detailed provisions on the relative status of a created, attached, and perfected security interest as to other creditors (priority). As a matter of customary practice, an enforceability opinion as to a security

¹⁰ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 cmt. e (AM. LAW INST. 2000).

¹¹ See MODEL RULES OF PROF’L CONDUCT r. 5.5(c)(4) (AM. BAR ASS’N 2018).

agreement (in whatever form it takes) does not cover the creation, attachment, perfection, or priority of any security interest provided for in the security agreement.¹² Illustrative Opinion Letter Paragraph 4.6(i) expressly excludes such opinions.¹³ If a specific opinion on creation, attachment, or perfection is provided, such an express exclusion should be modified as necessary.

(a) **Creation.** The U.C.C. does not define creation or specify what it takes to create a security interest. The only definitional reference to creation of a security interest in Article 9 is in the definition of security agreement: “‘Security agreement’ means an agreement that creates or provides for a security interest.”¹⁴ To give a creation opinion about a security interest in U.C.C. collateral, the opinion giver must either determine or assume that creation of or provision for a security interest was properly documented pursuant to a security agreement (ordinarily in writing) effective under the U.C.C. and applicable governing non-U.C.C. law (to the extent not covered by the U.C.C., typically contract law and applicable entity law) of the jurisdiction whose law applies to the creation of the security interest. A security agreement will “create” a security interest if the security agreement:

- (i) is authenticated¹⁵ by the debtor,¹⁶
- (ii) contains a sufficient description of the collateral,¹⁷ and

¹² See *TriBar U.C.C. Report*, *supra* note 6, at 1460.

¹³ See *Illustrative Opinion Letter*, *infra* para. 4.6(i).

¹⁴ U.C.C. § 9-102(a)(74). “Agreement” is defined in U.C.C. section 1-201(b)(3) as “the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade” (defined in U.C.C. section 1-303), to which contract law principles of the Opinion Jurisdiction will apply. U.C.C. § 1-201(b)(3). “Security interest” is defined in U.C.C. section 1-201(b)(35).

¹⁵ “Authenticat[ion]” is defined in U.C.C. section 9-102(a)(7) essentially as signing or executing in some legally recognized manner (including by electronic signatures). See U.C.C. § 9-102(a)(7). Matters of signature and due execution are assumed in most local counsel opinions. See *2012 Report*, *supra* note 1, at 234 and *Local Counsel Report*, *supra* note 2, at 189 if the opinion giver is relying on an assumption; and see *2012 Report*, *supra* note 1, at 266 if authentication is the subject of an opinion. There are three alternatives to an authenticated security agreement that are not germane to a real estate collateral. See U.C.C. § 9-203(b)(3)(B)–(D). These alternatives apply to investment property and deposit accounts. See *infra* Part III.A(2), B(2).

¹⁶ The term “debtor” is defined in U.C.C. section 9-102(a)(28).

¹⁷ See U.C.C. § 9-203(b)(3)(A); see also discussion *infra* Part I.(c).

- (iii) contains language to the effect that a security interest in the collateral is being granted.¹⁸

When these three elements are present, some believe that it is possible to provide an opinion limited to creation of a security interest.¹⁹ Under this view, a U.C.C. security interest may be created and a creation opinion given whether or not the security interest has attached, as discussed in subparagraph (b) following. Others believe that a “creation” opinion is the same as an “attachment” opinion, as described below, and includes the elements of value and rights in the collateral. When an attachment opinion is given (subparagraph (b) following), it subsumes the elements of creation, and there is no need to give a separate creation opinion.

¹⁸ Although a matter of applicable state real property law, an instrument that describes both real estate and non-real estate collateral, uses only language of mortgage or deed of trust, and does not contain the words “grants a security interest in” should be sufficient to serve as a security agreement under the U.C.C. See *TriBar U.C.C. Report, supra* note 6, at 1466; see also *Parks v. Brooks*, 452 B.R. 809, 812 (U.S. Bankr. Kan. 2011).

¹⁹ For example: The [security instrument] creates a security interest in [all right, title, and interest of the Borrower in] that portion of the [Collateral] that is fixtures [or goods that are to become fixtures]. An opinion such as this and the views referenced in the text of this subparagraph are discussed in *TriBar U.C.C. Report, supra* note 6, at 1463, which provides the following discussion of “creation” and “attachment” opinions at n.51:

U.C.C. § 9-102(a)(73) defines a ‘security agreement’ as an agreement that ‘creates or provides for a security interest.’ The word ‘create’ is also found in U.C.C. § 9-109(a)(1) in specifying those transactions to which Article 9 of the U.C.C. applies. Some lawyers believe that the ‘creation’ of a security interest is a necessary, but not sufficient, step for a security interest to attach to collateral. Under that view, an opinion on the ‘creation’ of a security interest covers only some of the steps required for a security interest to ‘attach to’ collateral and an opinion on the ‘attachment’ of a security interest covers all of the steps. Other lawyers believe that no distinction should be made between ‘creation’ and ‘attachment’ opinions. See *infra* § 3.3. Both sides agree that even if a ‘creation’ opinion is narrower than an ‘attachment’ opinion, the additional elements necessary for attachment are implicitly covered when, as is usually the case, a ‘perfection’ opinion is also given in the opinion letter. See *infra* notes 52, 335. However, as noted in section 3.3 *infra*, as a matter of customary practice, a creation or attachment opinion, whether express, or, by virtue of the giving of a perfection opinion, implied, is understood not to cover the question of whether the debtor has rights or the power to transfer rights in the collateral. Some opinion givers do not use either ‘create’ or ‘attach’ but instead state that ‘the secured party has a security interest in the collateral.’ This formulation of the opinion is unobjectionable and is understood to mean that the security interest has attached to the collateral.

(b) **Attachment.** Attachment, a U.C.C. term that is the key element to enforceability of the security interest and a requisite for perfection, is based on facts often assumed (expressly, as is commonly the case in real estate finance opinion letters, or implicitly, as may be recognized by customary practice). Under U.C.C. section 9-203(a), a security interest attaches when it becomes enforceable against the debtor as to the collateral, which requires that:

- (i) value has been given,²⁰
- (ii) the debtor has rights or the power to transfer rights in the collateral,²¹ and
- (iii) either a security agreement has been authenticated²² or special conditions regarding investment property or deposit accounts apply.²³

An attachment opinion can be given if a creation opinion can be given, as the attachment opinion flows from the opinion on creation with the addition of assumptions that value has been given (typically through the loan) and that the borrower has rights (or the power to transfer rights) in the collateral.²⁴ It is unnecessary to give separate creation and attachment opinions.²⁵ An opinion that a security interest in U.C.C. collateral is effective²⁶ can be given if an attachment opinion can be given.

(c) **Collateral description.**²⁷ A creation or an attachment opinion must be based, among other things, on the opinion giver's determination that the description of the U.C.C. collateral is legally sufficient. A security agreement must provide a description of the collateral to create an

²⁰ See U.C.C. § 9-203(a)–(b)(1); see also *Illustrative Opinion Letter*, *infra* para. 2.1(i) for this common assumption.

²¹ See U.C.C. § 9-203(b); see also *Illustrative Opinion Letter*, *infra* para. 2.1(b) for this common assumption.

²² See U.C.C. § 9-203(b)(3)(A).

²³ See U.C.C. § 9-203(b)(3)(B)–(D).

²⁴ These assumptions are by customary practice implicit. See *2012 Report*, *supra* note 1, at 233. Many lawyers preparing opinion letters in real estate finance transactions nonetheless choose to explicitly state assumptions essential to an opinion.

²⁵ See discussion *infra* Part II.A(2).

²⁶ See U.C.C. § 9-201(a).

²⁷ For further discussion, see *TriBar U.C.C. Report*, *supra* note 6, at 1466 and accompanying notes.

enforceable security interest.²⁸ The description must be sufficient, meaning that it satisfies the requirements of the U.C.C. to reasonably identify the collateral.²⁹ Such a determination would ordinarily not be difficult to make. Examples of what suffices as reasonable identification of collateral are provided in U.C.C. section 9-108(b), and include use of U.C.C. collateral definitions, such as “goods,” “fixtures,” “equipment,” “farm products,” “as-extracted collateral,” and “accounts.” U.C.C. section 9-108(c) provides that a supergeneric description (for example, “all debtor’s assets”) is insufficient as a collateral description for purposes of a security agreement, although U.C.C. section 9-504 permits such a supergeneric description for a financing statement.

Legal sufficiency of the description in the security agreement does not mean that it is factually accurate. An opinion as to legal sufficiency of the description (express or subsumed in another opinion such as attachment or perfection) does not subsume the completeness, adequacy, or factual accuracy of the description, all of which may be assumed, explicitly or implicitly. Illustrative Opinion Letter Paragraph 2.1(h) provides an appropriate formulation of an assumption as to the factual accuracy of the collateral description.³⁰ Paragraph 2.1(h) also provides an assumption that the description reasonably identifies the collateral.³¹ Both assumptions are implicit as a matter of customary practice. They are often stated in a real estate finance opinion letter (see for example, Part II.A(3) below), but less commonly so in opinions dealing with non-real estate collateral.

(d) **Perfection.** Perfecting a security interest is usually required to establish effectiveness against a lien creditor (including a trustee in bankruptcy). U.C.C. sections 9-301 through 9-316 describe how and where to perfect a security interest, and what law governs perfection. Although there are several means by which to perfect a security interest in collateral under the U.C.C., filing a financing statement is the most common. In a most general sense, location of collateral will determine where to file for real estate and real estate related collateral (although, as noted in U.C.C. section 9-501 cmt. 4, filing in the debtor’s location is

²⁸ See U.C.C. § 9-203(b)(3)(A).

²⁹ See U.C.C. § 9-108(a).

³⁰ See *Illustrative Opinion Letter*, *infra* para. 2.1(h).

³¹ See *id.*

equally effective), and location of the debtor will determine the place to file for non-real estate collateral.³²

U.C.C. Article 9, Part 5 provides detailed rules relating to perfection by filing a financing statement that must be considered when providing a perfection opinion. In subsuming or giving a perfection opinion, the opinion giver must either determine or assume that the financing statement (a) sufficiently provides the name of the debtor and secured party³³ and (b) “sufficiently indicates the collateral.”³⁴

The form of existence of a debtor, the nature of the debtor’s business, and the nature of the collateral may influence how perfection is achieved. In many cases, facts pertaining to these matters may be assumed when giving a U.C.C. perfection opinion, but in other cases, the opinion giver will need to ascertain those facts or draw legal conclusions based on available information.

An example of how the nature of the debtor’s business influences perfection is transmitting utilities, discussed further in Part II.A(3) of this Report.³⁵ As noted *infra*, an opinion giver customarily assumes (often without so stating) that the borrower is not a transmitting utility, unless such an assumption is contrary to actual knowledge.

A more problematic example of how the nature of the debtor’s existence affects the perfection process is presented by U.C.C. section 9-503(a)(3), describing how a trust that is not a registered organization is sufficiently named as the debtor. A statutory or business trust is a registered organization³⁶ because its organization or formation requires the filing of a public organic record.³⁷ Accordingly, under U.C.C. section 9-503(a)(1), the name of the debtor trust that is a registered organization must be that as shown on the public organic record of the debtor’s jurisdiction of organization. For trusts that are not registered organizations, however, there are many permutations. Factors such as whether under applicable trust law the trust or the trustee is considered the owner of the corpus, whether the trust has a name, and whether the trustee is an

³² See discussion *infra* Part II.A(3) for real estate collateral; Part II.B(1) for non-real estate collateral; Part III for deposit accounts and investment property.

³³ See U.C.C. § 9-503. The name of the debtor must be accurate, as prescribed in detail in this U.C.C. section. See *Illustrative Opinion Letter, infra* para. 2.1(v).

³⁴ U.C.C. § 9-504; see also discussion *infra* Part I.(c); *Illustrative Opinion Letter, infra* para. 2.1(h).

³⁵ For a definition, see U.C.C. section 9-102(a)(81).

³⁶ For a definition, see U.C.C. section 9-102(a)(71).

³⁷ For a definition, see U.C.C. section 9-102(a)(68).

individual or a registered organization must be taken into account in determining how to name the debtor.³⁸ These factors will also affect where to file a financing statement.³⁹

A third example is obtaining and perfecting a security interest in the assets of a series LLC. It is not entirely clear whether a series is a person separate from the LLC itself and whether the LLC or the series is the “debtor,”⁴⁰ and thus which of the LLC or the series would grant the security interest.⁴¹ Applicable state statutes may address this.

If the series is the debtor, it is also not clear what its name is for purposes of the financing statement—is it the name of the LLC or the name of the series (if one is specified in the LLC organizational documents)?⁴² Further, it is not clear whether the series is an LLC (and thus a “registered organization” for purposes of the location of the debtor in the state of its organization under Article 9’s filing rules)⁴³ or an organization that is not a registered organization, in which case the financing statement should be filed in the state of its chief executive office.⁴⁴

Thus, as a matter of prudence, for opinion letter (and transactional) purposes, *all* of the following should be established or assumed for situations in which the debtor is a series LLC:

³⁸ See U.C.C. § 9-503 cmt. 2(b).

³⁹ See U.C.C. § 9-307 cmt. 4. For a full explanation of U.C.C. section 9-503(a)(3) pertaining to trusts that are not registered organizations, along with a very helpful and detailed table for guidance as to filing rules, see Norman M. Powell, *Filings Against Trusts and Trustees under the Proposed 2010 Revisions to Current Article 9—Thirteen Variations*, 42 U.C.C. L.J. 375 (2010).

⁴⁰ For a definition, see U.C.C. section 9-102(a)(28).

⁴¹ See U.C.C. § 9-203(a)(3); see also discussion *supra* Part I.(a).

⁴² See U.C.C. § 9-502(a)(1).

⁴³ See U.C.C. § 9-307(e).

⁴⁴ See U.C.C. § 9-307(b)(2)–(3). A recently completed Uniform Series Act, once adopted in all potentially relevant states, which is designed to be incorporated into existing LLC statutes, will resolve many of these concerns. See Nat’l Conference of Comm’rs on Unif. State Laws, *Uniform Protected Series Act* (Nov. 14, 2017), https://www.iaca.org/wp-content/uploads/UPSA_Final-Act_2017-Prefatory-Note.pdf. The Delaware Limited Liability Company Act has been amended to create a new form of series limited liability companies called a “registered series” effective August 1, 2019. See DEL. CODE tit. 6 §§ 18-218 through 18-221. If a current Delaware series limited liability company is converted to a registered series or a new registered series limited liability company is created pursuant to these amendments, each series will be a registered organization for purposes of Article 9 of the U.C.C. All state statutory citations in this Report refer to the current statute unless otherwise indicated. The same applies to state regulations and ordinances.

- Security agreement: signed by both the LLC *and* the series
- Filing of financing statements in the state of organization of the LLC:
 - o Using the name of LLC, *and*
 - o Using the name of series
- Filing of financing statements in state of chief executive office of the series:
 - o Using the name of LLC, *and*
 - o Using the name of series

Similar debtor identity concerns and practices would apply to series LPs.

When a perfection opinion is given, it speaks as of the date of the opinion letter and does not implicitly opine that, once perfected, a U.C.C. personal property security interest will continue to be perfected regardless of the possible effect of subsequent events occurring or not occurring after the date of the opinion letter. The intent that all opinions given in the opinion letter are as of the date of the opinion letter only is consistent with customary practice, confirmed as to U.C.C. opinions in the *TriBar U.C.C. Report*.⁴⁵ Some opinion givers choose to make note of this intent when giving a perfection opinion, in the manner expressed in Paragraph 5.2 of the Illustrative Opinion Letter, or to express specific qualifications, such as reference to the need to file a continuation statement, to the perfection opinion to avoid any question about implicit post-closing assurances. The risk of the latter approach is that the qualifications expressed will not be sufficiently comprehensive, thereby implying that other post-perfection events are not relevant. Neither is necessary as a matter of customary practice.

(e) **Priority.** It is accepted practice in real estate finance transactions not to give an opinion as to the priority of a lien or a security interest in real estate collateral. The giving of a priority opinion as to personal property collateral is considered “rare.”⁴⁶ Although non-inclusion of any priority opinion is recognized as implicit by customary practice, opinion

⁴⁵ See *TriBar U.C.C. Report*, *supra* note 6, § 5.4(a), at 1484.

⁴⁶ See ARTHUR NORMAN FIELD & JEFFREY M. SMITH, LEGAL OPINIONS IN BUSINESS TRANSACTIONS VOL. 2: OPINION LETTERS IN REGULATED AND SPECIAL SITUATIONS 211 (Practising Law Inst. 3d ed., 2014). See discussion in *TriBar U.C.C. Report*, *supra* note 6, at 1477–85 as to giving non-real estate U.C.C. collateral priority opinions.

letters often expressly exclude any opinion about priority, such as that contained in Paragraph 4.6(i) of the Illustrative Opinion Letter.⁴⁷

(f) **Alternative to U.C.C. Legal Opinions.** Commercially available title insurance will insure attachment, perfection, and priority of a secured party's Article 9 security interest in personal property. This Report does not suggest any specific product, but does suggest that title insurance may be considered in lieu of providing or requesting legal opinions and may provide more comprehensive coverage than a legal opinion.

II. OPINIONS AS TO U.C.C. COLLATERAL

The discussion below relates to the subjects of creation, attachment, perfection, and priority in two contexts: real estate collateral (including collateral related to real estate) and personal property (non-real estate) collateral. Examples of opinion language provided are generic and may be subject to local law variations to the U.C.C. of which the opinion giver must be aware.

A. Real Estate Collateral. Fixtures⁴⁸ are likely present in all real estate transactions involving improved real estate. As laws in most states allow for the creation of mortgage liens in fixtures as real property, the execution and delivery of a sufficient mortgage granting a lien on real property will inherently grant a real property lien on the fixtures.⁴⁹ If the mortgage in addition, or if a separate security agreement, grants a security interest in goods that are or are to become fixtures, then a U.C.C. security interest has also been created.⁵⁰ Subject to the U.C.C.'s choice of law rules, the

⁴⁷ See *Illustrative Opinion Letter*, *infra* para. 4.6(i). The relative priority of conflicting interests in real property and in personal property is treated extensively by various provisions of the U.C.C. Because priority opinions are generally inappropriate, the subject of priority is not relevant to this Report; however, see *infra* notes 110, 162 and accompanying text.

