

Closing Commercial Real Estate Transactions

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IV. CLOSING COMMERCIAL REAL ESTATE TRANSACTIONS

A. Key Differences Between Residential and Commercial Practices.

(1) Use of Entities.

The biggest difference between closing a residential real estate transaction and commercial real estate transaction is the use of entities, rather than individuals, in the ownership of the real estate. Commercial real estate is rarely owned by individuals because of the desire to limit liability and the demands of capital sources. Closing a commercial real estate transaction involves attention to the organization of new entities and the authorization of the transaction through the management structure of the entities.

As there is generally more liability associated with ownership of a commercial property than homeownership and commercial property is solely an investment, the owner of a commercial property will want to isolate risk associated with the property. Ownership in an entity can shield the owner from liability beyond the assets of the property-owning entity. The enabling statute for corporations shields shareholders from the liabilities of the corporation; for limited liabilities, it shields its members from the liabilities of the company; and for limited partnerships, it shields limited partners from the liabilities of the partnership. Of course, entity liability protection is not absolute and should not be a substitute for insurance coverage.

Investors and lenders want the risks associated with their investment in commercial property to be isolated to the property. Ownership in an individual's name would tie an investment in the property to the credit of the individual. Commercial property is underwritten by investors and lenders on the cash flow and appraised value of the property, with much less emphasis on the credit of the principals. Having the property owned in an entity will shield the property from the credit risk of individual principals.

The choice of entities and the issues related to the entities at closing are discussed below in Section C(1).

(2) Escrow.

A commercial real estate closing will generally involve a more formal escrow process than in a residential transaction. Typically, the title agent will agree to hold the money, collect and record all documents, and wire out the money. The more formal escrow is due largely to the larger sums of money involved and the numerous documents that may come in from other capital sources.

(3) Title and Survey.

Title to a commercial property is generally more complex than title to a residential property. In Massachusetts, most commercial property is an amalgam of numerous lots, subject to easements for utilities, old rights of way, etc.

For commercial properties, an ALTA survey is required to delete the survey exception on a title policy. Mortgage plot plans are not sufficient.

See Section B(3) below for more information.

(4) Pre-closing Diligence.

Most commercial transactions provide for a fixed diligence date. Much work needs to be done and agreed upon prior to the closing. Zoning, title, survey and tenant leases must be acceptable to the purchaser, and the purchaser must raise any objections prior to the expiration of the diligence period. Usually, raising any issues at the closing is too late and places the purchaser's deposit monies at risk. This topic is addressed in more detail in Section B(3) below.

(5) Inapplicability of RESPA.

The Real Estate Settlement Procedures Act (12 USC §2601 *et. seq.*) is only applicable to loans secured with a mortgage placed on a one to four family residential property. Therefore, commercial real estate closings are not constrained by the restrictions of RESPA and purchasers/borrowers are not protected by RESPA.

The biggest impact on the closing process without the constraints of RESPA is the general disuse of the HUD-1 form as the settlement statement. For most commercial closings the HUD-1 is too limited to address the numerous prorations and adjustments involved in a commercial closing.

Since RESPA is not applicable, there are no limitations on escrows and reserves that a lender can require. Often the lender will require escrows for tax, insurance and capital expenditures. It is also common that the lender requires a “lockbox” where all of the revenue of the property is sent by the tenants to an account controlled by the lender.

(6) Closing Documents.

As with residential transactions, commercial real estate transactions will include a typical quitclaim deed, non-foreign affidavit and title affidavit. However, there will be several other documents included in the transfer package.

Unless the commercial property consists of raw land, there will be an assignment and assumption of leases. This document accomplishes three goals. First, it clarifies that the obligations of the seller under the leases have been passed to the buyer. The seller does not want to be subject to the contractual obligations under the leases for things such as tenant build-outs, etc. Second, the document clarifies that the benefits of the seller under the leases have passed to the buyer of the property. Theoretically, it is possible that the seller could transfer fee title to the property but retain the benefit of the leases. Third, the document is a useful tool for notifying tenants that the property has been conveyed. Many national tenants require formal documentation between the seller and buyer of the property. See Addendum A for an example of an assignment and assumption of leases.

There usually will be a sale and assignment of contracts. Typically, the buyer of a commercial property will want to retain at least some of the service contracts for the property, such as elevator maintenance, landscaping, etc. Service contracts would not otherwise transfer to the buyer with the transfer of fee title. The seller will want to ensure that it is no longer obligated under those contracts. See Addendum B for an example of an assignment and assumption of contracts.

There is typically a bill of sale conveying any personal property included in the real estate transaction. This personal property would not otherwise transfer to the buyer with the transfer of fee title. This document also transfers items such as warranties and supplier guarantees. Most roof warranties require an explicit assignment for the warranty to remain in effect. See Addendum C for an example of a bill of sale and general assignment.

B. Current Market Terms/Solutions.

(1) How to Get Paid and Avoid Liability.

A seller's interest in the sale of commercial is to get paid and to avoid liability. The key to executing this strategy is to remove all contingencies prior to the time of closing.