⁴⁸ See *supra* notes 3–4 and accompanying text. Security interests in other real estate-related collateral—as-extracted collateral, and standing timber to be cut—are discussed briefly *infra* Part II.A(6).

⁴⁹ See U.C.C. § 9-334(b) (AM. LAW INST. & UNIF. LAW COMM'N 2010).

⁵⁰ See U.C.C. § 9-334. The utility of granting a U.C.C. security interest in addition to a lien on real estate created by a real estate encumbrance in the mortgage itself is based on the principle that a separate security interest in goods that are or are to become fixtures in limited circumstances will have priority over the interest of a real estate encumbrancer to the extent provided in U.C.C. section 9-334. Often a separate security agreement that grants a security interest in goods that are or are to become fixtures provides that the security agreement is to be governed by the law of a jurisdiction other than the Opinion Jurisdiction.

parties may agree that the law chosen to govern the mortgage also governs the creation or attachment of a security interest in fixtures.⁵¹ The law of the jurisdiction where fixtures are physically located⁵² will govern perfection of a security interest in fixtures by a fixture filing.⁵³

(1) **Creation.** When the law of the Opinion Jurisdiction governs the contract, or if the grant of a security interest is limited to a real property lien (which inherently includes fixtures as real property), an opinion on creation of a security interest in fixtures may be expressed as a form of documents opinion, and might read as follows:

The [security instrument] is in form sufficient to create a security interest in [all right, title, and interest of the Borrower in]⁵⁴ that portion of the [Collateral] that is fixtures [or goods that are to become fixtures] under Article 9 of the State Uniform Commercial Code (the State U.C.C.).⁵⁵

Here, reference to the security instrument can be either to a mortgage or to a separate security agreement. Formulation of the opinion as it appears above is widely accepted in real estate finance opinions. Alternatively, the opinion might read:

The [security instrument] creates [a] [an attached] security interest in [all right, title, and interest of the Borrower in] that portion of the [Collateral] that is fixtures [or goods that are to become fixtures]

As Part I.(a) of this Report notes, views differ as to whether an opinion on creation alone is appropriate if it does not also cover attachment.⁵⁶ For this reason, and the assumptions made by customary practice as noted in

⁵¹ See U.C.C. § 1-301.

⁵² See U.C.C. § 9-301(2)–(3).

⁵³ Perfection of a security interest in fixtures by the filing of a financing statement that is *not* a fixture filing is governed by the law of the debtor's location. See U.C.C. § 9-301(1); see also *infra* note 60.

⁵⁴ This recitation is unnecessary as Borrower is assumed, explicitly or implicitly, to have title and rights or power to transfer rights in the collateral. See *Illustrative Opinion Letter, infra* para. 2.1(b).

⁵⁵ Opinion requests often include the word “valid” in reference to the security interest. Validity is not a U.C.C. concept and should not be included in a creation opinion. The term “valid” implies an enforceability opinion. The adjective “effective” would be appropriate. See U.C.C. §§ 9-201, 9-203.

⁵⁶ See discussion *supra* Part I.(a).

this Report Part I.(b), the second alternative may be more common and avoids the risk of ambiguity.⁵⁷

(2) **Attachment.** When the conditions for attachment discussed in Part I.(b) above exist, an opinion may be given that:

The security interest has attached to the [Collateral].

As noted in Part I.(a) of this Report, it is unnecessary to give separate creation and attachment opinions.⁵⁸ An example of a combined opinion is:

The [security instrument] creates an attached security interest in [all right, title, and interest of the Borrower in] the [Collateral] that is fixtures [or goods that are to become fixtures]. . . .

(3) **Perfection.** In most cases, a U.C.C. security interest in fixtures or goods that are to become⁵⁹ fixtures may be perfected by the filing in the local real estate records⁶⁰ of a financing statement that meets the additional requirements for a “fixture filing.”⁶¹ A fixture filing may consist of either the record of the real estate security instrument itself or a U.C.C. financing statement providing certain additional information required for a financing statement generally and additional information to satisfy the fixture filing requirements.⁶² To be a fixture filing, the recorded mortgage or filed

⁵⁷ See discussion *supra* Part I.(b).

⁵⁸ See discussion *supra* Part I.(a).

⁵⁹ Although the U.C.C. defines a fixture filing as one relating to “goods that are, *or are to become*, fixtures” (see, e.g., U.C.C. § 9-102(a)(40) (emphasis added)), until goods have become fixtures related to the underlying real property, they remain non-fixture “goods.” See *supra* note 7 and accompanying text. The definition of “fixture filing” facilitates pre-filing as to future fixtures. It should be understood that the perfection opinion as to fixtures based on a fixture filing relates only to goods that are or when they become fixtures, and not to goods before they become fixtures, even if the phrase “goods that are to become” fixtures is used. In most states, except only as to fixtures of a transmitting utility (discussed *infra* Part II.A(3)), a fixture filing or recording can be made only in the office where a mortgage on “related” real property would be recorded, the only place to file a fixture filing is in that office. The formulation shown in the example preceding *infra* note 68, avoids ambiguity.

⁶⁰ A security interest in fixtures may be perfected in ways other than a fixture filing in the local real estate records, such as by filing centrally at the location of the debtor. See U.C.C. § 9-301, 9-501 cmt. 4. Although other means or methods are available to perfect, an opinion as to place-to-perfect ordinarily is based on a fixture filing in the Opinion Jurisdiction.

⁶¹ See U.C.C. § 9-502(b).

⁶² See U.C.C. § 9-502(b)–(c) cmt. 5. The financing statement must contain information as to the type of collateral, a description of the real property, and information as to the record

financing statement must contain a legal description of the real property to which the fixture collateral is related sufficient to reasonably identify it under real property law.⁶³ In an opinion letter, the sufficiency of the legal description of the real estate is assumed, explicitly or implicitly.⁶⁴

Counsel is sometimes asked to opine that a proposed form of real estate security instrument or a separate U.C.C. financing statement is adequate under applicable law of the Opinion Jurisdiction (if that is the physical location of the fixtures) to serve as a fixture filing upon proper filing. An example of such an opinion when the security interest is in goods that are or become fixtures and the security interest will be perfected by a U.C.C. financing statement filed as a fixture filing is:

The [mortgage] [financing statement] to be filed as a fixture filing is in form sufficient for filing in the [office of the _____ (the "Recording Office")]⁶⁵ [a term defined here or elsewhere in the opinion letter indicating the office in the Opinion Jurisdiction in which to record a mortgage of the mortgaged property]; and when recorded⁶⁶ in the Recording Office⁶⁷ will be sufficient to perfect the security interest of the Lender as Secured Party in the interest of the Borrower as Debtor in that portion of the [Collateral] consisting of goods that are or that become⁶⁸ fixtures under the

real property owner if not the debtor. *See* U.C.C. § 9-502(b). In most states, the financing statement also must designate that it is being filed in the real estate records. Some states have adopted an alternative U.C.C. requirement that the legal description must be sufficient to give constructive notice of a mortgage lien under real property law of the physical location of the fixtures. Perfection of a security interest in fixtures by recording a mortgage will not require periodic filing of continuation statements as would apply to perfection by filing a U.C.C. financing statement as a fixture filing. *See* U.C.C. § 9-515(g).

⁶³ *See* U.C.C. § 9-502(b)(3).

⁶⁴ *See* discussion *supra* Part I.(c).

⁶⁵ *See* U.C.C. § 9-501(a).

⁶⁶ U.C.C. section 9-516(a) provides that "communication of a record to a filing office and tender of the filing fee or acceptance of the record by the filing office constitutes filing" unless an exception provided in U.C.C. section 9-516(b) applies. *See* U.C.C. § 9-516(a)-(b). State law will determine when a document is recorded.

⁶⁷ The opinion would require a determination that the real property described in the fixture filing is situated entirely within the geographical area covered by the Recording Office, or an assumption to that effect.

⁶⁸ *See supra* note 59 and accompanying text.

real property law of the State [to the extent a security interest in the fixtures has attached].⁶⁹

As so formulated, the opinion statement does not say that the filing of the financing statement effects perfection, but it does say that the proposed financing statement in the form provided is sufficient, and that it is being filed in the right place for that purpose. This opinion, as does the example following, includes and necessarily subsumes an opinion that the financing statement contains all of the additional information required to serve as a fixture filing.⁷⁰ A separate opinion to that effect is unnecessary if the foregoing opinion is given. In this context, the sufficiency and factual accuracy of the legal description of the real property is assumed, implicitly or expressly (see Illustrative Opinion Letter Paragraph 2.1(h)).

Lenders sometimes request an opinion as to the effect of filing the financing statement as a fixture filing (a perfection opinion).⁷¹ An example of such an opinion is:

The U.C.C. financing statement to be filed as a fixture filing is in form sufficient for filing in the [office of the _____ (the “Recording Office”)] [a term defined here or elsewhere in the opinion letter indicating the office in the Opinion Jurisdiction in which to record a mortgage of the mortgaged property]; and when filed in the Recording Office the security interest of the Lender as Secured Party in the interest of the Borrower as Debtor in that portion of the [Collateral] described therein constituting goods that are or are to become fixtures under the real property law of the State, will be perfected [to the extent a security interest in the fixtures has attached].⁷²

⁶⁹ The bracketed language “to the extent a security interest in the fixtures has attached” is not intended to contradict an opinion to the effect that a security interest has attached. When an attachment opinion is given, the bracketed language would be omitted. See discussion *supra* Part I.(b). The bracketed language is included to prevent an inadvertent opinion on creation or attachment. In many cases, and particularly for local counsel opinions, the law governing the creation of the security interest will be the law of a jurisdiction other than the Opinion Jurisdiction, and this qualification, or assumptions to its effect, should be made. The Illustrative Opinion Letter provides assumptions relating to aspects of creation and attachment. See discussion *supra* Part I.(a)–(b).

⁷⁰ See U.C.C. § 9-502(a).

⁷¹ See discussion *Local Counsel Report*, *supra* note 2, at 218.

⁷² See *supra* notes 59–69 and accompanying text regarding terminology applicable to this example as well as the one that follows it.

As long as the underlying facts of attachment are assumed to exist or are otherwise addressed, such an opinion can be given.⁷³ When a record of the security instrument itself is to serve as a fixture filing, the opinion would be expressed as follows:

Upon recording⁷⁴ of the [security instrument] in the Recording Office [a term defined here or elsewhere in the opinion letter indicating the office in the Opinion Jurisdiction in which to record a mortgage of the mortgaged property], the security interest created by the [security instrument] in that portion of the Collateral described in the [security instrument] that is fixtures related to the Mortgaged Property will be perfected [to the extent a security interest in the fixtures has attached].

This opinion statement subsumes an opinion that the U.C.C. in effect in the Opinion Jurisdiction (if that is the physical location of the fixtures) recognizes that recordation of the mortgage is effective to serve as a fixture filing. No opinion is needed on that point alone, or on the subject of a debtor's authorization to file or record the mortgage as a financing statement.⁷⁵

As presented in the foregoing examples, the appropriate place to file a financing statement filed as a fixture filing is the office where the mortgage would be recorded.⁷⁶ An opinion letter will often contain a statement that a certain office is the place to record the mortgage, and it will use a defined term to designate that office (for example, "Recording Office"). In view of the possible need to address personal property collateral in the same opinion letter, and in order to avoid confusion, one term should be used to designate the office for real estate recordings or real estate collateral filings, including fixture filings, and another term (for example, "Filing Office") should be used for personal property collateral financing statements. Although this terminology reflects general U.C.C.

⁷³ See U.C.C. §§ 9-310, 9-502.

⁷⁴ Although the U.C.C. provides statutory basis to determine when filing occurs, see U.C.C. § 9-516, other applicable state law will determine when a record of a mortgage occurs. This opinion is sometimes expressed as "[W]hen duly recorded" or similar language to indicate without further specificity that creating a record of a mortgage may require more than presentation to the recording office and payment of the recording fee.

⁷⁵ U.C.C. section 9-509(b) provides that execution of a security instrument itself authorizes the filing of a financing statement. See U.C.C. § 9-509(b).

⁷⁶ See *supra* note 65 and accompanying text. This may be subject to local variation. See, e.g., LA. STAT. ANN. 10:9-501. As to perfection other than by fixture filing, see *supra* note 60.

perfection rules, there are some exceptions, as noted for transmitting utilities, below. Use of appropriate terminology in the opinion letter is important.

When the debtor is a “transmitting utility,”⁷⁷ the office in which to perfect a security interest in collateral, including fixtures, by filing is governed specifically by U.C.C. section 9-501(b), a provision that accommodates a state-by-state designation of a filing office that is usually the central filing office. When giving a perfection opinion based on central filing only in the state of the debtor’s organization, it is customary to assume (often without so stating), subject to principles of assumptions generally, that the borrower (debtor) is not a transmitting utility.⁷⁸ However, if there is any doubt about whether the debtor is a transmitting utility, the opinion giver may wish to assume, expressly, that the borrower is a transmitting utility and give a perfection opinion based on or expressly assuming central filings in each state. No separate fixture filing in real estate records is needed as to transmitting utilities, and a security interest in a transmitting utility’s fixtures is perfected by filing a financing statement, indicating that the debtor is a transmitting utility, in the statutorily designated filing office of each jurisdiction in which the fixture collateral is located—usually the Filing Office. That filing also constitutes a fixture filing as to fixture collateral even though the formal requirements for a fixture filing, including attachment of a description of real estate to which the fixtures relate, do not pertain.

(4) **Priority.** The foregoing discussion on perfection focuses on whether the filing or recordation as described will perfect a security interest. The discussion does not address whether there are other methods of perfection, or whether there could be competing security interests in the collateral—for example, when a separate security interest has been granted in goods that are to become fixtures or in timber that has been cut. Priority opinions are never implied and should not be requested or given as to real estate collateral security interests and, as noted in Part II.B below, only rarely as to personal property security interests. The U.C.C. recognizes that there can be competing real and personal property security interests in the goods that are or are to become fixtures, and U.C.C. section 9-334 contains detailed provisions concerning when a secured party with a

⁷⁷ Transmitting utility is defined as “a person primarily engaged in” certain specific business listed in the definition that includes a broader range of activity than typical utilities. See U.C.C. § 9-102(a)(81).

⁷⁸ See *Illustrative Opinion Letter*, *infra* para. 2.1(x).

security interest in fixtures and growing crops has priority over a real estate encumbrancer.⁷⁹ The granting of a mortgage covering real property including fixtures and the granting of a security interest in fixtures will place the holder of those interests in the position of both a real estate encumbrancer and a secured party.

As with the subject of priority of a real estate mortgage itself, the secured party's reliance on title insurance is an appropriate avenue to obtain assurance as to priority of a security interest in fixtures under real estate law.

(5) **Title.** Opinions about title to real estate collateral including fixtures should not be requested or given in a third-party opinion letter.⁸⁰ Although it is customary practice to assume expressly (see Illustrative Opinion Letter Paragraph 2.1(b)) that the borrower or debtor has requisite title and rights (or, for U.C.C. purposes, the power to transfer rights) in any property involved in the transaction, the assumption is implicit.

(6) **Non-Fixture Real Estate Collateral.** Although this Report refers primarily to fixtures as real estate collateral, the U.C.C. applies to other types of collateral related to real estate, including oil, gas, and other minerals that become as-extracted collateral and standing timber to be cut.⁸¹ Special rules apply to security interests in these other types of real estate collateral that must be considered in providing an opinion relating to the attachment and perfection of a security interest in them.

(a) *As-Extracted Collateral.* A security interest in minerals in the ground and the right to extract them is governed by real property law, not the U.C.C.⁸² When extracted, however, minerals become personal property.⁸³ A debtor who has an interest in the minerals before extraction may grant a security interest that will attach to the minerals as they are extracted.⁸⁴ In this situation, perfection of the security interest in minerals once they are extracted (and accounts arising from the sale of them at the

⁷⁹ U.C.C. sections 9-317 through 9-339 contain the ground rules about priority of U.C.C. security interests. See U.C.C. §§ 9-317–9-339.

⁸⁰ See *Real Estate Opinion Guidelines*, *supra* note 4, § 4.0.c, at 252; see also *TriBar U.C.C. Report*, *supra* note 6, at 1468.

⁸¹ See U.C.C. §§ 9-102(a)(6), 9-102(44); see also *supra* note 7.

⁸² See U.C.C. § 9-102(a)(44).

⁸³ See U.C.C. § 9-102 cmt. 4.c.

⁸⁴ See U.C.C. §§ 9-102(a)(6), 9-501(a)(1)(A). See U.C.C. section 9-102 cmt. 4.c for further discussion.

wellhead or minehead) becomes subject to the U.C.C. under rules pertaining to “as-extracted collateral.” If the debtor does not have an interest in the minerals before they are extracted but only after they are extracted, the extracted minerals are not “as-extracted collateral,” and a security interest in the debtor’s interest in them would be perfected as personal property, for example as goods or inventory.

A security interest in as-extracted collateral is perfected in the same manner as a fixture filing perfects a security interest in fixtures (other than fixtures of a transmitting utility): the law where the wellhead or minehead is located governs perfection and priority,⁸⁵ and the security interest is perfected by filing a financing statement in the office for recording of a mortgage on the related real property, as it would be for a fixture filing.⁸⁶ The financing statement must contain information as to the type of collateral, a description of the real property, and information as to the record real property owner if not the debtor.⁸⁷ In most states, the financing statement also must designate that it is being filed in the real estate records.

Because of the similarities with fixtures, when opining as to as-extracted collateral an opinion giver may follow the guidance in this Report as to fixtures and alter it accordingly for this different class of collateral. The important point to observe is that although minerals after extraction become personal property, the rules of perfection of a security interest in “as-extracted” collateral are those that pertain to fixtures and not goods. In giving an opinion on as-extracted collateral, an opinion giver would ordinarily assume that the debtor has rights in the collateral prior to extraction⁸⁸ and that the location of the wellhead or minehead is in the Opinion Jurisdiction.

(b) *Standing Timber To Be Cut*. A security interest in standing timber to be cut and removed pursuant to a conveyance or contract for sale is perfected in a manner similar to perfection of a security interest in fixtures by a fixture filing (other than fixtures of a transmitting utility): the law of the jurisdiction where the timber to be cut is located governs perfection and priority,⁸⁹ and the security interest is perfected by filing a financing statement in the office for recording of a mortgage on the related real

⁸⁵ See U.C.C. § 9-301(4); U.C.C. § 9-301 cmt. 5.d.

⁸⁶ See U.C.C. § 9-501(a)(1)(A).

⁸⁷ See U.C.C. § 9-502(b).

⁸⁸ See discussion *supra* Part I.(b)(ii).

⁸⁹ See U.C.C. § 9-301(3)(B); U.C.C. § 9-301(4).

property, as it would be for a fixture filing.⁹⁰ Central filing in the jurisdiction of the debtor's location will not be effective to perfect a security interest in timber to be cut. However, timber to be cut is also considered "goods" and subject to the U.C.C. prior to it being cut, while as-extracted collateral becomes subject to Article 9 purposes only after the minerals are extracted. Unlike the security interest in as-extracted collateral, the perfection of a security interest in timber to be cut effected by local filing of a financing statement under U.C.C. section 9-501(a)(1)(A) ceases to be effective once the timber is cut. Once cut, the timber becomes ordinary goods,⁹¹ and the law of the debtor's location governs perfection. For this reason, central filing in the jurisdiction of the debtor's location would be necessary to have a perfected security interest in the cut timber.

Opinions as to as-extracted collateral and timber to be cut are usually based on assumptions as to the location of the wellhead or minehead or the physical location of the timber to be cut.⁹²

The foregoing Part II.A covers only U.C.C. security interests in real estate-related collateral. It excludes other collateral commonly subjected to a security interest in connection with a real estate finance transaction. The opinions described, therefore, may be appropriate in many routine real estate finance transactions but of limited value in any transaction involving a diverse array of collateral.

B. Personal Property (Non-Real Estate) Collateral. Opinions as to personal property collateral may be requested and given in real estate finance transactions involving both real estate and personal property collateral, discussed in the following portion of this Report. In considering the opinions discussed in this Part II.B and Part III that follows, the opinion giver needs to recognize that although a jurisdiction's law can be chosen to govern the security agreement and attachment of a security interest,⁹³ the U.C.C. contains specific choice of law rules on the subjects of perfection, the effect of perfection or non-perfection, and priority that cannot be contractually varied.

When an opinion on personal property collateral is given, the opinion giver should express a limitation that any opinion regarding security interests in such personal property collateral is given only to the extent that Article 9 of the U.C.C. (as in effect in the Opinion Jurisdiction) governs

⁹⁰ See U.C.C. § 9-501.

⁹¹ See U.C.C. § 9-501 cmt. 3.

⁹² See *Illustrative Opinion Letter*, *infra* para. 2.1(y).

⁹³ See U.C.C. § 1-301.

attachment, perfection, and the effect of perfection or non-perfection of a security interest in that collateral. This Report does not provide guidance about personal property security interests granted or perfected under other state or federal law or as to security interests unrelated to real estate finance transactions generally.

Providing an opinion as to personal property collateral requires competence in the law of personal property security interests. The opinion giver should have or gain the competence to give such an opinion, consult with persons having specific competence in U.C.C. transactions, or decline to give it.⁹⁴ The *TriBar U.C.C. Report* observes that opinion preparers who do not work with U.C.C. Article 9 regularly should consider whether to involve other lawyers more conversant with the U.C.C.⁹⁵

When giving non-real estate collateral opinions, the opinion giver must consider the facts or assumptions required to support them and applicable limitations necessary to qualify them. Those assumptions and limitations discussed in the 2012 Report and the Local Counsel Report would apply to most U.C.C. opinions.⁹⁶ The assumptions and limitations provided in the Illustrative Opinion Letter appended to this Report do not purport to express all those that may be appropriate for U.C.C. opinions but do present those relevant to the U.C.C. opinions discussed in this Report.⁹⁷

An opinion as to attachment and perfection (by the filing of a financing statement) of a security interest in non-real estate collateral would be inappropriate *except to the extent* that the law of the Opinion Jurisdiction is:

- (i) the law governing the security agreement, for attachment opinions,
- (ii) the law under which the debtor (if a registered organization) is organized, for perfection by filing opinions, or
- (iii) the law governing perfection under the U.C.C. for a debtor that is not a registered organization, for perfection opinions.

⁹⁴ See *TriBar U.C.C. Report*, *supra* note 6, at 1454, 1469.

⁹⁵ See *id.* at 1454.

⁹⁶ See *2012 Report*, *supra* note 1, at 233–37, 251–58; *Local Counsel Report*, *supra* note 2, at 186–91, 229–34.

⁹⁷ For further discussion of express assumptions and limitations, see discussion *infra* Part IV.B.

Even where these situations exist, some opinion givers in the context of providing U.C.C. opinions limit any non-real estate collateral opinion to the “form of documents” or a statement of filing procedures in the Opinion Jurisdiction.

Note that the situations described in (i) and (ii) *or* (iii) may both exist; they are not mutually exclusive.

(1) **Creation, Attachment, Perfection.** In the appropriate situations identified above,

(a) **When the law of the Opinion Jurisdiction is the law applicable to the security agreement,** an opinion may be requested concerning the creation or attachment of the security interest, in addition to enforceability of the security agreement as a contractual transaction document.⁹⁸ If the necessary facts are confirmed or are assumed (see this Report Part I.(a)), a form of documents opinion relating to the “creation” of a U.C.C. security interest may read as follows:

The [security instrument] is in form sufficient to create a security interest in the U.C.C. Collateral [a term defined in transaction documents or elsewhere] to the extent a security interest may be created in that collateral under Article 9 of the Uniform Commercial Code as in effect in the State.⁹⁹

Alternatively, the opinion may read, “A security interest has attached to the [Collateral] [a term defined in transaction documents or elsewhere] pursuant to the [security instrument]”; or as suggested in Part II.A(2), “The [security instrument] creates an attached security interest in [all right, title, and interest of the Borrower in] the U.C.C. Collateral” As the introductory discussion notes, “creation” is based on an agreement granting a security interest in sufficiently described collateral, authenticated by the debtor. If an “attachment” opinion is given (with express or implied assumptions as to value and rights in the collateral), there is no need for a separate “creation” opinion.¹⁰⁰

The opinion may be prefaced by:

To the extent the law of the State applies,

⁹⁸ See *Local Counsel Report*, *supra* note 2, at 209.

⁹⁹ See *id.* at 206, 209–10.

¹⁰⁰ See *Tribar U.C.C. Report*, *supra* note 6, at 1518.

(b) When the Borrower is a registered organization organized in the Opinion Jurisdiction (commonly referred to as the “State”) or the Borrower is otherwise “located” in the Opinion Jurisdiction, or when the law of the Opinion Jurisdiction otherwise applies to perfection by filing, counsel may be requested to provide opinions concerning the perfection of the security interest in personal property collateral by the filing of a financing statement.¹⁰¹ An example follows:

The Financing Statement is in proper form for filing under the State U.C.C. Upon the filing of the Financing Statement in the office of the ____ of the State (the “Filing Office”), the secured party will have a perfected security interest in the Collateral of a type in which a security interest can be perfected under Article 9 of the State U.C.C. and which may be perfected through the filing of a financing statement under Article 9 of the State U.C.C. [, to the extent a security interest in the Collateral has attached].¹⁰²

This assurance about perfection is based solely on filing a financing statement¹⁰³ and is intended to exclude fixture filings discussed previously in Part II.A.(3) of this Report, although the filing of a financing statement covering fixtures at the “location” of the debtor can perfect a security interest in fixtures even if physically located in another state.¹⁰⁴ In addition to specific provisions concerning the place to file as to certain collateral, the U.C.C. provides for perfection by means other than filing a financing statement (by possession, control, or automatic), and as to some collateral more than one means is applicable.¹⁰⁵ Opinions on perfection by means other than filing as to deposit accounts and investment property are discussed in Part III of this Report, but opinions on perfection other than by filing are otherwise outside the scope of this Report.

(c) When the Borrower is a registered organization organized in a jurisdiction other than the Opinion Jurisdiction, and the law of the Opinion Jurisdiction is therefore not the law applicable to perfection by filing a financing statement, a situation common to many

¹⁰¹ See *id.* at 1460, 1473–74.

¹⁰² See *supra* note 69.

¹⁰³ This opinion includes and necessarily subsumes an opinion that the financing statement contains all of the additional information required to serve as a fixture filing. See U.C.C. § 9-502.

¹⁰⁴ See U.C.C. § 9-501(a)(2).

¹⁰⁵ See U.C.C. § 9-313.

local counsel opinions, an opinion on the perfection of a security interest in personal property collateral in which a security interest is granted¹⁰⁶ would be inappropriate. Except when perfection of a security interest in the collateral by filing a financing statement is governed by the law of the Opinion Jurisdiction, discussed in subparagraph (b) above, matters of creation, attachment, and perfection of the security interest typically will be governed by other law, and they inherently are not covered by an opinion applying only the law of the Opinion Jurisdiction, the law of which does not apply.¹⁰⁷

(2) **Priority.** Priority opinions are discussed in the *TriBar U.C.C. Report*, in which the TriBar Committee characterized the circumstances in which such an opinion would be given as “rare.”¹⁰⁸ Actual priority opinions—based on analysis of all of the rules of the U.C.C.—should not be requested or given, and the *TriBar U.C.C. Report* noted in 2003 that “most opinion recipients have long since abandoned [such] requests.”¹⁰⁹ In situations where perfection is made by filing, priority opinions would be given based on a U.C.C. search report that is equally accessible and reviewable by the recipient. This Report posits that opinions as to the priority of a security interest in personal property collateral should not be given in a real estate finance transaction, as is the case with real estate liens.¹¹⁰

(3) **Title.** Opinions about title to, rights in, or power to transfer rights in, with respect to U.C.C. collateral should be neither requested nor given.¹¹¹ It is customary practice to assume that the debtor has requisite

¹⁰⁶ See U.C.C. §§ 9-301–9-306. For further discussion, see *infra* Part III.(C). The subject of providing a U.C.C. opinion governed by the law of a jurisdiction in which the opinion giver is not licensed to practice is discussed *supra*, Introduction, *Extra-Jurisdictional U.C.C. Opinions*.

¹⁰⁷ An opinion could be given regarding the appropriate place to perfect, after assuming or reciting that the debtor is a registered organization in a jurisdiction (X) other than the Opinion Jurisdiction. For example: **The law of X governs perfection and the effect of perfection and non-perfection of the secured party’s interest in the Collateral.** See *supra*, Introduction, *Extra-Jurisdictional U.C.C. Opinions*.

¹⁰⁸ See *TriBar U.C.C. Report*, *supra* note 6, at 1478–82.

¹⁰⁹ See *id.* at 1479.

¹¹⁰ See *supra* Part II.A(4). *But see* discussion of priority with respect to investment property, preceding *infra* note 144, and discussion of the status of a protected purchaser, preceding *infra* note 159.

¹¹¹ See *TriBar U.C.C. Report*, *supra* note 6, at 1468.

title and rights in any property involved in the transaction (see Illustrative Opinion Letter Paragraph 2.1(b)). The assumption is implicit.

III. SPECIFIC U.C.C. PERSONAL PROPERTY COLLATERAL IN REAL ESTATE FINANCE TRANSACTIONS

Certain specific matters relating to U.C.C. opinions require special attention. In financing of income producing property, rental income, which is often paid into a deposit account, is a common component of U.C.C. collateral. In a mezzanine financing, the equity interest of the real property owner is pledged as security.

A. Deposit Accounts.

(1) **Attachment.** An opinion regarding attachment of a security interest in a deposit account requires the same analysis as would be made for an opinion regarding any personal property collateral.

(2) **Perfection.** Perfection of a security interest in deposit accounts (as original collateral), such as lockbox or other cash management arrangements, operating accounts, accounts containing proceeds of leases and rents, and accounts containing reserves is not accomplished by filing a financing statement but instead is accomplished only by control.¹¹² Opinions relating to perfection other than by filing are most appropriately requested from and given by lead counsel, not generally by local counsel unless the law applicable to perfection of such a security interest is governed by the Opinion Jurisdiction of local counsel.

A security interest in deposit accounts (as original collateral) can be perfected only by control.¹¹³ There are three ways for a secured party to obtain control of a deposit account. First, when the secured party is the depository bank, the secured party has automatic control.¹¹⁴ In the second and most common way, the debtor, the secured party, and the depository bank enter into an agreement in which they agree that the depository bank will comply with the instructions of the secured party as to disposition of

¹¹² See U.C.C. § 9-312(b)(1) cmt. 5.

¹¹³ See U.C.C. § 9-312(b)(1).

¹¹⁴ See U.C.C. § 9-104(a)(1).

the funds in the account without further consent of the debtor.¹¹⁵ This tri-party agreement is commonly called a “deposit account control agreement” (referred to as a DACA).¹¹⁶ The third way for the secured party to obtain control is by the secured party’s becoming the depository bank’s customer as to the deposit account.¹¹⁷

For opinion purposes, the determination of what law governs perfection, non-perfection, and priority of the security interest is important. The local law of the depository bank’s jurisdiction governs perfection and priority.¹¹⁸ In most cases, the bank’s jurisdiction is specifically set forth in the DACA itself.¹¹⁹ If the DACA does not state the bank’s jurisdiction, making a determination of that jurisdiction would be essential to providing

¹¹⁵ See U.C.C. § 9-104(a)(2).

¹¹⁶ See generally Joint Task Force, *Initial Report of the Joint Task Force on Deposit Account Control Agreements*, 61 BUS. L. 745 (2006) [hereinafter *Initial DACA Report*]; Joint Task Force, *Additional Report*, 64 BUS. L. 801 (2009).

¹¹⁷ See U.C.C. § 9-104(a)(3).

¹¹⁸ See U.C.C. § 9-304(a).

¹¹⁹ See U.C.C. § 9-304(b)(1). U.C.C. section 9-304(b) provides a sequence of rules for determining the jurisdiction that governs perfection, the effect of perfection and non-perfection, and priority of the deposit account security interest, all of which are summarized as follows:

- If an agreement between the bank and its customer governing the deposit account (usually the DACA) expressly provides that a particular jurisdiction is the bank’s jurisdiction for purposes of Part 3 of Article 9 (covering perfection and priority), of Article 9, or of the U.C.C. generally, then that is the bank’s jurisdiction. See U.C.C. § 9-304(b)(1).
- If the agreement between the bank and the debtor governing the deposit account does not expressly provide the bank’s jurisdiction under U.C.C. § 9-304(b)(1), then the law expressly chosen in the agreement to govern in the agreement is the bank’s jurisdiction. See U.C.C. § 9-304(b)(2).
- If neither of the preceding two rules [U.C.C. § 9-304(b)(1) and (b)(2)] applies, if the agreement between the bank and its customer governing the deposit account expressly provides that the deposit account is to be maintained at an office in a particular jurisdiction, then that jurisdiction is the bank’s jurisdiction. See U.C.C. § 9-304(b)(3).
- If the preceding three rules do not apply, then the bank’s jurisdiction is the jurisdiction where the bank’s office is located, as identified in the customer’s account statement. See U.C.C. § 9-304(b)(4).
- If none of the foregoing rules apply, then the bank’s jurisdiction is the jurisdiction where the bank’s chief executive office is located. See U.C.C. § 9-304(b)(5).

a perfection opinion and a priority opinion (if given). The cost of the opinion giver determining the bank's jurisdiction may outweigh the benefit of this opinion, so as a practical matter, both the opinion giver and the opinion recipient should make sure that the bank's jurisdiction is set forth in the DACA and is an Opinion Jurisdiction.

Generally, after the opinion giver has either given an attachment opinion or assumed that attachment has occurred, a perfection opinion as to a deposit account may be formulated as follows, depending upon the method of perfection:

The security interest in the deposit accounts described in the [name of the document in which the security interest is granted] will be perfected upon secured party's becoming the bank with which the deposit accounts are maintained.

OR

The security interest in the deposit accounts described in the [DACA] will be perfected upon the execution and delivery of the [DACA] by all parties thereto.

OR

The security interest in the deposit accounts described in the [name of the document in which the security interest is granted] will be perfected upon the secured party's becoming the bank's customer with respect to the deposit accounts.

Additional assumptions may be necessary for rendering a perfection opinion. For example, the institution in which the deposit account is held must be a bank.¹²⁰ The term "bank" is defined as "an organization that is engaged in the business of banking . . . including . . . savings and loan associations, credit unions, and trust companies."¹²¹ Where it is not entirely clear that the underlying depository institution is a bank, it may be appropriate to assume expressly it is a bank as defined in the U.C.C. Further, sometimes it is not clear whether the underlying account is a deposit account or a securities account. In these situations, it may be

¹²⁰ See U.C.C. § 9-102(a)(29).

¹²¹ U.C.C. § 9-102(a)(8).

appropriate to assume expressly the underlying account is a deposit account as defined in the U.C.C.¹²²

Lastly, opinion givers and opinion recipients should consider the implications of an interpleader provision. It has been suggested that if the DACA contains a contractual interpleader provision, the document will not constitute a control agreement because the bank will not have agreed to follow the instructions of the secured party without the consent of the debtor.¹²³ The opinion giver would need to determine there is no such provision in the DACA. The opinion recipient should not be concerned about the absence of such a provision because the recipient typically has the statutory right to interplead as a matter of law.

B. Investment Property (including equity interests in an obligor).

Meaning of investment property and other terminology. It is important to understand what is and what is not included in the definition of investment property. “Investment property” is a security, security entitlement, or securities account under Article 8 of the U.C.C.¹²⁴ Generally, a “security” is an equity interest represented by a certificate or a book entry that is “divisible into a class or series of . . . interests . . . and . . . is, or is of a type [that is], dealt in or traded on securities exchanges.”¹²⁵ A “security entitlement”¹²⁶ is the interest of an entitlement holder in a

¹²² For the definition of “deposit account,” see U.C.C. section 9-102(a)(29).

¹²³ See *Initial DACA Report*, *supra* note 116, at 771.

¹²⁴ See U.C.C. § 9-102(a)(49). Investment property also includes a commodity contract or a commodity account, discussion of which is beyond the scope of this Report.

¹²⁵ U.C.C. § 8-102(a)(15). A “certificated security” is a security represented by a certificate. See U.C.C. § 8-102(a)(4). An “uncertificated security” is a security that is not represented by a certificate. See U.C.C. § 8-102(a)(18).

¹²⁶ See U.C.C. § 8-102(a)(17).

financial asset¹²⁷ that has been credited to a securities account,¹²⁸ including the rights of the customer in a securities account.