First, the seller should structure the transaction so that all of the buyer's rights to terminate the transaction are waived well in advance of the closing. The seller should ensure that the purchase contract provides that buyer's rights to review the real estate and conduct its diligence have a fixed expiration date with no further ability to review or raise issues.

Second, the seller must make sure that it has obtained all of the consents and authority documents it needs to execute the transaction. In particular, all consents of the members, partners, directors, etc. should be in hand by the end of the buyer's diligence period. All certificates from the Massachusetts Secretary of State should be in hand at the end of the buyer's diligence period. Some certificates, such as the long form good standing certificates can take a week to be issued from the Secretary of State.

Third, if the seller has made any representations to the buyer, the seller should take steps to isolate the liabilities associated with these representations. Seller should make sure that the sale agreement provides that the representations do not survive indefinitely, but instead expire within set time after the closing.

Fourth, the seller should make sure that the transfer documents do not contain representations that the seller is not obligated to make under the terms of the sale agreement. A buyer may try to broaden the provisions of the transfer documents to include representations about the assets being conveyed rather than merely transferring the assets.

(2) Status of New Entity Transfer Tax.

Deed Stamps must be purchased for the deeds transferring property. Since beneficial interests in a nominee trust are deemed an interest in real estate, an assignment of beneficial interests in a nominee trust requires the payment of deed stamps (See DOR Directive 95-5, attached as Addendum E). A few states explicitly require the payment of their equivalent of deed stamps for transfers of controlling interests in a real estate owning entity.

Most practitioners take the position that M.G.L. c. 64D does not require the payment of deed stamps for transfer of interests in real estate entities. There is a difference of opinion on whether the transfer of 100% of the interests in a single member limited liability company requires the payment of deed stamps under 64D.

House Bill 4168 was introduced into the legislature last year which would have revised 64D so that excise tax on the deeds would be due when a transfer is made of more 50% of the direct or indirect interests in a company or partnership that owns real estate. The bill was not passed by the Senate, but it may resurface as the Commonwealth looks for new revenue sources.

(3) Diligence to Make Sure You Get what You Paid For.

“Due Diligence” is a broad term that business and real estate attorneys and professionals frequently use. Typically the term is used to refer to the inspection and investigation of real property, personal property or a business entity before a buyer makes the final decision whether to consummate a transaction. Below is a list of topics that a buyer or investor in real estate should consider and review prior to closing.

The results of these review should impact whether there even will be a closing. The buyer or investor should make sure that they have adequate time to review this issues and to terminate their obligations to purchase or invest if they are not satisfied with the results.

The seller should make sure that issues are reviewable by the but, after the expiration of the diligence period, are not conditions to the closing.

(a) Environmental Factors.

This category covers a wide array of issues, focusing on environmental regulatory schemes that may affect the property.

Phase One Environmental Assessment. A Phase One Environmental Assessment provides the buyer with a survey/overview of the environmental condition and environmental history of a particular property, focusing on the possible presence of hazardous materials. The report is intended to identify actual

and potential problems (e.g., underground storage tanks, hazardous materials contamination) based primarily on a review of historical documentation, regulatory databases and a walk-through inspection of the site. If problems, or potential problems, are discovered during the course of the Phase One inspection, the report will generally recommend specific follow-up testing, remediation and/or studies in the form of a Phase Two assessment. It is important to initiate work on the Phase One report early in the due diligence process so that the environmental consultant has enough time to complete the project and, if problems are disclosed, there is adequate time to follow up with further studies and tests. It is important to note that a Phase One report typically does not include specific inspections for asbestos, lead (paint or in plumbing), radon, delineation of wetlands or review of environmental compliance.

Phase Two Environmental Report. A Phase Two is typically done, if necessary, as a follow up to a Phase One report and involves physical inspections and testing of the property, such as core samples, ground water testing, typically focusing on the specific issues of concern identified in the Phase One report. If the presence of regulated hazardous materials contamination is confirmed by the Phase Two report, further reporting, monitoring, investigation and/or remediation may be necessary, based upon the extent and magnitude of that contamination. If additional investigation and remediation activities cannot be completed prior to closing, the parties may need to negotiate an environmental agreement which

establishes an escrow to cover the anticipated costs of such work and contains an appropriate environmental indemnity which will survive closing.

Asbestos. If asbestos is present or suspected to be present on the property, it is advisable to engage a consultant to prepare an asbestos survey and report. There are several important issues related to asbestos: (i) identifying whether asbestos is present, (ii) identifying the form of the asbestos, and (iii) determining whether abatement, encapsulation or removal will be necessary for the buyer's planned use of the property. If the asbestos will remain in the property, a consultant should be engaged to develop an operations and maintenance plan to prevent the deterioration of the asbestos.

USTs and ASTs. If underground storage tanks ("USTs") or aboveground storage tanks ("ASTs") are located on the property, there may be affirmative reporting, removal and/or closure obligations for the property owner related to those tanks. USTs and ASTs are also often the source of hazardous materials contamination. If USTs or ASTs have been removed from the property, you will want to ascertain that proper site closure procedures were followed and completed in connection with the tank removal.

Lead Paint. Lead paint is most problematic in residential settings (i.e., multifamily housing) where child safety is a concern and where federal law requires disclosure to tenants and buyers in residences built prior to 1978. Lead paint can also be problematic in industrial settings, since it can significantly affect

how repainting and refurbishing activities are conducted. For example, sandblasting and removal of old lead paint often will require significant precautions in order to avoid lead contamination problems.

Mold. Over the past few years there have been a growing number of lawsuits and insurance claims across the country related to the level of mold and mildew in buildings and its adverse effect on health and habitability. Mold is not as much of a problem in Massachusetts as it is in other parts of the country that are more prone to flooding and humidity.

Wetlands. The presence of wetland conditions can have a significant effect on the operation and development potential of a property. As a result, it is important to check with the applicable municipality to determine whether any portion of the property is considered wetlands or shoreline. Wetlands and certain uplands located near navigable waters are under federal jurisdiction (U.S. Army Corps of Engineers) under section 404 of the Clean Water Act, 33 U.S.C. § 1344, and there may be significant restrictions on the use or development of land in those areas. In addition, there are significant regulatory hurdles related to filling, cutting, or relocating wetlands areas. It is important to remember that wetlands are not always “wet” or obvious to the casual observer. Generally, the analysis of what constitutes a wetland is focused on vegetation and wildlife characteristics, rather than the presence of surface water.

Flood Zones. Flood zone designation can adversely affect the development potential, applicable building standards and the availability of financing, as well as insurance requirements and costs. Under federal law, mortgage lenders must have a verification that the property is not in a flood zone or that the borrower has flood insurance.

Endangered Species. The presence of endangered or potentially endangered plants and animals may significantly restrict the development potential and value of a property. Typically, initial inquiries on this subject can be made at the local planning agency to determine whether there are species of concern in the area. If there is the potential for the presence of such species or habitat on the property, the buyer should consider retaining an appropriate consultant to examine the property for the presence of the species and/or habitat in question.

(b) Code Compliance And Physical Condition.

This category focuses on the specific physical condition of the property to be acquired.

Code Compliance. The buyer should confirm that the existing use of the property complies with applicable zoning, building and life safety codes. See Section B(5) for a discussion on this topic.

Structural Inspection. If there are existing improvements on the property, the buyer should consider having a qualified engineer or building inspector

determine the condition of those improvements and identify any potential problem areas, such as deferred maintenance and necessary repairs. The buyer will want to determine the cost and schedule effects of any necessary repairs to the property. If work is being performed on the improvements prior to closing, the buyer should obtain copies of any design or construction contracts and determine whether the seller's rights under those contracts are assignable to the buyer. The buyer should also determine whether the contractor(s) have been and are being paid and whether proper lien waivers have been (or will be) obtained by the seller for work performed prior to closing and that it obtains adequate protection from any mechanic liens related to pre-closing work on the property.

Accessibility. In addition to the physical inspection, it is important to determine whether existing improvements on the property comply with applicable handicap accessibility requirements, including the Americans with Disabilities Act ("ADA"). It is important to remember that a change in use or construction of additional improvements may trigger significant additional handicap accessibility compliance requirements. For example, under the ADA, "public accommodations" (i.e., retail, restaurants and other businesses generally open to the public) have more stringent standards than other commercial facilities. Consequently, an existing commercial building may be in compliance for its existing use, but not for a new use which constitutes a public accommodation under the ADA.

Roads. The buyer should check whether the property has adequate access from public streets. If new or additional access is required, speak with the applicable public works department to determine if additional access is possible and the procedure, cost and lead time for establishing the necessary access. It may also be worthwhile to consult with the applicable local and/or state agency to determine whether there are planned road improvements, which may affect the property. Projected road improvements or realignments could significantly enhance or diminish the desirability of the property.

Railroads. If applicable, check with railroad(s) regarding access to sidings and mainlines located on or near the property. Contact the applicable railroad to determine whether there are existing access and trackage agreements and whether those agreements are assignable in connection with a transfer of the property. Determine whether existing stubs and sidings are sufficient and, if not, the cost, process and lead times for constructing additional sidings or stubs to the property. Under M.G.L. c. 40 §54A, the Executive Office of Transportation and Construction must consent to building on any property used as a railroad right of way or any property appurtenant thereto.

Circulation/Parking/Loading. It is important to determine whether the property has sufficient parking (auto and truck) for the buyer's intended use. Similarly, the buyer should determine whether the property has sufficient truck loading facilities and check for any user specific concerns (e.g., dock high loading

turning radii for trucks) and whether the vehicular circulation on the property is adequate for the intended use.

Utilities. The buyer should check with the applicable utility providers to determine whether the property has adequate service levels available and determine the procedures for entering into provider agreements with the appropriate utility providers. It is important to determine whether development of the property may be affected by any utility-related moratoria or allocation programs, particularly with respect to water and sewer. If inadequate service exists or new service is required, the buyer should determine availability, timing and costs of upgrading the existing utility service.