Equity interests of a limited liability company or a partnership, as opposed to those of a corporation, are not securities for U.C.C. purposes unless an additional step is taken. An ownership interest in a limited liability company or partnership may become a security only if the entity elects to make its ownership interests securities for purposes of Article 8.¹²⁹ This election, often referred to as “opt-in,” is important for purposes of perfection and priority, subjects discussed in this Part III.B.

Opt-in. A lender securing a loan with pledged equity interests may require that the issuer of the limited liability company or partnership interests intended to serve as collateral for the loan opt in to Article 8.¹³⁰ The security under Article 8 can either be certificated or uncertificated.¹³¹ Perfection of a security interest in both uncertificated and certificated securities can be perfected by control.¹³² A secured party may perfect a security interest in certificated securities also by possession.¹³³

¹²⁷ See U.C.C. § 8-102(a)(9). “Financial asset,” except as otherwise provided in U.C.C. section 8-103, means:

- (i) a security;
- (ii) an obligation of a person or a share, participation, or other interest in a person or in property or an enterprise of a person, which is, or is of a type, dealt in or traded on financial markets, or which is recognized in any area in which it is issued or dealt in as a medium for investment; or
- (iii) any property that is held by a securities intermediary* for another person in a securities account if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under this Report. As context requires, the term means either the interest itself or the means by which a person’s claim to it is evidenced, including a certificated or uncertificated security, a security certificate, or a security entitlement.

*For a definition of “securities intermediary,” see U.C.C. section 8-102 cmt. 14.

¹²⁸ “Securities account” means “an account to which a financial asset is or may be credited in accordance with an agreement under which the person maintaining the account undertakes to treat the person for whom the account is maintained as entitled to exercise the rights that comprise the financial asset.” U.C.C. § 8-501(a).

¹²⁹ See U.C.C. § 8-103(c).

¹³⁰ See U.C.C. § 8-103(c); U.C.C. § 8-103 cmt. 3.

¹³¹ See U.C.C. § 8-102(a)(19).

¹³² See U.C.C. § 9-314.

¹³³ See U.C.C. § 9-313.

Where a security interest in certificated or uncertificated securities is to be covered by an opinion, the opinion giver must determine that the limited liability company has opted in to Article 8. It is accepted practice that a limited liability company or partnership can opt in to Article 8 by (among other means) an affirmative election in its operating agreement or partnership agreement as applicable. The opinion giver would look for language in the applicable agreement similar to the following example:

All equity interests in the Company shall be securities governed by the Uniform Commercial Code – Investment Securities (U.C.C. §§ 8-101 through 8-511).

The applicable partnership or limited liability company act may determine whether the partnership or operating agreement may or needs to authorize the entity to issue certificates, by language such as the following:

All issued equity interests in the Company shall be represented by certificates. Each issued equity interest is a “certificated security” as defined in U.C.C. § 8-102(a)(4), and the certificate representing any equity interest is a “security certificate” as defined in U.C.C. § 8-102(a)(16).

(1) **Attachment.** An opinion regarding attachment of a security interest in investment property requires the same analysis as an opinion regarding a U.C.C. security interest in any other personal property collateral.

(2) **Perfection of a Security Interest in Investment Property.** Although a security interest in investment property, including equity (ownership) interests in corporations and in other types of organizations that opt in to U.C.C. Article 8, can be perfected by filing a financing statement, a security interest in investment property can also be perfected by control and, in the case of certificated securities, by delivery (possession). Control can be important in the real estate finance context where a lender’s only security is the pledgor’s equity interest in the entity that owns the real estate. In real estate financings involving a loan secured by such an equity interest (typically a mezzanine loan but sometimes a senior debt), counsel may be requested to issue a U.C.C. opinion to the lender(s). There are several methods to perfect a security interest in securities, security entitlements, and securities accounts that are investment property under U.C.C. Article 8. These ways include filing, control, and, for certificated securities, possession.

(a) Filing. A security interest in all types of investment property can be perfected by filing a financing statement.¹³⁴

(b) Control. A security interest in all types of investment property can also be perfected by the secured party's obtaining control of the investment property.¹³⁵ The means of "control" is dictated by the type of investment property.¹³⁶

(i) Certificated Securities. A secured party has control of a certificated security in bearer form when it is delivered to the purchaser.¹³⁷ For certificated securities in registered form, a secured party has control when it is delivered to the secured party either with any necessary indorsements or when it is registered in the secured party's name.¹³⁸

(ii) Uncertificated Securities. A secured party can obtain control of an uncertificated security in either of two ways. Control is achieved by the secured party's becoming the registered holder of the uncertificated security in the books and records of the issuer.¹³⁹ A secured party can also obtain control of an uncertificated security when the issuer has agreed to comply with the instructions of the secured party without further consent of the debtor, often through an uncertificated securities control agreement.¹⁴⁰

(iii) Security Entitlements. For security entitlements (including securities accounts), there are three methods of perfection by control. A secured party can perfect its security interest by being the securities intermediary or the entitlement holder, usually by becoming the account holder of a broker/dealer holding a securities account for the

¹³⁴ See U.C.C. § 9-312(a).

¹³⁵ See U.C.C. § 9-314(a); U.C.C. § 9-106.

¹³⁶ As cautioned earlier in this Report, this may be subject to state-by-state variation. For example, perfection by control of collateral assignments in Illinois land trusts is governed by a specific additional section of the Illinois U.C.C. A discussion of collateral other than interests in a limited liability company or a partnership is beyond the scope of this Report.

¹³⁷ See U.C.C. § 8-106(a). A certificated security in "bearer form" means the security is payable to the bearer of the security certificate, but not by reason of indorsement. See U.C.C. § 8-102(a)(2).

¹³⁸ See U.C.C. § 8-106(b)(1)–(2). A certificated security in "registered form" means the security certificate specifies the person entitled to the security. See U.C.C. § 8-102(a)(13).

¹³⁹ See U.C.C. § 8-301(b); U.C.C. § 8-106(c)(1).

¹⁴⁰ See U.C.C. § 8-106(c)(2).

debtor.¹⁴¹ A security interest in a security entitlement can also be perfected by control when the securities intermediary (usually the broker/dealer) agrees that it will comply with entitlement orders of the secured party without further consent of the debtor, usually through a securities account control agreement.¹⁴²

(c) *Possession*. As to certificated securities in registered form, a secured party may also perfect its security interest by delivery of the certificated securities to the secured party, even though the secured party does not have all the necessary indorsements.¹⁴³

(3) **Priority**. The priority of a security interest in investment property depends on the means by which the security interest is perfected. A secured party having control of investment property has priority over another secured party that perfects only by possession or filing (or both).¹⁴⁴ A security interest perfected by delivery of a certificated security in registered form even without the necessary indorsements has priority over a security interest perfected only by filing.¹⁴⁵

(4) **Law Governing Perfection**. An important part of the opinion analysis regarding perfection is determining what law governs perfection and the effect of perfection or non-perfection in an investment security or a security entitlement, and whether the applicable law is the law of an Opinion Jurisdiction. This inquiry involves application of both Articles 8 and 9 of the U.C.C.

(a) *Filing*. If perfection is to be obtained by filing a financing statement, the law of the jurisdiction in which the debtor is located governs perfection.¹⁴⁶

¹⁴¹ See U.C.C. § 8-106(d)(1), (e).

¹⁴² See U.C.C. § 8-106(d)(2). A securities account control agreement is similar to a deposit account control agreement. It is sometimes difficult to distinguish between a securities account and a deposit account.

¹⁴³ See U.C.C. § 9-313(a).

¹⁴⁴ See U.C.C. § 9-328(1).

¹⁴⁵ See U.C.C. § 9-328(5). Note, however, that in order to have control there must be delivery to another secured party. If the certificate is in possession of the “possessory” secured party, there is no way for another secured party to obtain control.

¹⁴⁶ See U.C.C. § 9-305(c)(1)–(2).

(b) Possession or Control.

(i) Certificated Securities. For certificated securities, the law of the jurisdiction where the certificated security is physically located governs perfection and the effect of perfection or non-perfection for purposes of perfection by possession or control.¹⁴⁷ In addressing perfection by control or possession, the opinion giver may consider making assumptions as to the status of a security as a “certificated security” and as to where the secured party will obtain possession of the certificated security. If the governing law jurisdiction is not a jurisdiction whose law is addressed by the opinion letter, the opinion giver should consider whether to retain other counsel to address perfection by control or possession or whether to give the opinion by, for example, basing it on relevant portions of the U.C.C. of the applicable jurisdiction as published by a recognized reporting service.¹⁴⁸

(ii) Uncertificated Securities. For uncertificated securities, the law of the issuer’s jurisdiction governs perfection and the effect of perfection or non-perfection in an uncertificated security when the secured party obtains perfection by control.¹⁴⁹ The issuer’s jurisdiction is the jurisdiction of the issuer’s formation or the law of another jurisdiction specified by the issuer (if the law of the jurisdiction of issuer’s formation allows the issuer to do that).¹⁵⁰ If the law of the jurisdiction covered by the opinion giver differs from the law of the issuer’s jurisdiction, the opinion giver will need to consider whether to retain other counsel to address perfection by control or whether to give the opinion by, for example, basing it on relevant portions of the U.C.C. of the applicable jurisdiction as published by a recognized reporting service.¹⁵¹

(iii) Security Entitlements. For security entitlements and securities accounts, the law of the securities intermediary’s jurisdiction governs perfection and the effect of perfection or non-perfection when the secured party obtains perfection by control. The analysis is similar to the analysis of a bank’s jurisdiction for deposit accounts discussed above in Part III.A(2). If an agreement between the securities intermediary and its entitlement holder governing the securities account specifies the security

¹⁴⁷ See U.C.C. § 9-305(a)(1).

¹⁴⁸ See *supra*, Introduction, *Extra-Jurisdictional U.C.C. Opinions*.

¹⁴⁹ See U.C.C. § 9-305(a)(2).

¹⁵⁰ See U.C.C. § 8-110(d).

¹⁵¹ See *supra*, Introduction, *Extra-Jurisdictional U.C.C. Opinions*.

intermediary's jurisdiction, then that is the security intermediary's jurisdiction.¹⁵² If the security intermediary's jurisdiction is specified in a securities account control agreement, it should also specify that in an amendment to the underlying account agreement.¹⁵³

If the account agreement does not state the securities intermediary's jurisdiction, making a determination of that jurisdiction would be essential to providing a perfection opinion. As the cost of the opinion giver's determining that jurisdiction may outweigh the benefits of the opinion, the opinion giver and the opinion recipient should consider whether the bank's jurisdiction should be set forth in the securities account control agreement and whether that jurisdiction should also be the jurisdiction covered by the opinion letter as an Opinion Jurisdiction. If the law of the jurisdiction covered by the opinion giver differs from the law of the securities intermediary's jurisdiction, the opinion giver will need to consider

¹⁵² See U.C.C. § 8-110(e)(1). Under The Hague Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary, the law applicable to the perfection of a security interest (whether by filing a financing statement or control) in a securities account or a security entitlement may not be fully governed by the rules in the U.C.C. See The Hague Convention on the Law Applicable to Certain Rights in Respect of Securities, Jul. 5, 2006, treaty document 112-6, (<https://www.hcch.net/en/instruments/conventions/full-text/?cid=72>). For an introductory discussion of the effect of the Hague Convention on U.C.C. opinions, see *In Our Opinion*, Vol. 16 No. 3 at 11, ABA, Chicago, IL, https://www.americanbar.org/content/dam/aba/administrative/business_law/newsletters/CL510000/full-issue-201706.pdf.

¹⁵³ See U.C.C. section 8-110(e) for a sequence of rules for determining the jurisdiction to govern the effect of perfection and non-perfection of the securities account, summarized as follows:

- If the securities account control agreement provides that a particular jurisdiction is the securities intermediary's jurisdiction, then that is the security intermediary's jurisdiction. See U.C.C. § 8-110(e)(1).
- If the account agreement does not specify the securities intermediary, then the law governing the account agreement will be the security intermediary's jurisdiction. See U.C.C. § 8-110(e)(2).
- If the preceding two rules of selection do not apply, the jurisdiction where the securities account is maintained, if that jurisdiction is specified in the underlying securities account agreement between the securities intermediary and its customer, that jurisdiction is the security intermediary's jurisdiction. See U.C.C. § 8-110(e)(3).
- If the preceding three rules of selection do not apply, then the security intermediary's jurisdiction is the jurisdiction where the security intermediary's office is located, as indicated on the account statement. See U.C.C. § 8-110(e)(4).
- If none of the foregoing rules of selection apply, then the security intermediary's jurisdiction is the jurisdiction where the security intermediary's chief executive office is located. See U.C.C. § 8-110(e)(5).

whether to retain other counsel to address a perfection by control or whether to give the opinion by, for example, basing it on relevant portions of the U.C.C. of the applicable jurisdiction as published by a recognized reporting service.¹⁵⁴

(5) **Perfection Opinions (by methods other than by filing).**

Generally, if the opinion giver gives an attachment opinion or assumes expressly that attachment has occurred, a perfection opinion for the types of investment property described below may be formulated as follows:

(a) For certificated securities, a formulation of a perfection by delivery (that is, possession) opinion (including control of certificated securities in bearer form) is:

Upon delivery of the [certificated securities] to the secured party in [State X] [the Opinion Jurisdiction], the secured party will have a perfected security interest in the [certificated securities].

Where perfection as to certificated securities in registered form is by control,¹⁵⁵ a formulation is:

The secured party will have a perfected security interest in the [certificated securities] when the [certificated securities] have been delivered to the secured party in [State X] [the Opinion Jurisdiction] and are either indorsed to the secured party or in blank, or registered in the name of the secured party by the issuer.

(b) For uncertificated securities, a formulation for a perfection opinion where perfection is by control through registration is:

The secured party will have a perfected security interest when such [securities] are registered by the issuer in the name of the secured party.

When perfection in uncertificated securities is by control through a control agreement or a document of similar effect, a formulation for an opinion is:

The security interest in the uncertificated securities described in the [name of uncertificated securities control agreement or other relevant document] will be perfected upon the execution and delivery of the [name of uncertificated securities control agreement

¹⁵⁴ See *supra*, Introduction, *Extra-Jurisdictional U.C.C. Opinions*.

¹⁵⁵ See *supra* Part III.B(2)(b)(i).

or other relevant document] by the issuer and all other parties thereto.

(c) For security entitlements in a securities account, formulations for perfection by control opinions, depending on the method upon which control is obtained, are:

The security interest in the security entitlements described in the [name of securities account control agreement] will be perfected upon the execution and delivery of the [name of securities account control agreement] by all parties thereto.

OR

The security interest in the security entitlements described in the [name of the document in which the security interest is granted] will be perfected upon the secured party becoming the security intermediary's account holder with respect to the securities account.

(6) **Protected Purchaser and Priority.** A “protected purchaser” is “a purchaser,” a status that includes a secured party,¹⁵⁶ “of a certificated or uncertificated security . . . who: [i] gives value; [ii] does not have notice of any adverse claim to the security;¹⁵⁷ and [iii] obtains control of the security.”¹⁵⁸ To the extent a certificated security is in registered form, it must contain any necessary indorsements in order for the secured party to achieve protected purchaser status.¹⁵⁹ A protected purchaser acquires its interest in the collateral (the security) free of any adverse claim to the security.¹⁶⁰ A secured party that is a protected purchaser of the security would take its interest free of any other security interest—its security interest would be prior to any person with an adverse claim, including the security interest of another secured party.

Some lenders may request a priority opinion as to the certificated securities. Customary practice is not to give or request priority opinions,¹⁶¹

¹⁵⁶ See U.C.C. § 1-201(b)(29)–(30).

¹⁵⁷ An “adverse claim” is a claim to a property interest in the security and that the transfer or holding of the security is in violation of this property interest. See U.C.C. § 8-102(a)(1). A security interest is an adverse claim. See U.C.C. § 8-102 cmt. 1.

¹⁵⁸ U.C.C. § 8-303(a).

¹⁵⁹ See U.C.C. § 8-304(c).

¹⁶⁰ See U.C.C. § 8-303(b).

¹⁶¹ See *supra* Part II.B(2).

but exceptions are sometimes made. A formulation for a protected purchaser (priority) opinion in certificated securities would be:

The security interest of the secured party in the certificated securities is prior to any other security interest created under Article 9 of the U.C.C.¹⁶²

This opinion may be stated alternatively as follows, relating to “adverse claim”¹⁶³ to the security:

The security interest of the secured party in the certificated securities is free of any adverse claim.

In giving either opinion, additional assumptions are usually made: (i) the secured party has no notice of any adverse claim;¹⁶⁴ (ii) [*If no opinion is given by the opinion giver as to possession or control*] the secured party has control of the certificated security; and (iii) to the extent the certificated security is in registered form, it contains an effective indorsement to the secured party or in blank.¹⁶⁵

A more limited priority opinion (that is, limited to priority over security interests perfected by methods other than control) can be given when a certificated security has been delivered to the secured party,¹⁶⁶ even if the secured party is not a protected purchaser under Article 8 of the U.C.C.

IV. OTHER CONTENT OF THE OPINION LETTER

A. Summary of Perfection Choice of Law Rules

An opinion letter does not implicitly provide an opinion as to perfection even if it covers either or both creation and attachment of a U.C.C. security interest under the law of the Opinion Jurisdiction. This exclusion is sometimes expressed (see, for example, Illustrative Opinion Letter Paragraph 4.6(i)). If an opinion letter does not provide a perfection opinion under circumstances in which other counsel (presumably with appropriate assumptions as to attachment) will provide a perfection opinion as to the U.C.C. collateral, the opinion letter does not need to contain, recite, or

¹⁶² For further discussion, see *TriBar U.C.C. Report*, *supra* note 6, at 1498.

¹⁶³ See U.C.C. § 8-102(a)(1).

¹⁶⁴ For a definition of “adverse claim,” see U.C.C. section 8-102(a)(1).

¹⁶⁵ See U.C.C. §§ 8-106(b)(1), 8-107(b).

¹⁶⁶ See U.C.C. § 9-328(5).

summarize the Opinion Jurisdiction U.C.C. choice of law rules that may affect perfection. If, in the absence of expressing any perfection opinion or disclaiming coverage of perfection, the opinion giver provides advisory language concerning perfection rules of an applicable jurisdiction, the opinion giver will need to recite such rules accurately and completely as to the subjects covered. A summary of the rules that paraphrases the provisions of the U.C.C. may not be adequate. The rules of perfection are covered in the limited context of this Report and more expansively in sources cited.