Wells. As part of its due diligence inspections, the buyer should determine whether there are any wells (water, oil, gas or monitoring) located on the property. Operating wells may require permits and inoperative wells may require sealing and/or regulatory closure. If there are or have been oil and gas wells on the property, there may be soil and/or water contamination in connection with the operation of those wells. If water for a site is provided by an on site well, quality/potability and quantity (i.e., gallons per hour) need to be determined. In some instances the output of the well may limit the permitted development of the property.

Leases and Contracts. The buyer should require the seller to promptly provide copies of all leases, licenses and contracts that affect the property. The

buyer should also require the seller to provide estoppel certificates from each of the tenants prior to closing and have the seller provide a current rent roll for the property. An estoppel certificate should have the tenant confirm that there are no defaults, no prepaid rent, the status of security deposits under their lease, the landlord is not in default, etc. The buyer should make sure that the purchase agreement places appropriate restrictions on the seller's ability to enter into new leases or to modify or terminate existing leases. Issues of concern to the buyer related to existing leases include the rent structure, duration, renewal rights, expansion rights, termination rights, free rent, security deposits, TI allowance obligations, rights of first refusal, exclusive use rights and options to purchase. If there are service contracts on the property (e.g., HVAC maintenance, snow removal, landscaping and the like), the buyer should review these contracts to determine whether they can be canceled at or prior to closing and/or be assigned to the buyer (if desired).

(c) Title Issues.

The title review process is used to determine the condition of the title to be transferred to the buyer at closing as well as identifying potential title problems.

Title Insurance Commitment. The initial step in the title review process is the issuance of a title insurance commitment or preliminary title report. This initial document provides documentation of the current state of title for the property and includes the precise legal description of the property. The title

commitment/report can be a vital indicator of title problems (e.g., some or all of the property is not owned by the seller). The commitment/report also provides the buyer with a list of all current exceptions to title on the property such as unpaid taxes, easements, options to purchase, mortgages, judgment liens, liens, restrictions, equitable servitudes and other significant encumbrances and may contain information regarding appurtenant benefits to the property, such as access easements. It is usually prudent for the buyer to obtain copies, where available, of any item which is listed as an exception to title in the commitment/report, particularly any items which will remain on title after closing (e.g., easements, CC&Rs and/or equitable servitudes).

Registered Land. When dealing with registered property, the buyer should carefully review the certificate of title as part of the title review process. All of the recitals and memorials on the certificate of title will generally be listed in the schedules of exceptions on the title commitment/report.

ALTA Survey. In connection with obtaining an ALTA (“American Land Title Association”) owner’s policy of title insurance, the title insurance company will require an ALTA survey of the property (“ALTA Survey”). An ALTA survey is a comprehensive survey of the existing, as built, state of the property, which locates the parcel boundaries, existing improvements, adjacent infrastructure, and recorded and apparent unrecorded easements and interests. ALTA surveys often are one of the most useful documents in the due diligence

process, especially when they include one or more of the optional levels of detail available. First, with the physical survey, the buyer can review and confirm that it matches the property the buyer intends to purchase. It is often quite difficult from the legal description in the purchase agreement to determine the precise location of the property. Second, an ALTA survey provides the buyer with the precise location of utility and other easements and physical encumbrances which are described in the exception schedules in the title commitment, as well as illustrating the precise location of physical improvements located on the property. Once again, since it is often difficult to determine the location of utility easements based on the metes and bounds descriptions in the public records, the ALTA survey is quite useful in disclosing potential issues or problems with the property (e.g., a utility easement running across an area where buyer wishes to construct improvements, encroachments onto or from adjacent properties). Finally, an ALTA survey may disclose physical encroachments that are not indicated in the title commitment. These can include boundary fences that do not correspond with the true boundary, potential prescriptive easements and physical encroachments of improvements onto or from the property in question. Obtaining an ALTA survey should be initiated early enough in the due diligence process so that there is adequate time to address any title problems disclosed in the survey prior to the end of the due diligence period or closing.

Easements, REAs & CC&Rs. The buyer should make sure to carefully review any easements, reciprocal easement agreements (“REAs”) covenants,

conditions and restrictions (“CC&Rs”), or similar encumbrances that may affect use of the property. As this type of encumbrance will continue to burden the property, it is important that the buyer determine, prior to committing to close, whether it can live with these applicable encumbrances. Significant restrictions typically affect multi-parcel developments such as office or industrial parks with shared facilities. Buyers should be cautious of provisions in any REA or CC&R that permit further restrictions to be placed on the use of the property in question (e.g., relocation of access roads, right of master developer to grant further easements on common areas, and the like) or expansions of the existing use of the property.

Title Insurance Endorsements. During the title review process the buyer should check with the title insurer as to the availability of endorsements for the property. Typically, individual buyers will have standard title insurance endorsements that they require in connection with any purchase. It is good practice to explicitly require the issuance of these required endorsements as conditions to closing in the purchase agreement. Examples of commonly-sought endorsements include: (i) a zoning endorsement insuring that the present use of the property complies with applicable zoning laws; (ii) a contiguity endorsement that insures that the parcels comprising the property are contiguous; (iii) a survey accuracy endorsement; (iv) a location endorsement insuring that the legal description matches the address for the property; and (v) a specific access endorsement insuring the property has access from a public right-of-way.

Depending on the context of the transaction, there may be other endorsements that are desirable or appropriate.

Taxes and Assessments. In conjunction with the title review, the buyer should determine what real property taxes and assessments will apply to the property after closing. The buyer should pay particular attention to the presence of any special assessments or the property being located within a special assessment district. Issues with assessments often arise in the context of newly subdivided/platted property where significant public infrastructure has been or will be constructed. At closing, you will want a municipal lien certificate. Recording of this document will estoppel the municipality from seeking outstanding taxes not disclosed on the certificate.

(d) Approvals and Entitlements.

If the buyer intends to develop the property, change the use of the property or make significant changes to the existing improvements, it is often useful to initiate the entitlement process during the due diligence period. It is better to find out early if there are going to be significant roadblocks to the buyer's plans for the property.

Subdivision/Platting. It is important to confirm that the property being acquired constitutes a legal and separate parcel. This can often be determined by checking with the applicable jurisdiction and will generally be confirmed by a title commitment. Be cautious if subdivision or platting of the property is

necessary to close the purchase transaction or to develop the property as intended. Depending on the nature of the subdivision, the subdivision or platting process may involve significant efforts (both time and money) to complete and may include unanticipated exactions or conditions of approval.

Required Approvals & Permits. The buyer should determine what permits will be required for the buyer to operate the property. Required permits may include some of the following:

Special Permits and Variances. If the buyer's proposed improvements do not comply with the applicable building or use restrictions (e.g., height, bulk, set backs), variances may be required. As variances are discretionary in nature, there may be conditions attached to their issuance. Under M.G.L. c. 40A, to obtain a variance the property owner must demonstrate a substantial hardship owing to the circumstances relating to the soil conditions, shape or topography of the land or structures and especially affecting such land or structures but not generally affecting the zoning district in which it is located. Special permits are discretionary approvals that generally do not require a special hardship. Variances and special permits must be recorded against the title to the property to be effective.

Signage. If there is existing signage on the property, the buyer should determine whether it will be able to replace that signage with its own or install additional signage, without requiring a new permit.

(4) Commercial Title Endorsements.

Commercial purchasers and lenders typically require additional coverage from the title insurance company beyond the standard policy. Below is a list of title endorsements and descriptions of the additional coverage they provide.

ALTA - Form 1 (Street Assessments). Insures the lender against loss or damage which it might sustain by reason of any assessments for street improvements either under construction or completed at the date of the policy which could gain priority over the insured mortgage.

ALTA - Form 2 (Truth in Lending). Insures affirmatively an insured under a loan policy against loss or damage sustained by reason of the exercise of the right of rescission conferred upon a mortgage borrower under the Federal Truth in Lending Act, as implemented by Regulation Z.

ALTA - Form 3 (Zoning). Informs the insured under an owner's or loan policy of the zoning classification under which the land falls and to insure the insured against loss or damage that may be sustained by reason of inaccuracies in the information supplied or a final judicial determination invalidating the zoning ordinance establishing such classification and resulting in the prohibition of such uses.

ALTA - Form 3.1 (Zoning - Completed Structure). Expands the coverage given in Form 3 to insure the insured further against loss or damage that may be

sustained by reason of a final judgment requiring the removal or alteration of existing structures on the land, on the grounds that they are violation of the zoning restrictions imposed on the use of the land relating to the site or floor area, set back lines, height of the building or number of parking spaces.

ALTA - Form 4 (Condominium). Provides special comprehensive title protection as to matters peculiar to condominiums. This endorsement is available to both owners and lenders, subject to review of each item of coverage. This endorsement is not intended to insure the title of the developer.

ALTA - Form 4.1 (Condominium). For use in those several states where legislation has given super priority status to liens for unpaid association charges.

ALTA - Form 5 (Planned Unit Development). Available for use for both owner's and loan policies in some jurisdictions. The endorsement insures against loss due to violations of any restrictive covenants, encroachments, prior unpaid homeowners' association dues or outstanding rights of first refusal.

ALTA - Form 5.1 (Planned Unit Development). For use in those several states where legislation has given super priority status to liens for unpaid homeowner association charges.

ALTA - Form 6 (Variable Rate Mortgage). Offers insurance as to the validity and lien priority of mortgage provisions providing for a variable interest rate.

ALTA - Form 6.1 (Variable Rate Mortgage). Offers insurance as to the validity and lien priority of mortgage provisions providing for a variable interest rate where such validity and priority depend upon compliance with particular statutes or regulations.