B. Express or Unstated Assumptions and Limitations

Practice concerning the expression of assumptions and limitations or the providing of general information, such as that referred to in the immediately preceding paragraph of this Report, in opinion letters varies. Many of the assumptions and limitations referred to in this Report are understood, as a matter of customary practice, to apply to an opinion concerning a security interest whether or not stated in the opinion letter.¹⁶⁷ As noted in the *2012 Report* and the *Local Counsel Report*, opinion letters in real estate finance transactions frequently express assumptions and limitations.

Many U.C.C. opinions are accompanied by lengthy standard qualifications, sometimes referred to as a “laundry list.” Often, these qualifications restate or recite provisions of Articles 8 and 9 of the U.C.C. Many of these qualifications address priority of the security interest and events occurring after the date of the opinion letter. Some qualifications refer to matters outside the express scope of the opinions given. For several reasons, many items in a typical laundry list of qualifications for non-real estate U.C.C. opinions—although often stated—are unnecessary in a real estate finance opinion letter. First, customary opinion practice is to limit expressly opinions given as to non-real estate collateral to U.C.C. collateral, that is, collateral as to which a security interest may be created and perfected under the U.C.C. Whether or not this limitation is stated in the opinion letter, it is not necessary to explain to the opinion recipient what property is U.C.C. collateral and what is not. Second, it is neither customary to give nor appropriate to request priority opinions with respect to most U.C.C. collateral. For example, an opinion stating that the security interest will be a “first-priority” security interest upon perfection is inappropriate in most cases. Opinion letters in real estate finance transactions often expressly

¹⁶⁷ See *TriBar U.C.C. Report*, *supra* note 6, at 1455 n.16.

disclaim a priority opinion. In either case, because the opinion itself does not address priority, there is no need to give a lengthy recitation as to how a particular security interest may be primed by another security interest.¹⁶⁸ Finally, a number of typical qualifications relate to matters that may occur after the date of the opinion; for example a change in the debtor's name or location, or the need to file continuation statements periodically. Because, by its terms and as a matter of customary practice, an opinion letter speaks only as of its date, there is no need to add qualifications addressing matters arising after that date.¹⁶⁹ An opinion letter may expressly provide that it is given only as of its date. Whether or not that is so stated, no implied obligation exists to re-address the conclusions of the opinion letter to a non-client.

Lenders taking U.C.C. security interests should understand the workings of the U.C.C.—a substantially uniform law throughout the United States in effect for many years—so a generalized explanation of it in a real estate finance transaction opinion letter is unnecessary. If the U.C.C. of the Opinion Jurisdiction differs in some relevant respect from uniform law in a way that materially affects an opinion being expressed, the opinion preparer must consider whether that difference would be an appropriate subject for a qualification in the opinion letter. And, of course, express qualifications as to specific transactional issues are essential.¹⁷⁰

¹⁶⁸ For a discussion on limited priority opinion, see *supra* Part III.B(6).

¹⁶⁹ See *supra* Part I.(d).

¹⁷⁰ For further discussion on the qualifications, see *Illustrative Opinion Letter, infra* para. 4.4.

ADDENDUM**ILLUSTRATIVE OPINION LETTER**

The following illustrative opinion letter (the “**Illustrative Opinion Letter**”) accompanies the report entitled Uniform Commercial Code Opinions in Real Estate Finance Transactions (the “**U.C.C. Opinions Report**”). This Illustrative Opinion Letter provides content discussed in the U.C.C. Opinions Report fully integrated into the Illustrative Opinion Letter provided with the report entitled Local Counsel Opinion Letters in Real Estate Transactions¹⁷¹ (the “**Local Counsel Report**”), a supplement to the report entitled Real Estate Finance Opinion Report of 2012¹⁷² (the “**2012 Report**”), and which in turn supplemented the Illustrative Language for an Opinion Letter accompanying the 2012 Report. Additions made here to the Illustrative Opinion Letter of the Local Counsel Report that are specific to a U.C.C. Opinion Letter are underlined for ready reference, and deletions are indicated by ~~striketrough~~. Please refer to the 2012 Report, to the Local Counsel Report, and to the U.C.C. Opinions Report for a full discussion of the language of this Illustrative Opinion Letter and for the context in which such language is used, as this Illustrative Opinion Letter is not intended to be an independent document or to reflect fully the discussion in the texts. Paragraph numbers in this Illustrative Opinion Letter correspond to the paragraph numbers in the Local Counsel Report. Cross references to the U.C.C. Opinions Report are provided in the text or in footnotes.

This Illustrative Opinion Letter can be used as a starting point to assist lead counsel or local counsel in connection with a real estate finance transaction in which a security interest in U.C.C. collateral is important. The content is drawn from the U.C.C. Opinions Report. However, users are cautioned that (i) many of the included opinions and provisions are illustrative only and will not be applicable in all contexts, and (ii) the U.C.C. Opinions Report does not purport to be comprehensive in its content. In carrying over specific content from the U.C.C. Opinions Report text, some entries in the Illustrative Opinion Letter may appear repetitive or highly nuanced. Please refer to their source for context. Changes to and deletions from this Illustrative Opinion Letter will be necessary based on the facts and circumstances of each transaction and the law that is applicable. References to sections of the Uniform Commercial Code are

¹⁷¹ See generally *Local Counsel Report*, *supra* note 2.

¹⁷² See generally *2012 Report*, *supra* note 1.

to the sections in the Uniform Commercial Code as approved by the National Conference of Commissioners of Uniform State Laws (now called the Uniform Law Commission). The opinion preparer may be required to modify those references so that they conform to the applicable State references.