ALTA - Form 6.2 (Variable Rate Mortgage - Negative Amortization). Offers insurance as to the validity and lien priority of mortgage provisions providing for both a variable interest rate and negative amortization.

ALTA - Form 7 (Manufactured Housing Unit). Insures a mobile or manufactured home as part of the land, if the statutory conversion procedures have been completed, including permanent foundation and affixation to the land and filing of statutory documents to cancel the home title.

ALTA - Form 8.1 (Environmental Lien Protection). Insures a lender in situations where a mortgage is made on land used primarily for residential purposes against loss by reason of lack of priority of the lender's lien because of environmental protection liens recorded in those records which under state statutes impart constructive notice of matters relating to real estate or which are filed in the records of the clerk of the United States district court unless the lien is excepted to in Schedule B of the policy. This form also protects against lack of priority for any environmental lien provided for in any state statute in effect at date of policy unless otherwise designated in the endorsement.

ALTA - Form 9 (Restrictions, Encroachments, Minerals). Gives a lender an assortment of coverages dealing with violations of restrictions, encroachments and future exercise of a right to use the surface of the land for the extraction of minerals.

ALTA - Form 9.1 (Restrictions, Encroachments and Minerals) (Owner's Policy - Unimproved Land). Provides certain frequently requested protections for an owner of unimproved property concerning private property restrictions, encroachments and excepted minerals.

ALTA - Form 9.2 (Restrictions, Encroachments and Minerals) (Owner's Policy - Improved Land). Provides certain frequently requested protections for an owner of improved property concerning private property restrictions, encroachments and excepted minerals.

ALTA - Form 10 (Assignment). Insures the effectiveness of the assignment of mortgage but does not cover matters of record after the effective date of the original loan policy, except to insure that there have been no releases or conveyances that do appear of record.

ALTA - Form 10.1 (Assignment). Covers the same items as Form 10 and gives additional coverage over certain matters occurring after the original effective date of the policy and before the date of endorsement. These matters, unless specifically shown in the endorsement, include: real estate taxes or

assessments; priority over intervening defects liens or encumbrances; and federal tax liens or encumbrances.

ALTA - Form 11 (Mortgage Modification). Insures the lender that the modification of the insured mortgage evidenced by the document referred to within the endorsement does not impair the validity, enforceability or priority of the insured mortgage.

ALTA - Form 12 (Aggregation). Also called the “Tie-in” endorsement. Frequently, mortgages covering many parcels in different recording districts or jurisdictions are recorded for the full amount of the mortgage. Instead of combining all of the parcels into one large loan policy, this endorsement allows an insurer to issue a number of policies for lesser amounts but to tie together the policies so that the insured can take advantage of any increases in the value of a particular parcel should there be a loss.

ALTA - Form 13 (Leasehold-Owner’s). Provides additional tailored coverages for the lessee-owner of a leasehold estate, replacing the former ALTA Leasehold Owner’s Policy.

ALTA - Form 13.1 (Leasehold-Loan). Provides additional tailored coverages for the lender for which the security interest is in a leasehold estate, replacing the former ALTA Leasehold Loan Policy.

ALTA - Form 14 (Future Advance - Priority). Provides for continued priority of future advances.

ALTA - Form 14.1 (Future Advance - Knowledge). Provides the same coverage as Form 14, but excludes coverage for advances made after the insured has knowledge of an intervening lien, encumbrance or other matter affecting title.

ALTA - Form 14.2 (Future Advance - Letter of Credit). Provides similar coverage of future advances in situations where the “agreement” involves a letter of credit, surety or reimbursement agreement.

ALTA - Form 15 (Non-Imputation – Full Equity Transfer). Provides coverage of the title-holding entity against loss due to knowledge imputed to title-holding entity solely by operation of law due to knowledge or action of named outgoing partners, members, shareholders, officers or directors on transfer of the entire equity ownership to new incoming partners, shareholders or members.

ALTA - Form 15.1 (Non-Imputation – Additional Insured). Provides coverage of incoming purchasing partner, member, or shareholder purchasing an interest in the title-holding entity from the entity, for their purchased percentage interest only against loss due to knowledge imputed to the title-holding entity solely by operation of law due to knowledge or action of named shareholders, partners, members, shareholders, officers or directors. Since the policy itself insures the title-holding entity, they must consent to this coverage being for the

benefit of an individual partner, member or shareholder, rather than the title-holding entity.

ALTA - Form 15.2 (Non-Imputation – Partial Equity Transfer). Provides coverage of incoming purchasing partner, member, or shareholder, purchasing an interest in the title-holding entity from an outgoing partners, members or shareholder, against loss due to knowledge imputed to such entity solely by operation of law due to knowledge or action of named outgoing partners, members, shareholders, officers or directors.

ALTA - Form 16 (Mezzanine Financing). Provides for direct claim of mezzanine lender on owner's policy in property not serving as security interest, but owned by borrower under mezzanine financing arrangement.

ALTA - Form 17 (Access and Entry). Provides coverage against loss due to lack of access to named open, public street, including curb cuts.

ALTA - Form 17.1 (Indirect Access and Entry). Provides coverage against loss due to lack of access over a private easement or right-of-way to named open, public street, including curb cuts.

ALTA - Form 18 (Single Tax Parcel). Provides coverage that land is single separate tax parcel, not included within a larger parcel.

ALTA - Form 18.1 (Multiple Tax Parcel). Identifies the actual tax parcel identification numbers of multiple parcels, as well as providing assurance regarding easements.

ALTA - Form 19 (Contiguity – Multiple Parcels). Provides assurances regarding contiguous boundary lines of multiple parcels being insured.

ALTA - Form 19.1 (Contiguity – Single Parcel). Provides assurances regarding contiguity of insured parcel to other parcels, not insured under the policy.

ALTA - Form 20 (First Loss-Multiple Parcel Transactions). Allows lender to prove loss without accelerating entire debt and foreclosing on all parcels. For use in multiple parcel transactions only.

ALTA - Form 21 (Creditors' Rights). Limits the scope of the Creditors' Rights exclusion contained in the policy jacket.

(5) Zoning/Building Jacket Searches.

By the time of closing, the buyer and seller will require evidence that the property complies with local zoning requirements. For existing buildings, you should get evidence that there are no obvious zoning problems with property. Two common techniques are a building jacket search and a zoning compliance letter.

This includes checking with the applicable jurisdictions as to applicable zoning for the property. It often is useful to review both planning department and building department files and records for the property. These files may contain important information related to the property, such as conditions for use permits or records of past building code violations. If the current use of the property does not comply with the current zoning, it may still be permitted but have significant restrictions. When zoning for a property changes, existing uses and structures which do not comply with the new code requirements are usually “grandfathered” in as non-conforming uses or non-complying structures. However, these codes usually place significant restrictions on any expansion of the non-conforming use or additions to existing non-complying structures and often will not permit reconstruction of a non-conforming use or non-complying structure after casualty damage. While improvements are typically considered code compliant if the improvements complied with the codes that were in effect at the time of construction, this is not the same as complying with current code requirements, which are often more stringent. In addition, renovations to existing buildings

often can trigger code compliance requirements that are more restrictive. Life safety and handicap access upgrades triggered by renovations to a structure can be expensive (e.g., adding sprinklers, providing handicap accessible bathrooms and/or elevators) and add significant amounts to the total project costs.

It is very common outside of the Commonwealth for building departments to provide a letter that the municipality has no outstanding zoning or building code citations against the property. Some municipalities will issue a letter that the property complies with zoning requirements. In the Commonwealth it is becoming more common for the municipality to issue a letter that there are no outstanding violations.

Most title companies will accept the municipal letter and an ALTA survey showing dimensional constraints as adequate diligence for a zoning endorsement to the title policy. Outside of Massachusetts, most lenders and investors will feel satisfied with the municipal letter, the survey and zoning endorsement as adequate for meeting their zoning compliance standard.

Massachusetts is one of the only areas in the country where lenders demand zoning opinions from a borrower's counsel and borrower's counsel are willing to give them. Zoning opinions are time consuming and expensive for the borrower.

(6) Assignment of Non-Real Estate Property.

(a) Personal Property with Real Estate.

There is generally some personal property involved in a commercial real estate closing. As mentioned above in Section A(6), there will typically be an assignment of service contracts, personal property and building warranties.

At closing it is important to review what service contracts are needed to keep the building operational. Generally, the most important contract is the property management agreement. Most commercial buyers will want to put their own property management company in place. At closing it is important to make sure that the existing property management was terminated and that the seller is responsible for any termination fees. Most property management agreements are not terminable without prior notice.

Beyond the property management agreement, the buyer of a commercial property may want to retain some service contracts. The analysis is generally whether the contract is with a third party, on market terms with no prior adverse history with the buyer. Typically contracts for elevator service and HVAC service are retained because of the nature of these trades and the warranties that come with the contracts.

For any contracts assumed by the buyer, it is important to clarify that the seller is responsible for all costs and obligations that accrue prior to the closing. Since the property management agreement can involve significant fees, if the

buyer wants to continue using the same property management company it is better to terminate the existing contract with the seller at closing and enter into a new property management agreement with the buyer at closing.

Personal property is generally a small part of the assets for a commercial property. Some particular items of note are the intellectual property assets associated with the property, holiday decorations and service equipment.

The intellectual property assets are items such as the name of the property, trademarks and service logos associated with the property. Some of these items can be sticking points for a transaction, especially if the seller's name is associated with the property.

Holiday decorations are more important for retail properties, where holiday decorations can be key to the prime season for the property's tenants. Santa's village can be time-consuming and expensive to build.

For service equipment, one should ascertain prior to the closing whether it is owned by the seller or the property manager. The big ticket items in this category are usually vehicles for the maintenance and the operation of the property. Also many items of service equipment may be leased. Commonly items such as the telephone system, copy machines and computer equipment are leased rather than purchased

At closing, the buyer should have a UCC search against the seller to identify any liens on personal property that the buyer expects to purchase.