Comments, notes, instructions, subheadings, numberings, and directions in italics and the footnotes in this Illustrative Opinion Letter are included for instructional purposes only and are not intended to be included in a final opinion letter. Bracketed items need to be selected or deleted in a final opinion letter.

~~~~~  
[date]

[Name and Address of  
Opinion Recipient]

Re: [\$ \_\_\_\_\_] Loan (the “**Loan**” or the “**Transaction**”)  
from [ \_\_\_\_\_] (the “**Lender**”) to  
[ \_\_\_\_\_, a describe nature of entity and identify state of organization]  
(the “**Borrower**”) [guaranteed by  
[ \_\_\_\_\_, a describe nature of entity and identify state of organization]  
(the “**Guarantor**”)]

Ladies and Gentlemen:

We provide to you this letter (this letter, including any attachments, this “**Opinion Letter**”) at the request of the above-referenced Borrower [substitute for Borrower, or add, Guarantor, as applicable] [pursuant to Section \_\_\_\_\_ of the {Agreement} described below].

### I. BACKGROUND

1.1 Role of Counsel; Transaction Documents; Defined Terms. We have acted as counsel to the Borrower in the State of \_\_\_\_\_ (the “**State**”) [solely] for the purpose of providing this Opinion Letter in connection with the Loan.

In preparing this Opinion Letter, we have [been furnished with] [reviewed] unexecuted copies of the following documents relating to the Transaction [provided to us by \_\_\_] [, each to be dated {as of the date of this Opinion Letter} { \_\_\_\_\_ }] [*list only those documents relevant to an opinion being given*]:

- (a) Promissory Note by the Borrower (the “**Note**”).
- (b) [Mortgage/Deed of Trust/Deed to Secure Debt] by the Borrower (the “**Mortgage**”) with respect to certain property including real property located [*briefly describe location of real property in the State*]<sup>173</sup> and

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<sup>173</sup> The location of real property determines where a Mortgage is recorded and where perfection of a security interest in real estate collateral (*see supra* Part II.A) is made by fixture filing. This description may also include a specific location in the State, such as a county (or other relevant local governmental unit) in which the Recording Office related to the real estate security is located (the “Recording Jurisdiction”). If the location of the real property in the State and (where relevant to an opinion given) the Recording

more particularly described in the Mortgage (such property to the extent comprising real property under the Law (defined below) of the State, the “**Real Property**”).

- (c) Assignment of Leases and Rents by the Borrower (the “**Assignment of Leases**”).
- (d) Security Agreement by the Borrower (the “**Security Agreement**”).
- (e) Loan Agreement by the Borrower and the Lender (the “**Agreement**”).
- (f) [Guaranty by the Guarantor (the “**Guaranty**”).]
- (g) [Deposit Account Control Agreement among the Borrower, the Lender and (the “**Bank**”) (the “**DACA**”).]
- (h) [Certificate No. [1] issued by [Issuer] [a term defined in the applicable transaction document or elsewhere in this Opinion Letter] and Assignment, in blank, of Certificate, executed by Borrower evidencing the [Pledged Interests] [a term defined in the applicable transaction document or elsewhere in this Opinion Letter] in (the “**Certificate**”).]
- (i) [Securities Account Control Agreement among the Borrower, the Lender and (the “**Securities Intermediary**”) (the “**Securities Account Control Agreement**”).]
- (j) [add other transaction documents as relevant]
- (k) [A Uniform Commercial Code ~~Fixture~~ financing statement (the “**U.C.C. Fixture Financing Statement**”) to be filed as a fixture filing naming the Borrower as debtor and the Lender as secured party].

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Jurisdiction defined in the opinion letter is not expressly stated in the opinion letter, location in the State and the Recording Jurisdiction is assumed implicitly or expressly. The Recording Office would be identified in the opinion letter if an opinion concerning the place to perfect a security interest in real estate collateral by a fixture filing is given. See *supra* Part II.A(3) and this *Illustrative Opinion Letter* para. 3.6 and 3.12.

- (l) [A Uniform Commercial Code Financing Statement (the “U.C.C. Financing Statement”) naming the Borrower as debtor and the Lender as secured party].

The documents described in items (a) through [(i)] above [*correct the letters as appropriate*] are referred to in this Opinion Letter as the “**Transaction Documents.**”<sup>174</sup> The Transaction Documents described in items [(a) through (e) [and (g) through (i)]] above [*correct the letters as appropriate*] are referred to in this Opinion Letter as the “**Borrower Transaction Documents.**” The Transaction Documents described in items [(b) through (d)] above [*correct the letters as appropriate*] are referred to in this Opinion Letter as the “**Security Documents.**” The Real Property, together with all other property described in any of the Security Documents in respect of which provision is made by the Security Documents for a lien or security interest, is referred to in this Opinion Letter as the “**Collateral**” [*a different collective term used in the security instrument to define the property in which a security interest is created, such as “Subject Property” or “Mortgaged Property,” could be substituted*].

*NOTE: Unless all of the Transaction Documents are governed by the Law of the State and are intended to be addressed in the Opinion Letter, the scope of review should be tailored. In many cases, local counsel will limit its review to those documents or provisions of them that are governed by State Law, such as the Security Documents. If the opinions given are to be limited to certain documents, a statement to that effect should be made and added to the foregoing language. An example follows:*

The Transaction Documents described in items [(a) and (e)] above [*correct letters as appropriate to refer to those documents that are not governed in whole or in part by the Law of the State*] are referred to in this Opinion Letter as the “**Other Transaction Documents.**” The Borrower Transaction Documents excluding the Other Transaction Documents are referred to in this Opinion Letter as the “**Opinion Transaction Documents.**”

In rendering our opinions, we have not reviewed the Other Transaction Documents except to the extent the Other Transaction Documents contain

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<sup>174</sup> U.C.C. financing statements are not “Transaction Documents,” and no opinion concerning execution or enforceability of them is given. Other opinions regarding the form, purpose, and effect of them may be given, referring to them expressly. In some opinion letters, U.C.C. financing statements are referred to in a separate paragraph and are not listed in the enumerated documents. *See 2012 Report, supra* note 1, at 228.

specific definitions that are expressly incorporated in the [Mortgage] [Opinion Transaction Documents] and are necessary to our opinions. Our opinions are given (a) assuming that nothing in any of such Other Transaction Documents materially changes any of the terms of the [Mortgage] [Opinion Transaction Documents], (b) assuming that such Other Transaction Documents will be enforced consistently with the opinions expressed in this Opinion Letter, (c) assuming that definitions incorporated in the [Mortgage] [Opinion Transaction Documents] will be construed in accordance with the Law of the State if applicable, and (d) without regard to the effect of incorporation, by reference or otherwise. We express no opinions concerning the Other Transaction Documents.

*NOTE: In some cases, Other Transaction Documents may not be provided for review by local counsel although such Other Transaction Documents may affect documents about which opinions are provided. For example, when defined terms are incorporated from a loan agreement that is not reviewed, an exception about unknown effects should be made. An example is:*

We have not [been furnished with] [reviewed] the [*name of document(s)*] [Other Transaction Documents]. Our opinions are given (a) assuming that nothing in any of such Other Transaction Documents materially changes any of the terms of the Opinion Transaction Documents, (b) assuming that such Other Transaction Documents will be enforced consistently with the opinions expressed in this Opinion Letter, and (c) without regard to the effect of incorporation by reference or otherwise. We express no opinions concerning the Other Transaction Documents.

Terms used in this Opinion Letter with initial capital letters and not otherwise defined in this Opinion Letter shall have the meanings ascribed to them in the [Mortgage].

*NOTE: When the scope of local counsel's role is limited to enforceability of a few documents that are governed (at least in part) by State Law, as is often the case, in place of providing a comprehensive list of transaction documents and creating defined terms for classes of documents, a more limited list of documents may appear, using the names of the specific documents in the opinions being provided. In the remaining portions of the Opinion Letter, reference to Borrower Transaction Documents or Opinion Transaction Documents might be replaced by reference to one or more specific documents. This Illustrative Opinion*

*Letter does not provide all possible variations for this; and references to defined document groupings, such as Borrower Transaction Documents and Opinion Transaction Documents, in the text of this Illustrative Opinion Letter should be adjusted and coordinated as necessary.*

1.2 Authority Documents.<sup>175</sup> In connection with this Opinion Letter we also have reviewed the following documents (collectively, the “**Authority Documents**”):

- (a) (i) [Certificate of Formation] of the Borrower as filed in the office of the [*name appropriate Public Authority*] of the State and certified in the Public Authority Documents described below; and (ii) Operating Agreement of Borrower dated [\_\_\_\_\_] as certified to us in the Client Certificates described below (collectively, the “**Borrower Organizational Documents**”).
- (b) [Consent/Resolution of partners, members, board of directors, or other necessary persons of the Borrower] as certified to us in the Client Certificates.
- (c) (i) [Certificate of Formation] of the Guarantor as filed in the office of the [*name appropriate public authority*] of the State and certified in the Public Authority Documents described below; and (ii) Operating Agreement of the Guarantor dated [\_\_\_\_\_] as certified to us in the Client Certificates described below (collectively, the “**Guarantor Organizational Documents**”).
- (d) [Consent/Resolution of partners, members, board of directors, or other necessary persons of the Guarantor] as certified to us in the Client Certificates.
- (e) (i) [certificate of status of the Borrower issued by the state of the Borrower’s organization, dated {\_\_\_\_\_}]; (ii) [certificate(s) of status of the Borrower in any

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<sup>175</sup> NOTE: This paragraph applies when the Opinion Letter is to cover entity matters pertaining to the Borrower or Guarantor. Not all subparagraphs of this paragraph will be applicable to all opinion letters. For example, if an opinion letter is provided as to a party not organized in the State (Opinion Jurisdiction), only the matters covered in (e)(iii) or (iv) and (f) may be appropriate.

other states in which the Real Property is located, dated {\_\_\_\_\_}; (iii) certificate issued by the State [*or a defined Public Authority of the State*] stating that the Borrower [Guarantor, *whichever is the owner of the Real Property*] is qualified to do business in the State (the “**State Certificate**”); (iv) [certificate of status of the Guarantor issued by the state of the Guarantor’s organization, dated {\_\_\_\_\_}]; and (v) [where relevant, certificates concerning tax status, certificates concerning U.C.C. filings, or certificates concerning title registration or ownership] (collectively, the “**Public Authority Documents**”).

- (f) Certificate of the Borrower and Certificate of the Guarantor attached hereto (collectively the “**Client Certificates**”).

*NOTE: If the Borrower or the Guarantor is organized outside of the State, local counsel will not opine about the entity aspects of the Borrower or the Guarantor and, therefore, will not need to review any of the foregoing Authority Documents issued outside the State other than, if needed, a Client Certificate. In such case, local counsel may opine with respect to the Borrower’s or Guarantor’s being qualified to do business in the State if such qualification is necessary to the opinions being provided, and will review only the applicable Public Authority Document of the State referred to in Paragraph 1.2(e). This Illustrative Opinion Letter does not provide all possible variations for this; and references to Public Authority Documents and Authority Documents in the text of this Illustrative Opinion Letter should be adjusted and coordinated as necessary.*

1.3 Opinion Jurisdiction[s]; Definition of Law. The statutes, the judicial and administrative decisions, and the policies, rules, and regulations duly promulgated by the governmental agencies (collectively “**Law**”) covered by the opinions expressed in this Opinion Letter are limited to the Law of the State [*the following text in this bracketed section would be omitted in most local counsel opinions, and if omitted, the term “State” would be used in place of “Opinion Jurisdictions” or “Entity State” in the Opinion Letter:* and the Limited Liability Company Act and General Corporation Law {*as applicable*} of the State of {*Insert name of state where entity was organized*} (the “**Entity State**,” and together with the State, the “**Opinion Jurisdictions**”), in each case] as currently in

effect. We express no opinion concerning federal law, the Law of any other jurisdiction[, the other Law of the Entity State,] or the effect thereof. Further, and without limiting the foregoing provisions of this Paragraph or other limitations on coverage, our opinions in this Opinion Letter relate only to such Law of the [State] [Opinion Jurisdictions] that we, in the exercise of customary professional diligence, would reasonably recognize as being directly applicable to any or all of the Borrower, the Guarantor, or the Transaction. References in this Opinion Letter to the “**Uniform Commercial Code**” or “**U.C.C.**” refer to the Uniform Commercial Code as in effect in the State [or Opinion Jurisdiction(s), as appropriate].

1.4 Scope of Review. In connection with the opinions set forth in this Opinion Letter and subject to the foregoing, we have reviewed [unexecuted copies of] the Opinion Transaction Documents and the [Authority Document{s}] [State Certificate], [and the Client Certificates]. [Our opinions expressed in this Opinion Letter are limited to our review of the foregoing Opinion Transaction Documents].<sup>176</sup> We have given consideration to such matters of Law [and facts], as we have deemed appropriate, in our professional judgment, to render such opinions.

1.5 Reliance on Other Sources Without Investigation. We have relied, without investigation or analysis, upon information in the [Authority Document{s}] [State Certificate], [and the Client Certificates]. Except to the extent the information constitutes a statement, directly or in practical effect, of any legal conclusion at issue, we also have relied, without investigation or analysis, upon the information contained in representations and warranties made by both the Borrower and the Guarantor in the [Transaction Documents] and on information provided in the Client Certificates.

## II. ASSUMPTIONS

2.1 Assumptions. In rendering this Opinion Letter, we have relied, without investigation, upon the assumptions set forth below:

- (a) A Borrower [or Guarantor] who is a natural person, and natural persons who are involved on behalf of [either of] the Borrower [or the Guarantor], each has

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<sup>176</sup> The bracketed sentence is appropriate if the opinions given are to be limited to specific documents, such as the Opinion Transaction Documents in this *Illustrative Opinion Letter*, which often is the case in a local counsel opinion. The scope of review may not be so effectively limited if the bracketed language is not included.

- sufficient legal capacity to enter into and perform the Transaction or to carry out that person's role in it.
- (b) The Borrower [or the Guarantor] holds the requisite title and rights or [with respect to U.C.C. collateral] power to transfer rights in and to any property involved in the Transaction.
  - (c) Each party to the Transaction (other than the Borrower [and the Guarantor]) [*if the Borrower or the Guarantor is organized outside of the State,*<sup>177</sup> *either delete the parenthetical content as to the entity organized outside of the State or change "other than" to "including" that entity*] has satisfied those legal requirements that are applicable to it to the extent necessary to make the Transaction Documents enforceable against it, and [*if one or more of the Transaction Documents, or a portion of, or certain issues under, one or more of the Transaction Documents are governed by Law other than that of the State, and counsel is rendering an enforceability opinion about the Transaction Document[s] or portion thereof that is governed by the Law of the State, add the following:* except as is expressly provided as to the Borrower [and the Guarantor] in Paragraph\_{3.5 Enforceability} of this Opinion Letter,] each such party's obligations set forth therein are enforceable against it in accordance with all stated terms.<sup>178</sup>
  - (d) Each party to the Transaction (other than the Borrower and the Guarantor) has complied with all legal requirements pertaining to its status as such status relates to its rights to enforce the Transaction Documents against the Borrower and the Guarantor.

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<sup>177</sup> If the Borrower or the Guarantor is organized outside the State, add Assumption(s), *Illustrative Opinion Letter, infra* paras. 2.1(p) and 2.1(q) relating to entity issues.

<sup>178</sup> See *Local Counsel Report, supra* note 2, at 187–89. For a suggested additional assumption regarding the Borrower, the Guarantor, or both, see *id.* at 187 n.46. This additional assumption is set out in this *Illustrative Opinion Letter, infra* para. 2.1(p).

- (e) Each Transaction Document, Authority Document, and other document submitted to us for review is accurate and complete, each such document that is an original is authentic, each such document that is a copy conforms to an authentic original, and all signatures on each such document are genuine. The form and content of all Transaction Documents submitted to us as unexecuted copies do not differ in any respect relevant to this Opinion Letter from the form and content of such Transaction Documents as executed and delivered.
- (f) Each Public Authority Document is accurate, complete, and authentic, and all official public records (including their due and proper recordation or filing, and their due and proper indexing) are accurate and complete.
- (g) The [Security Documents have] [Mortgage has] been or will be duly and properly recorded or filed and duly and properly indexed in all places necessary (if and to the extent necessary) to create [if applicable: and perfect] the encumbrance and lien as provided therein.
- (h) The description of the Collateral is accurate and reasonably identifies the Collateral.<sup>179</sup>
- (i) Legally adequate consideration [and value]<sup>180</sup> has been given for the Transaction and the obligations of the Borrower and the Guarantor in the Transaction Documents.

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<sup>179</sup> This assumption is also an exclusion from an opinion unless expressly covered. See *Illustrative Opinion Letter, infra* para. 4.6(u).

<sup>180</sup> An opinion relating to enforceability of a U.C.C security interest would be premised on “value” having been given, and use of that term in this would be appropriate when giving a U.C.C. opinion. “Consideration” is a requirement for formation of a contract. The giving of “value” is a requirement of U.C.C. section 9-203 for enforceability. The term “value” is defined in U.C.C. section 1-204. Value may be given in several specific ways.

*Assumptions related to the ways the parties have dealt with and are anticipated to deal with each other, and to the state of the Law:*<sup>181</sup>

- (j) [There has not been any mutual mistake of fact or misunderstanding, fraud, duress, or undue influence.]
- (k) [The conduct of the parties to the Transaction has complied and will continue to comply with any requirement of good faith, fair dealing, and conscionability.]
- (l) [The Lender and any agent acting for the Lender in connection with the Transaction have acted in good faith and without notice of (i) any defense against the enforcement of any rights created by the Transaction, (ii) any adverse claim to any Collateral, lien, or security interest transferred, or created as part of the Transaction, or (iii) any agreement, or court or administrative order, writ, judgment, or decree that would be violated by entering into the Transaction, or by execution, delivery, or performance of the Transaction Documents.]
- (m) [There are no agreements or understandings among the parties, written or oral, and there is no usage of trade or course of prior dealing among the parties that would, in either case, define, supplement, or qualify the terms of the Transaction Documents.]
- (n) [All statutes, judicial and administrative decisions, and rules and regulations of governmental agencies, constituting the Law of the State are generally available (i.e., in terms of access and distribution following publication or other release) to lawyers practicing in the State, and are in a format that makes legal research reasonably feasible.]
- (o) [The constitutionality or validity of a relevant statute, rule, regulation, or agency action is not in issue unless

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<sup>181</sup> Many opinion givers include assumptions as to the issues in some or all of the assumptions in bracketed Paragraphs 2.1(j)–(o). All these assumptions are implied. Please refer to the corresponding sections of Chapter Two of the *2012 Report* for a full explanation of these bracketed assumptions. See *2012 Report, supra* note 1, at 227–60.

a reported decision in the State has specifically addressed but not resolved, or has established, its unconstitutionality or invalidity.]

*Additional Entity Assumptions:*

- (p) *Insert if the Borrower and/or the Guarantor are not organized under the Law of the State:* [Each of] [T]he Borrower [and the Guarantor] (i) is a [*nature of entity*] duly organized, validly existing and in good standing under the Law of the jurisdiction of its organization or formation; (ii) has the power under its organizational documents and applicable [*nature of entity*] Law to execute, deliver, and perform its obligations under the Transaction Documents to which it is a party; (iii) has taken all action necessary under its organizational documents and applicable [*nature of entity in jurisdiction of formation*] Law to authorize the execution and delivery of the Transaction Documents to which it is a party and the performance of its obligations thereunder, and (iv) has duly executed and delivered the Transaction Documents to which it is a party.<sup>182</sup>
- (q) Each of the persons whose consent is required to authorize the Borrower [or the Guarantor] to execute and deliver the Transaction Documents and perform its agreements thereunder, if an entity, (i) is validly existing and in good standing under the Law of the jurisdiction of its organization or formation and (ii) has taken all action necessary under any applicable organizational documents and applicable Law to authorize the execution and delivery of the Transaction Documents to which the Borrower or the Guarantor is a party and the performance of the Borrower's or the Guarantor's obligations thereunder.<sup>183</sup>

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<sup>182</sup> See *Local Counsel Report*, *supra* note 2, Part II.(1).

<sup>183</sup> See *id.* Part II.(5).

*Alternate assumptions as to execution and delivery by all parties, including the Borrower and/or the Guarantor:*

- (r) The Transaction Documents have been duly executed and delivered by the respective parties thereto by their duly authorized officers or other representatives in accordance with the Law of the jurisdiction where executed and with the Law of any jurisdiction governing actions of the parties executing and delivering such documents.<sup>184</sup>
- (s) The form of acknowledgment and action taken with respect to acknowledgment of each Transaction Document comply with requirements of the jurisdiction where acknowledged.<sup>185</sup>

*Choice of Law Assumptions*<sup>186</sup>

- (t) *When a choice of law opinion is not given:* To the extent governed by the Law of any jurisdiction other than the State, including conflicts of law principles thereof, we have assumed that the Transaction Documents are enforceable against the parties thereto in accordance with their respective terms.<sup>187</sup>
- (u) *When a choice of law opinion is given under Restatement principles:* To the extent governed by the Law of any jurisdiction other than the State (an “**Other Jurisdiction**”), including conflicts of law principles thereof, we have assumed that: (i) the Transaction Documents are enforceable against the parties thereto in accordance with their respective terms under the Law of the Other Jurisdiction; (ii) the Other Jurisdiction has a substantial relationship to the parties or the Transaction, or there is other reasonable basis for the choice by the parties, and application of the Law of an Other Jurisdiction would not be

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<sup>184</sup> See *id.* Part II.(2).

<sup>185</sup> See *id.* Part II.(3).

<sup>186</sup> See *id.* Parts II.(1) and (4), III.3.5 and 3.9. But see this Report, *supra*, Part II.B, as to statutory limitation on choice of law governing perfection and priority.

<sup>187</sup> See *Local Counsel Report, supra* note 2, Part I.(1)(ii).

contrary to a fundamental policy of the State; and (iii) the selection of application of the Law of the Other Jurisdiction will be honored by courts in the Other Jurisdiction.<sup>188</sup>

*U.C.C. Assumption*<sup>189</sup> *as to Name of the Borrower/Debtor*:<sup>190</sup>

- (v) The Mortgage [and any U.C.C. financing statement] [the U.C.C. Financing Statement to be filed as a fixture filing, and the U.C.C. Financing Statement] sufficiently provide the name of the Borrower as debtor.

*“No Governmental Approvals” Assumption*:<sup>191</sup>

- (w) The Borrower [or the Guarantor] is a general business entity of a type that is not regulated by governmental authority or court order in a way that would restrict the ability of the Borrower [or the Guarantor] to alienate or encumber its property to secure indebtedness [or to enter into the Transaction Documents].

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<sup>188</sup> See *id.* Part II.(4).

<sup>189</sup> For this assumption, see *supra*, Part I.(d). Additional assumptions for U.C.C. opinions discussed in the *U.C.C. Opinions Report* are found in assumptions (x)-(ll) in this *Illustrative Opinion Letter*.

<sup>190</sup> See *Local Counsel Report*, *supra* note 2, Part II.(6); see also this Report, *supra* Part I.(d).

<sup>191</sup> For a discussion of this assumption, see *Local Counsel Report*, *supra* note 2, at Part III.3.5(f). It may be provided as an alternative to the limitation in the 2012 Report. See *2012 Report*, *supra* note 1, at 269. As an alternative to these assumptions, the factual basis of the “no governmental approvals” assumptions may be included in the Borrower’s certificate. More specific assumptions may include: (a) Neither the Borrower nor the Guarantor is subject to any federal, state, or local governmental programs that require governmental consent prior to the Borrower’s or the Guarantor’s entering into [commercial loan transactions]; (b) Neither the Borrower nor the Guarantor is engaged in an industry or business activity that is specially regulated by any federal, state, or local governmental entity or agency such that governmental consent is required prior to the Borrower’s or the Guarantor’s entering into [commercial loan transactions]; and (c) Neither the Borrower nor the Guarantor is subject to any court order that requires governmental consent prior to the Borrower’s or the Guarantor’s entering into [commercial loan transactions].

Additional U.C.C. Assumptions:

For an opinion on perfection by filing as to Fixtures or Personal Property (or both):<sup>192</sup>

- (x) The Borrower is not a transmitting utility as defined in U.C.C. section 9-102(a)(81).

For an opinion on perfection by filing as to as-extracted collateral or standing timber to be cut:<sup>193</sup>

- (y) The [wellhead or minehead] [standing timber to be cut] is located in the State.

For perfection by filing as to Personal Property (this assumption would be appropriate when an opinion is given as to a debtor located in the Opinion Jurisdiction):<sup>194</sup>

- (z) The jurisdiction of organization of the Borrower is and will be as set forth [in the caption to] [on the first page {or other designated location} of] this Opinion Letter.

For an opinion as to the perfection of a security interest in a deposit account:<sup>195</sup>

- (aa) Every account described in the DACA is a “deposit account” as defined in Section 9-102(a)(29) of the U.C.C.
- (bb) The “Bank” as defined in the DACA is a “bank” as defined in Section 9-102(a)(8) of the U.C.C.
- (cc) The Bank’s jurisdiction (as defined in Section 9-304 of the U.C.C.) for every account described in the DACA is, and at all relevant times will be, the State.

For opinions as to perfection of Investment Property (other than “securities”):<sup>196</sup>

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<sup>192</sup> See *supra* Part II.A(3).

<sup>193</sup> See *supra* Part II.A(6).

<sup>194</sup> See *supra* Part II.B.

<sup>195</sup> See *supra* Part III.A.

<sup>196</sup> See *supra* Part III.B.

- (dd) [Name of Securities Intermediary] (the “**Securities Intermediary**”) is a “securities intermediary” as defined in Section 8-102 of the U.C.C.
- (ee) The [Investment Account] (as defined in the [Security Agreement] and [Securities Account Control Agreement]) is a “**securities account**” as defined in Section 8-501(a) of the U.C.C., and all property from time to time credited to the [Investment Accounts] are “**financial assets**” as defined in Section 8-102(a)(9) of the U.C.C.
- (ff) The security intermediary’s jurisdiction (as defined in Section 8-110(e) of the U.C.C.) with respect to any Investment Accounts is, and, at all relevant times will be, only in the State. The Borrower is the only “entitlement holder” (as defined in the U.C.C.) of the Securities Accounts and the financial assets (as defined in the U.C.C.) credited to the Securities Accounts.

*For opinions as to perfection as to Letter of Credit Rights (not covered in the U.C.C. Opinions Report):*

- (gg) The [Letter of Credit] is a “**letter of credit**” as defined in the U.C.C.
- (hh) The Issuer’s jurisdiction (as defined in Section 9-306 of the U.C.C.) with respect to the [Letter of Credit] is, and at all relevant times will be, only in the State.]

*If the Pledged Interests are “securities”:*<sup>197</sup>

- (ii) The Pledged Interests are “[certificated] securities” under the U.C.C. and have been duly issued by Issuer and remain outstanding.

*If the Pledged Interests have been certificated:*

- (jj) [The Certificate has been duly issued by Issuer and is the only certificate representing the Pledged Interests in Issuer. The Certificate is the sole original certificate. The Pledged Interests have been duly

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<sup>197</sup> See *supra* Part III.B.

issued by Issuer and remain outstanding. All of the Pledged Interests are indorsed (by the Assignment) to or registered in the name of the Lender or endorsed (by the Assignment) in blank.]

- (kk) The Certificate [and Assignment] will be delivered to and will, at all relevant times, be held by Lender in the State.

*If the Pledged Interests are “securities,” but not certificated:*

- (ll) The Pledged Interests have been assigned to, and registered by, Issuer in the name of the Lender.

*If an opinion as to priority or no adverse claim is to be provided:*<sup>198</sup>

- (mm) The secured party has no notice of any adverse claim (as that term is defined in U.C.C. section 8-102(a)(1).
- (nn) [If no opinion is given by the opinion giver as to possession or control] The secured party has control of the certificated security.
- (oo) To the extent the certificated security is in registered form, it contains an effective indorsement to the secured party or is in blank.

*Other Assumptions:*

- (pp) *[Placeholder if necessary and appropriate for other state, entity, or transaction-specific assumptions].*

## II. OPINIONS

Based upon and subject to the foregoing assumptions and other matters, and to the exceptions, exclusions, qualifications, and other limitations set forth in this Opinion Letter, we are of the opinion that:

3.1 Status. [Based solely on the Public Authority Documents,] The Borrower is a [limited liability company], validly existing in the State. [Based solely on the Public Authority Documents,] The Guarantor is a [nature of entity], validly existing in the State. *Instead of the preceding sentences, if the Borrower or the Guarantor is not organized under the*

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<sup>198</sup> See *supra* Part III.B(6).

*Law of the State:* Based solely on the Public Authority Document(s), the Borrower [Guarantor] is qualified to do business in the State.

3.2 Power. The Borrower has the [limited liability company] power to execute and deliver the Opinion Transaction Documents. The Guarantor has the [corporate] power to execute and deliver the Guaranty. *Omit this paragraph as to the Borrower or the Guarantor if it is not organized under the Law of the State and instead assume the subject matter.*<sup>199</sup>

3.3 Authorization. All [limited liability company] actions or approvals by the Borrower, [and its {members/managers},] necessary to bind the Borrower under the Transaction Documents have been taken or obtained. All [corporate] actions or approvals by the Guarantor, [and its {directors/shareholders},] necessary to bind the Guarantor under the Guaranty have been taken or obtained. *Omit this paragraph as to the Borrower or the Guarantor if it is not organized under the Law of the State, and instead assume the subject matter.*<sup>200</sup>

3.4 Execution and Delivery. The Borrower has duly executed [and delivered] the Borrower Transaction Documents. The Guarantor has duly executed and delivered the Guaranty. *Omit this paragraph as to the Borrower or the Guarantor if it is not organized under the Law of the State or the Law of the State does not apply to the acts described, and instead assume the subject matters.*<sup>201</sup>

3.5 Enforceability. The Opinion Transaction Documents are enforceable against the Borrower, in accordance with their terms. *If the Transaction Documents are governed in part by the Law of the State and in part by the Law of another jurisdiction, and the opinion giver is satisfied that selection of State Law will be honored, the opinion instead could read:* To the extent that the Law of the State applies, giving effect to the choice of law provisions in the Borrower Transaction Documents choosing the Law of the State but excluding choice of law rules, the Opinion Transaction Documents are enforceable against the Borrower, in

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<sup>199</sup> See *Illustrative Opinion Letter*, *supra* para. 2.1(p)(ii).

<sup>200</sup> See *Illustrative Opinion Letter*, *supra* para. 2.1(p)(iii).

<sup>201</sup> See *Illustrative Opinion Letter*, *supra* para. 2.1(r).

accordance with their terms. [The Guaranty is enforceable against the Guarantor in accordance with its terms.]<sup>202</sup>

3.6 Form of Documents; Suitability for Recording/Filing. The Mortgage is in a form sufficient to create a lien on all right, title, and interest of the Borrower [Guarantor] in and to the Real Property. *If a separate Security Agreement that is governed by Law of the State is included within the term Transaction Documents, add the following:* The Security Agreement is in a form sufficient to create a security interest in those items of the personal property identified as constituting part of the Collateral in which a security interest can be created under Article 9 of the U.C.C.

*Or, in place of the first sentence of the foregoing paragraph when appropriate:*

The Mortgage is in form sufficient to create (i) a lien on all right, title, and interest of the Borrower [*or the Guarantor*] in and to the Real Property[, including the Leases and Rents,] and (ii) an assignment of all right, title, and interest of the Borrower [Guarantor] in the [Leases and] Rents [for collateral purposes]. *If there is a separate assignment of leases and rents (or analogous document):* The Assignment of Leases is in form sufficient to assign all right, title, and interest of the Borrower [Guarantor] in the [Leases and]Rents [for collateral purposes].

*A more specific opinion regarding creation of a security interest in fixtures may read:*

The [security instrument] is in form sufficient to create a security interest in [all right, title, and interest of the Borrower in] that portion of the [Collateral] that is fixtures [or goods that are to become fixtures] under Article 9 of the U.C.C. [OR The [security instrument] creates [a] [an attached] security interest in [all right, title, and interest of the Borrower

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<sup>202</sup> When transaction documents provide that they are to be governed by the law of a jurisdiction other than the [State] and a choice of law opinion is disclaimed, requests are sometimes made that an [“as if”] enforceability opinion be given . . . : **if a court of competent jurisdiction would rule that the law of the State should govern the [Opinion] Transaction Documents, notwithstanding the choice of law of [chosen jurisdiction], the Opinion Transaction Documents are enforceable.** See *Local Counsel Report, supra* note 2, Part III.3.5(b)(3).

in] that portion of the [Collateral] that is fixtures [or goods that are to become fixtures].]<sup>203</sup>

*If an opinion regarding creation of a security interest in U.C.C Collateral is to be provided and the Mortgage serves as a security agreement for this purpose, use of the following may be appropriate:*

The Mortgage is in form sufficient to create a security interest in the U.C.C. Collateral [a term defined in the transaction documents or elsewhere in this Opinion Letter] to the extent a security interest may be created in that collateral under Article 9 of the U.C.C.<sup>204</sup>

*Alternatively, if an opinion regarding the creation of an attached<sup>205</sup> security interest in U.C.C. Collateral is to be provided, use of the following may be appropriate:*

The Mortgage creates an attached security interest in [all right, title, and interest of the Borrower in] the U.C.C. Collateral [a term defined in the transaction documents or elsewhere in this Opinion Letter] to the extent a security interest may be created in that collateral under Article 9 of the U.C.C.<sup>206</sup>

*Suitability for Recording Mortgage:*

The Mortgage is in form sufficient to permit recordation under the Law of the State. *Add if appropriate:* We note the possibility that recording offices in this State may apply Local Law, and no opinion is provided in this Paragraph \_\_ [3.6 *Form of Documents*] that the Mortgage is in form suitable, or will be accepted, for, recording by reason of Local Law.

*If the requirements of U.C.C. section 9-502 are met by the Mortgage, the following opinion may be given:*

Upon recordation in the [office of the \_\_\_\_\_ (the “Recording Office”)] [Recording Office]<sup>207</sup> [a term defined here or elsewhere in the opinion letter indicating the office in the State in which to record a mortgage of the mortgaged property], the Mortgage is in form sufficient to serve as a U.C.C. fixture ~~financing statement~~ filing with

<sup>203</sup> See *supra* Parts I.(a), II.A(1).

<sup>204</sup> See *supra* Parts I.(b), II.B(1).

<sup>205</sup> See *supra* Parts I.(b), II.A(2), B(1).

<sup>206</sup> See *supra* Part II.B(2).

<sup>207</sup> See *supra* Part II.A(3).

respect to that portion of the Collateral that consists of goods that are or are to become fixtures under the real property law of the State. **OR** The Mortgage to be filed as a fixture filing is in form sufficient for recording in the [office of the \_\_\_\_\_ (the “Recording Office”)] [Recording Office] [a term defined here or elsewhere in the opinion letter indicating the office in the State in which to record a mortgage of the mortgaged property].<sup>208</sup>

*Suitability for Filing Financing Statement: Opinions may be requested concerning the form of U.C.C. Financing Statements including U.C.C. Fixture Filings. These are often coupled with an opinion about the effect of filing or recording. See Paragraph 3.12 below. Given alone, examples are:*

The U.C.C. Financing Statement is in proper form for filing under the State U.C.C. in the office of the \_\_\_\_\_ of the State (the “Filing Office”) [defined here or elsewhere in this Opinion Letter].<sup>209</sup>

The U.C.C. Financing Statement to be filed as a fixture filing is in form sufficient for filing in the [office of the \_\_\_\_\_ (the “Recording Office”)] [Recording Office] [a term defined here or elsewhere in the opinion letter indicating the office in the State in which to record a mortgage of the mortgaged property].<sup>210</sup>

3.7 No Breach or Violation. The borrowing of the Loan, and the execution and delivery by the Borrower of, and performance of its payment obligations in, the Opinion Transaction Documents, do not: (i) violate the Borrower Organizational Documents, (ii) breach any existing obligation of the Borrower under any of the agreements and documents specified in Attachment [ ] hereto, or (iii) violate any existing obligation of the Borrower under any orders, if any, which are identified as such in Attachment [ ] hereto, which the Borrower has confirmed to us are the only court and administrative orders that name the Borrower and are specifically directed to it or its property. Execution and delivery by the Guarantor of, and performance of its payment obligations in, the Guaranty, do not: (x) violate the Guarantor Organizational Documents, (y) breach any existing obligation of the Guarantor under any of the agreements and documents specified in Attachment [ ] hereto, or (z) violate any existing

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<sup>208</sup> See *supra* Part II.A(3).

<sup>209</sup> See *supra* Part II.B(1).

<sup>210</sup> See *supra* Part II.A(3).

obligation of the Guarantor under any orders, if any, which are identified in Attachment [ ] hereto, which the Guarantor has confirmed to us are the only court and administrative orders that name the Guarantor and are specifically directed to it or its property. Our opinions in this Paragraph do not extend to any action or conduct of either the Borrower or the Guarantor that a Transaction Document may permit but does not require. In this Opinion Letter, the agreements and documents referred to in clauses (ii) and (y) above in this Paragraph sometimes are referred to as “**Other Agreements**,” and the orders referred to in clauses (iii) and (z) above in this Paragraph sometimes are referred to as “**Court Orders**.” For purposes of this Paragraph, in addition to the other assumptions in this Opinion Letter, we assume that Other Agreements and Court Orders, if any, to the extent they are governed by Law other than that of the State, would be enforced to the same extent, and only to the same extent, as under the Law of the State.<sup>211</sup>

3.8 No Violation of Law. The execution and delivery by the Borrower of, and performance by the Borrower of its payment obligations in, the Transaction Documents, neither are prohibited by applicable provisions of Law comprising statutes or regulations duly enacted or promulgated by the State (“**Statutes or Regulations**”) nor subject the Borrower to a fine, penalty, or other similar sanctions, under any Statutes or Regulations. Execution and delivery by the Guarantor of, and performance by the Guarantor of its payment obligations in, the Guaranty, neither are prohibited by applicable provisions of Statutes or Regulations nor subject the Guarantor to a fine, penalty, or other similar sanctions, under any Statutes or Regulations. Our opinions in this Paragraph do not extend to any action or conduct of either the Borrower or the Guarantor that a Transaction Document may permit but does not require.

3.9 Choice of Law. [Except as expressly stated below in this Paragraph, this] [This] Opinion Letter does not express any opinion as to the enforceability of any choice of law or analogous provisions in the Transaction Documents.<sup>212</sup>

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<sup>211</sup> Local counsel typically do not render this opinion about breach or violation of organizational documents if Borrower is not formed under the Law of the State, or breach or violation of other obligations of the Borrower. Lead counsel is typically in a better position to render these opinions.

<sup>212</sup> This format is presented in the 2012 Report Illustrative Language. As the 2012 Illustrative Language in Paragraph 3.9 suggests, if no choice of law opinion is given, an express exclusion of choice of law (e.g., “This Opinion Letter does not express any opinion

*If a choice of law opinion can be given, based on applicable State Law,<sup>213</sup> the opinion language might read:*

A federal court sitting in the State and the State courts in the State, applying the choice of law rules of the State [would] [should] give effect to the choice of law provisions contained in Paragraph \_\_ of the [Mortgage]. *NOTE: Use of this opinion statement would require either the Assumption noted in Paragraph 2.1(u) of this Illustrative Opinion Letter, where the Restatement (Second) Conflicts of Law has been followed, or other assumptions based on State Law.*

*If a choice of law opinion cannot be given under applicable Law, a disclaimer either such as that appearing in the opening sentence above, beginning with “This Opinion Letter . . .” would be included here or a Limitation as provided in Paragraph 4.6 of this Illustrative Opinion Letter would be included in the Opinion Letter.*

3.10 Usury.<sup>214</sup> *[If no opinion on usury or related interest regulation matters is to be provided implicitly:] No opinion is expressed by this Opinion Letter with respect to usury or whether any amounts might constitute unenforceable penalties.<sup>215</sup>*

*Or, if an opinion on usury is being rendered:*

The payment of any interest pursuant to the Transaction Documents will not violate the usury laws or laws regulating the use or forbearance of money of the State.

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as to the enforceability of any choice of law or analogous provisions in the Transaction Documents.”) is more appropriately stated as in Illustrative Opinion Letter Paragraph 4.6(v) than in the opinions portion of the Opinion Letter. *See 2012 Report, supra* note 1, para. 3.9, at 267–68.

<sup>213</sup> *See Local Counsel Report, supra* note 2, Part III.3.5, 3.9. *But see* this Report, *supra* Part II.B.

<sup>214</sup> A usury opinion is implied by most enforceability opinions and most no violation of law opinions. If the only documents covered by this Opinion Letter are the Mortgage and Assignment of Leases, it may not be appropriate to issue a usury opinion. *See Local Counsel Report, supra* note 2, Part III.3.5(c), 3.10.

<sup>215</sup> This format is presented in the 2012 Report Illustrative Language. As the 2012 Illustrative Language Paragraph 3.10 suggests, if no usury opinion is given, an express exclusion of the subject matter (e.g., “No Opinion is expressed by this Opinion Letter with respect to usury . . .”) is more appropriately stated in Illustrative Opinion Letter Paragraph 4.6(w) than in the opinions portion of the Opinion Letter. *See 2012 Report, supra* note 1, para. 3.10, 4.6(w), at 268.

3.11 Legal Proceedings Confirmation. [In addition to the opinions contained in this Opinion Letter, we inform you that, based solely on a review of our litigation docket, {except as disclosed in Schedule \_\_ to \_\_} we are not representing the Borrower or the Guarantor in any pending litigation, in which either is a named defendant, in which the pleadings request as relief that any of the obligations of the Borrower or the Guarantor under the Transaction Documents be declared invalid or subordinated or that the performance by either of the Borrower or the Guarantor of the Transaction Documents be enjoined.]

***The following opinions or confirmations are not necessarily or even ordinarily included in an opinion letter, but are provided as examples of expressions when these subject matters are addressed.***

3.12 Recording/Filing and its Effect. The recording of the Mortgage in the Recording Office [*define here unless defined elsewhere in this Opinion Letter*] is the only action, recording, or filing necessary [to publish record {or constructive} notice and] to establish of record the rights of the parties under the Mortgage in the real property, including, without limitation, leases and rents, and the goods described therein that are or are to become fixtures.<sup>216</sup>

*When appropriate:*<sup>217</sup>

When duly recorded, the record of the Mortgage is sufficient as a U.C.C. ~~financing statement~~ fixture filing for the purpose of perfecting the security interest of the Lender as Secured Party in the interest of the Borrower as Debtor in that portion of the Collateral that consists of goods that are or are to become fixtures under the real property law of the State.

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<sup>216</sup> For a discussion about requests for an opinion regarding future advances, see *Local Counsel Report*, *supra* note 2, Part III.3.12.

<sup>217</sup> *See id.* Part III.3.12.

*An alternate form of this sufficient-to-perfect opinion.*<sup>218</sup>

. . . [W]hen recorded in the [office of the (the “Recording Office”)] [Recording Office] [a term defined here or elsewhere in the opinion letter indicating the office in the Opinion Jurisdiction in which to record a mortgage of the mortgaged property] the Mortgage will be sufficient to perfect the security interest of the Lender as Secured Party in the interest of the Borrower as Debtor in that portion of the [Collateral] consisting of goods that are or that become fixtures under the real property law of the State [to the extent a security interest in the fixtures has attached].<sup>219</sup>

*An opinion that the recording of the Mortgage will perfect the security interest in fixtures would be.*<sup>220</sup>

. . . [W]hen recorded in the [office of the (the “Recording Office”)] [Recording Office] [a term defined here or elsewhere in the opinion letter indicating the office in the Opinion Jurisdiction in which to record a mortgage of the mortgaged property] the security interest of the Lender as Secured Party in the interest of the Borrower as Debtor in that portion of the [Collateral] described therein constituting goods that are or are to become fixtures under the real property law of the State, will be perfected [to the extent a security interest in the fixtures has attached].<sup>221</sup>

*If a U.C.C. Financing Statement is being filed as a fixture filing, the following opinion may be given.*<sup>222</sup>

The U.C.C. Financing Statement to be filed as a fixture filing is in form sufficient for filing in the [office of the (the “Recording Office”)] [Recording Office] [a term defined here or elsewhere in the opinion letter indicating the office in the Opinion Jurisdiction in which to record a mortgage of the mortgaged property]; and when filed in the Recording Office will be sufficient to perfect the security interest of the Lender as Secured Party in the interest of the Borrower as Debtor in that

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<sup>218</sup> See *supra* Part II.A(3).

<sup>219</sup> The bracketed language “to the extent a security interest in the fixtures has attached” would not be appropriate if an opinion on attachment has been given. For further discussion, see *supra* note 69.

<sup>220</sup> See *supra* note 69.

<sup>221</sup> See *supra* note 69.

<sup>222</sup> See *supra* Part II.A(3).

portion of the [Collateral] consisting of goods that are or that become fixtures under the real property law of the State [to the extent a security interest in the fixtures has attached].<sup>223</sup>

*If an opinion as to perfection by filing of a U.C.C. financing statement as to personal property collateral is to be provided, use of the following may be appropriate:*<sup>224</sup>

The U.C.C. Financing Statement is in proper form for filing under the U.C.C. Upon the filing of the U.C.C. Financing Statement in the office of the \_\_\_\_\_ of the State (the “Filing Office”), the Lender, as the secured party, will have a perfected security interest in U.C.C. Collateral of a type in which a security interest may be perfected through the filing of a financing statement under Article 9 of the U.C.C. [to the extent a security interest in the U.C.C. Collateral has attached].<sup>225</sup>

3.13 No Governmental Approvals Required. No consent, approval, authorization, or other action by, or filing or registration with, any governmental authority or regulatory body of the State, or court order, is required by or on behalf of the Borrower as a condition precedent to execution and delivery by the Borrower of the Transaction Documents [other than those consents, approvals, authorizations, filings, actions, and registrations as to which the requisite filings have been accomplished, the requisite consents, approvals, or authorizations have been obtained, the requisite actions have been taken, and the requisite filings and registrations have been accomplished].

3.14 Effect of Exercise of Remedies. *In states that do not have anti-deficiency, one-action, appraisal, or similar debtor protection legislation, and where it is customary to address the subject, counsel may be able to render the following opinion:* The foreclosure of the Mortgage in accordance with applicable Law will not restrict or impair the liability of the Borrower for the monetary obligations of the Borrower secured by such Mortgage to the extent that a deficiency remains unpaid after application of the proceeds of such foreclosure.

*In states that have anti-deficiency, one-action, or similar debtor protection legislation counsel might include such specific limitations to an opinion on exercise of remedies as may be applicable, which might read*

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<sup>223</sup> See *supra* note 69.

<sup>224</sup> See *supra* Part II.B(1).

<sup>225</sup> See *supra* note 69.

as follows: Our opinion[s] [in Paragraph \_\_{Paragraph 4.3 on generic enforceability qualification with assurance} [and in Paragraph \_\_\_{Paragraph 3.14 on Exercise of Remedies}] [is] [are] subject to the effect of the applicable provisions of the Law of the State which may, inter alia, limit or prohibit the recovery of a deficiency judgment on a debt after sale of the security for the debt, require a lender to proceed against or exhaust the security for a debt before proceeding against the debtor, or otherwise require a lender to exercise foreclosure rights in a certain manner.

3.15 Perfection by Means Other than Filing.<sup>226</sup> Generally, after the opinion giver has either given an attachment opinion, assumed that attachment has occurred, or determined that another opinion giver has addressed attachment, a perfection opinion may be formulated in given situations described below:

If an opinion regarding perfection by control under the laws of the State of a security interest in a deposit account is to be provided, use of the following may be appropriate:

The security interest [granted to the Lender by the Borrower] in the deposit accounts described in the DACA will be perfected upon {select the applicable provisions:} [(x) the execution and delivery of the DACA by all parties thereto] [(y) the Lender, as secured party, becoming the bank's customer with respect to deposit accounts described in the {[Mortgage}{Security Agreement}{Loan Agreement}] [(z) the Lender becoming the bank at which the deposit account is maintained] [, to the extent that such security interest has attached under Article 9 of the U.C.C].<sup>227</sup>

For certificated securities, a formulation of a non-filing perfection opinion (including control of certificated securities in bearer form) is:

Upon delivery of the [certificated securities] to the Lender, the Lender will have a perfected security interest in the [certificated securities].<sup>228</sup>

Where the non-filing perfection as to certificated securities in registered form is by control, then a formulation is:

The Lender will have a perfected security interest in the [certificated securities] when the [certificated securities] have been delivered to the

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<sup>226</sup> See *supra* Part III.A(1), B(2).

<sup>227</sup> See *supra* note 69.

<sup>228</sup> See *supra* Part III.B(5)(a).

Lender in [State X] [the Opinion Jurisdiction] and are either indorsed to the secured party or in blank, or registered by the issuer in the name of secured party.<sup>229</sup>

*A formulation for a perfection opinion in uncertificated securities where perfection is by registration is:*

The Lender will have a perfected security interest when such [securities] are registered in the name of the Lender by the issuer.<sup>230</sup>

*A formulation for a perfection opinion in uncertificated securities in which perfection is accomplished by a control agreement is:*

The security interest [granted to the Lender by the Borrower] in the uncertificated securities described in the [name of uncertificated securities control agreement] will be perfected upon the execution and delivery of the [name of uncertificated securities control agreement] by all parties thereto.<sup>231</sup>

*A formulation for a perfection opinion in security entitlements in a securities account, depending on the method upon which control is obtained is:*

The security interest [granted to the Lender by the Borrower] in the security entitlements described in the [name of securities account control agreement] will be perfected upon the execution and delivery of the [name of securities account control agreement] by all parties thereto.<sup>232</sup>

**OR**

The security interest [granted to the Lender by the Borrower] in the security entitlements described in the [name of the document in which the security interest is granted] will be perfected upon the Lender's becoming the security intermediary's customer with respect to the securities account.<sup>233</sup>

*A formulation for a protected purchaser opinion as to certificated securities, when given, is:*

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<sup>229</sup> See *supra* Part III.B(5)(a).

<sup>230</sup> See *supra* Part III.B(5)(b).

<sup>231</sup> See *supra* Part III.B(5)(c).

<sup>232</sup> See *supra* Part III.B(5)(c).

<sup>233</sup> See *supra* Part III.B(5)(c).

The security interest of the secured party in the certificated securities is prior to any other security interest created under Article 9 of the U.C.C.<sup>234</sup>

**OR**

The security interest of the secured party in the certificated securities is free of any adverse claim.<sup>235</sup>

#### IV. CERTAIN LIMITATIONS

The opinions set forth in this Opinion Letter are subject to the following exceptions, exclusions, qualifications, and other limitations:

4.1 Bankruptcy Exception. The effect of bankruptcy, insolvency, fraudulent transfer, reorganization, receivership, moratorium, and other similar Law affecting the rights and remedies of creditors generally.

4.2 Equitable Principles Exception. The effect of general principles of equity, whether applied by a court of law or equity, including, without limitation, principles governing the availability of specific performance, injunctive relief, and other equitable remedies, and principles of diligence, good faith, fair dealing, reasonableness, conscionability, materiality, and other equitable defenses.

4.3 Generic Enforceability Qualification [with Assurance]. Certain provisions of the Transaction Documents may not be enforceable; nevertheless, subject to the other limitations set forth in this Opinion Letter, any such unenforceability will not render the Opinion Transaction Documents invalid as a whole or preclude (i) the judicial enforcement in accordance with applicable Law of the obligation of the Borrower to repay as provided in the Note the principal, together with interest thereon (to the extent not deemed a penalty), and the judicial enforcement in accordance with applicable Law of the obligation of the Guarantor to repay as provided in the Guaranty the amounts set forth in the Guaranty (to the extent not deemed a penalty and subject to defenses of a surety that have not been or cannot be waived); (ii) 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 by the Borrower in any other material provision of the Transaction Documents]; [and] (iii) the foreclosure in

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<sup>234</sup> See *supra* Part III.B(6).

<sup>235</sup> See *supra* Part III.B(6).

accordance with applicable Law of the lien on and security interest in the Collateral created by the Mortgage upon maturity or upon acceleration pursuant to clause (ii) above[; and (iv) the exercise of the assignment of rents contained in the Mortgage [(or) Assignment of Leases] in accordance with applicable Law].<sup>236</sup>

*If the Mortgage is governed by the Law of the State but the debt instrument is governed by the Law of another jurisdiction, counsel should not give assurance about remedies under the debt instrument. In that case, the assurance of the preceding paragraph would be modified to omit reference to the payment obligation as follows:*

. . . nevertheless, subject to the other limitations set forth in this Opinion Letter, any such unenforceability will not render the Opinion Transaction Documents invalid as a whole or preclude (i) the foreclosure in accordance with applicable Law of the lien on and security interest in the Collateral created by the Mortgage and (ii) exercise of the assignment of rents contained in the Mortgage [or Assignment of Leases] in accordance with applicable Law.

*The enforcement of the Guaranty would be separately treated if governed by the law of the State.*

4.4 Other Transaction-Related Qualifications. The opinion given in Paragraph \_\_\_ [*Paragraph 3.5 Enforceability*] and the assurances provided in Paragraph \_\_\_ [*Paragraph 4.3 Generic Enforceability Qualification [with Assurance]*] of this Opinion Letter are further limited by the following:

- (a) [consider issues pertaining to: assignment of rents (e.g., We express no opinion as to whether provisions in the Transaction 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), usury, guaranties, environmental indemnities, jury trial waivers, special issues in arbitration, foreign trustees,

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<sup>236</sup> Assurance about assignment of rents and assignment of leases may need to be tailored to exclude provisions that are more broadly written than may be enforceable. See discussion in *Local Counsel Report*, *supra* note 2, Part III.3.6(i), and also the limitation in this *Illustrative Opinion Letter*, *infra* para. 4.5(e).

real party in interest law, exercise of remedies, no violation of law, etc.—see accompanying text]

*Qualifications appropriate to specific opinions other than enforceability may be expressed as well. If the opinion is not qualified in the opinion paragraph itself, a limitation would be expressed here and be introduced by language such as: The opinion given in Paragraph \_\_\_ [relevant opinion paragraph] is further limited by the following:*

- (b) [consider: effect of recording, exercise of remedies, no governmental approvals, etc.—see accompanying text. By way of example: This qualification may or may not be appropriate when an express opinion is given as discussed in Local Counsel Report Paragraph 3.13. In rendering the opinions in Paragraph \_\_\_ [3.13 No Governmental Approvals], we have not made any independent investigation into the nature of the Borrower or its business that may require governmental or court approvals or procedures for execution and delivery of the Transaction Documents or the performance of the Borrower’s obligations thereunder. We are relying solely on information provided to us that has been the basis for our review; and our opinion is rendered as if the Borrower is a general business entity authorized to conduct business in the State without special conditions.]

*A Limitation such as the following is sometimes provided, but is not necessary because it relates to events after the date of the opinion letter:*<sup>237</sup>

- (c) 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 sentence and Paragraph [5.2], we point out that the continued perfection of any security interest in any U.C.C. Collateral (i) may be affected by the removal of such U.C.C. Collateral to another jurisdiction or upon the change of the name or the state of organization of any debtor, or (ii) that is perfected by the filing of a

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<sup>237</sup> See *supra* Part IV.B.

financing statement, may be affected by the failure to file a timely continuation statement.

4.5 Other General Qualifications. The effect of generally applicable rules of Law that:

- (a) limit or affect the enforceability of a waiver of a right of redemption;
- (b) limit or affect the enforceability of any provision that purports to prevent any party from becoming a mortgagee in possession, notwithstanding any enforcement actions taken under the Security Documents;
- (c) limit or affect the enforceability of provisions for late charges, prepayment charges, or yield maintenance charges; acceleration of future amounts due (other than principal), without appropriate discount to present value; liquidated damages; penalties; or interest on interest;<sup>238</sup>
- (d) limit or affect the enforceability of provisions that provide for the acceleration of indebtedness upon any transfer, encumbrance, or change in the control, ownership, or management of any party;
- (e) [limit or affect the enforceability of provisions purporting to assign the rents, issues, and profits of the Collateral] [provide that the assignment in the {Opinion Transaction} {Security} Documents of the rents, issues, and profits of the Collateral for other than security purposes only; among other things, we express no opinion that any assignment of leases and rents included in the {Opinion Transaction} {Security} Documents is in form to be enforceable or effective to assign the leases and rents absolutely];
- (f) limit the enforceability of provisions releasing, exculpating, or exempting a party from, or requiring indemnification of a party for, liability for its own action or inaction, to the extent the action or inaction

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<sup>238</sup> See *Local Counsel Report*, *supra* note 2, Part III.3.5(d).

- involves [gross] negligence, recklessness, willful misconduct, or unlawful conduct;
- (g) limit or affect the enforcement of provisions of a contract that purport to require waiver of the obligations of good faith, fair dealing, diligence, and reasonableness;
  - (h) provide that forum selection clauses in contracts are not necessarily binding on the court(s) in the state or the forum selected;
  - (i) limit the availability of a remedy under certain circumstances where another remedy has been elected;
  - (j) limit the right of a creditor to use force or cause a breach of the peace in enforcing rights;
  - (k) relate to the sale or disposition of collateral, or the requirements of a commercially reasonable sale, including, without limitation, statutory cure provisions, rights of reinstatement, and limitations on deficiency judgments;
  - (l) where less than all of a contract may be unenforceable, may limit the enforceability of the balance of the contract to circumstances in which the unenforceable portion is not an essential part of the agreed exchange;
  - (m) govern and afford judicial discretion regarding the determination of damages and entitlement to attorneys' fees and other costs;
  - (n) [*This limitation may be used if the Opinion Letter relates to a Guarantor.*] in the absence of a waiver or consent, may discharge the Guarantor to the extent that (i) action by a creditor impairs the value of collateral securing guaranteed debt to the detriment of the Guarantor, or (ii) guaranteed debt is materially modified;
  - (o) may permit a party who has materially failed to render or offer performance required by the contract to cure that failure unless (i) permitting a cure would

unreasonably hinder the aggrieved party from making substitute arrangements for performance, or (ii) it was important in the circumstances to the aggrieved party that performance occur by the date stated in the contract;

- (p) impose limitations on attorneys' or trustees' fees; or
- (q) limit or affect the enforceability of provisions that provide for the application of insurance or condemnation proceeds to reduce indebtedness.

4.6 Exclusions. No opinions are implied beyond those expressly stated in this Opinion Letter. Without limiting the generality of the preceding sentence, unless explicitly addressed in this Opinion Letter, the opinions and confirmations set forth in this Opinion Letter do not address any of the following legal issues, and we specifically express no opinion with respect thereto:

- (a) securities Law, "Blue Sky" Law, and Law relating to commodity (and other) futures and indices and other similar instruments;
- (b) margin regulations;
- (c) pension and employee benefit Law and regulations;
- (d) antitrust and unfair competition Law;
- (e) Law concerning filing and notice requirements,<sup>239</sup> other than requirements applicable to charter-related documents such as a certificate of merger;

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<sup>239</sup> This Exclusion and all exclusions listed in *Illustrative Opinion Letter*, *supra* para. 4.6 have precedent in the Accord. See Committee on Legal Opinions, *Third-Party Legal Opinion Report including the Legal Opinion Accord, of the Section of the Business Law*, American Bar Association, 47 BUS. L. 167 (1991) [hereinafter *ABA Business Law Accord Report*] as adapted and enhanced in the Joint Drafting Committee, *Report on Adaptation of the Legal Opinion Accord*, 29 REAL PROP. PROB. & TR. J. 569 (1994). The precedent to this Exclusion contained in the Accord at section 19(e), provided examples giving context to this Exclusion: "(e.g., Hart-Scott-Rodino and Exon-Florio)." Omission of these specific examples is not intended to broaden application of this Exclusion beyond requirements related to filing requirements that affect the validity of the transaction or its compliance with applicable Law, which was the scope implied by the examples. This Exclusion is historical, and, given an appropriate limitation of Law covered, see *Illustrative Opinion Letter*, *supra* para. 1.3, or the scope of opinions provided, its necessity is questionable.

- (f) compliance with fiduciary duty requirements;
- (g) the statutes and ordinances, the administrative decisions, and the rules and regulations of counties, towns, municipalities, and special political subdivisions, and judicial decisions to the extent that they deal with any of the foregoing (“**Local Law**”);
- (h) the characterization of the Transaction;
- (i) the creation, attachment, perfection, or priority of a lien, or security interest in, or to Collateral, or enforcement of a security interest in Collateral comprising personal property;<sup>240</sup>
- (j) environmental Law;
- (k) zoning, land use, condominium, cooperative, subdivision, and other development Law;
- (l) tax Law;
- (m) patent, copyright and trademark, state trademark, and other intellectual property Law;
- (n) racketeering Law;
- (o) health and safety Law;
- (p) labor Law;
- (q) Law concerning (i) national and local emergency, (ii) possible judicial deference to acts of sovereign states, and (iii) criminal and civil forfeiture Law;
- (r) Law of general application to the extent such Law provides for criminal prosecution (e.g., mail fraud and wire fraud statutes);
- (s) bulk transfer Law;
- (t) Law concerning access by the disabled and building codes;

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<sup>240</sup> If the opinions identified in one or more of paras. 3.6, 3.12, and 3.15 of this *Illustrative Opinion Letter* are to be given, this exclusion should be appropriately modified.

- (u) title to any property, the characterization of any property as real property, personal property, or fixtures, or the accuracy or sufficiency of any description of collateral or other property;
- (v) choice of law or analogous provisions in the Transaction Documents;<sup>241</sup>
- (w) usury and similar Law governing the legal rate of interest; and
- (x) [Placeholder if necessary and appropriate for possible others such as: anti-terrorism, anti-money laundering, arbitration, know-your-borrower, Equal Credit Opportunity Act (ECOA), Fair Debt Collection Practices Act (FDCPA), consumer protection Law, Servicemembers Civil Relief Act,<sup>242</sup> the Interstate Land Sales Act, federal Assignment of Claims/Contracts Acts, Controlled Substances Act, appointment of the Lender as attorney-in-fact, etc.].

#### IV. USE OF THE OPINION LETTER

5.1 Use. The opinions expressed in this Opinion Letter are solely for the purposes contemplated by the Transaction Documents. Without our prior written consent, this Opinion Letter may not be used or relied upon by the [Lender] [addressee] for any other purpose whatsoever or relied on by any other person[, except that this Opinion Letter may be delivered by the [Lender] [addressee] to an assignee from time to time for value in good faith of all right, title, and interest in and to the [Note] [Transaction Documents], and such assignee may rely on this Opinion Letter as if it were addressed and had been delivered to it on the date hereof]. Nothing in the preceding sentences, however, shall give any person entitled to rely upon this Opinion Letter any greater rights with respect to this Opinion Letter than those of the [Lender] [addressee] as of the date hereof, or shall provide or imply any opinion being given with respect to an assignee that depends on the identity or characteristics of the named assignee or

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<sup>241</sup> As noted in *Local Counsel Report*, *supra* note 2, Part III.3.9, if a choice of law opinion is given or intended, this exception should be deleted or modified. In certain respects, a U.C.C. opinion will cover choice of law under the U.C.C.

<sup>242</sup> Reference to Troubled Asset Relief Program/Term Asset Backed Securities Loan Facilities (TARP/TALF) appearing in previous Illustrative Opinion language has been deleted.

circumstances other than those at the date of this Opinion Letter. This Opinion Letter may be delivered (i) to a regulatory agency having supervisory authority over the [Lender] [addressee] for the purpose of confirming the existence of this Opinion Letter; (ii) to the court or arbitrator and parties to a litigation or arbitration in connection with the assertion of a defense as to which this Opinion Letter is relevant and necessary; (iii) to nationally recognized statistical rating organizations rating an issuance involving [the Loan] or otherwise entitled to access under Rule 17g-5 under the Securities and Exchange Act of 1934, as amended (or any successor provision to such subsection) by providing a copy of this Opinion Letter to the appropriate 17g-5 information provider for the securitization into which the Loan or a component of the Loan is deposited or as otherwise permitted by the applicable pooling and servicing agreement or trust and servicing agreement, as the case may be; and (iv) to other parties as required by the order of a court of competent jurisdiction in the United States.

*A further provision authorizing but limiting reliance by assignees of the lender may be added.<sup>243</sup>*

The opinions expressed in this Opinion Letter are solely for the benefit of the addressee[s]. We consent to reliance on the opinions expressed in this Opinion Letter, solely in connection with the Opinion Transaction Documents, by any assignee of the Lender's interest subsequent to the date of this Opinion Letter (each an "Assignee") as if this Opinion Letter were addressed and delivered to such Assignee on the date of this Opinion Letter, on the condition and understanding that (i) any such reliance must be actual and reasonable under the circumstances existing at the time such Assignee becomes a Lender, including any circumstances relating to changes in Law, facts, or any other developments known to or reasonably knowable by such Assignee at such time, (ii) our consent to such reliance shall not constitute a reissuance of the opinions expressed in this Opinion Letter or otherwise extend any statute of limitations period applicable hereto on the date hereof, and (iii) in no event shall any Assignee have any greater rights with respect hereto than the original addressee[s] of this Opinion Letter on its date.

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<sup>243</sup> This language is best placed in the main Illustrative Opinion Paragraph 5.1 following the sentence beginning "Nothing in the preceding sentences . . .," but may be used as a separate paragraph.

*If there are multiple reliance parties, the opining counsel may want to include language such as the following so that if an action is brought under the Opinion Letter it is done so through a single agent or in a consolidated action:*

All rights hereunder may be asserted only in a single proceeding by and through [the Administrative Agent] or [the Required Lenders].

5.2 Effective Date; No Obligation to Update. This Opinion Letter is rendered as of its date, and we express no opinion as to circumstances or events that may occur subsequent to such date. Further, we undertake no, and hereby disclaim any, obligation to advise you of any changes in the applicable Law or any new developments that might affect any matters or opinions set forth in this Opinion Letter.

*The following statements are not ordinarily expressed. Paragraphs 5.4 and 5.5 are implicit. Express selection of law governing the Opinion Letter as presented in Paragraph 5.3 is not recognized as customary practice. As Local Counsel Report Part V Paragraph 5.3 notes, it appears to be consistent with recognized standard of care but it may also implicate customary practice peculiar to a State.*

5.3 Governing Law. This Opinion Letter shall be governed by the Law of the State.

5.4 Disclaimer of Implied Opinions. This Opinion Letter deals only with the legal issues expressly stated in this Opinion Letter. No implied or inferred opinions should be read into this Opinion Letter.

5.5 Expression of Professional Judgment. This Opinion Letter includes expressions of professional judgment and not guarantees of particular results.

Very truly yours,  
[SIGNATURE OF OPINION  
GIVER FIRM]

[PRIMARY LAWYER'S INITIALS]

ATTACHMENTS: [*limit list to those applicable to the opinions given*]

Attachment [ ]: Certificate(s) of the Borrower (*see Paragraph 1.2(f)*)

Attachment [ ]: Certificate of the Guarantor (*see Paragraph 1.2(f)*)

Attachment [ ]: Other Agreements of the Borrower (*see Paragraph 3.7*)

Attachment [ ]: Court Orders Regarding the Borrower (*see Paragraph 3.7*)

Attachment [ ]: Other Agreements of the Guarantor (*see Paragraph 3.7*)

Attachment [ ]: Court Orders Regarding the Guarantor (*see Paragraph 3.7*)