(b) Personal Property instead of Real Estate.

Many commercial real estate closings involve the acquisition of interests in the real estate ownership rather than the ownership of the real estate itself. Many real estate investors prefer to purchase the indirect interests to avoid the cost and liabilities associated with fee title ownership.

Except for the transfer of interests in a nominee trust, most practitioners feel that a transfer of less than 100% of the interests in a property owner or its constituent entities does not require the payment of deeds excise tax under M.G.L. c. 64D. As discussed above in Section B(2), the legislature has identified these types of transfers as a new revenue source but have not yet amended the statute to make the transactions taxable. There is a difference of opinion among practitioners as to whether a transfer of 100% of the interests in the property owner would require the payment of deeds excise tax.

M.G.L. c. 64D only refers to writings transferring realty for which consideration is paid. The Department of Revenue has issued a number of letter rulings, however. These do need to be followed, regardless of whether they have been challenged in court, until overturned. Going back to the statute, since there is always a writing, the questions tend to involve (1) whether there's consideration or (2) whether there was a sale of realty. On consideration, there are rulings

where consideration was not found, like LR 84-20 (liquidation of corporate trust) and LR 89-17 (statutory merger), and where non-cash consideration was found, like LR 89-14 (exchange). On the issue whether realty was sold, the DOR's consistent approach has been to look at substance over form. Deed stamps were owed in LR 90-1 (stock in cooperative), LR 79-52 (lease for 99 years), and LR 95-5 (beneficial interest in nominee trust). They were not owed in LR 89-12 (substance of the transaction was a loan) and LR 95-3 (substance of the transaction was lease financing).

If one accepts the substance over form principle, it is hard to conclude that no deeds excise tax is owing in a sale of 100% of the interests in an entity that has no significant activity other than real estate. It should be noted that there is a 3 year limitation on DOR actions for underpayment, but no limitation for no payment. LR 03-01.

(7) Post-Closing Claims Against the Seller.

Post-closing claims against a seller fall into two categories depending on the provisions of the purchase and sale contract. Some contracts will create a post-closing indemnification process. However, most contracts will be silent on the topic.

If the contract establishes a procedure, the parties should ensure that the contract is clear what claims survive the closing, how long a party has to bring a claim and the procedure for disputing the claim. These contractual indemnification procedures are found more commonly in transactions where the seller will have a continual involvement, such as when there is a purchase of interests in the owner rather than a purchase of fee title.

Without a contractual indemnification process, the claim will be a common law tort claim. The buyer will need to prove (1) actual loss, (2) the representation or covenant survived the closing, (3) the seller breached the representation or covenant. If successful the buyer will also need to execute on the judgment and locate assets of the seller.

As an ultimate remedy it is possible for a buyer to rescind the purchase agreement. To do so, the buyer would need to prove that there was a mutual mistake of an ascertainable fact that is material to the transaction.

A buyer of a commercial property may also be able to file a claim under M.G.L. c. 93A. The isolated sale of a private home has been held not to constitute conduct of trade or business and therefore is outside of the scope of 93A (*See Lantner v. Carson* 374 MASS 606 (1978)). A seller of commercial property may have difficulty saying it is not in the trade or business. It best that a seller not be deceptive in its disclosure to the buyer to avoid the repercussions of 93A.

The seller's entity is generally not a liability shield for post-closing claims. Typically, the seller will distribute the proceeds from the sale to its constituent entities and principals, leaving the selling entity with little or no remaining assets. A buyer can be successful in forcing a return of the distribution if the buyer can show that the distribution left the entity insolvent or was in excess of the fair-market value of the entity's assets. For example, if the seller knew the representation was incorrect, the seller should know that it would be liable to the seller and this claim would be a liability of the entity.

(8) What is Market?: Caps, Floors and Survival Periods.

The “market” for post-closing claims in commercial transactions continues to vary as the market varies. In seller dominated markets, a seller will be able to contractually exclude itself from nearly all post-closing claims. As the market cools, the seller will more often be forced to stand behind the property.

Survival periods will generally range from three months to two years. The need is to give the buyer enough time with the property to find the problems and analyze whether it was something that should have been disclosed under the terms of the purchase agreement.

In real estate contracts where the contract establishes a post-closing indemnification process, it is common to have minimum claim amounts and maximum claim amounts. By setting minimum claims, problems need to be of a sufficient magnitude before the seller becomes responsible. By setting a maximum claim, the seller is able to ensure that at least a portion of the sale proceeds cannot be reached by the buyer. The maximum claim is often tied to the seller’s equity in the property after discharge of the mortgage debt.

It has become less rare that the seller requires the buyer to relinquish the right to sue the seller for environmental claims. This waiver does not shield the seller from claims by third parties or government action.

C. Entity Formation and Authority.

(1) Use of Limited Liability Companies, Corporations and Limited Partnerships.

As mentioned above, most commercial property is owned in an entity rather than an individual's name. This section will briefly highlight some of the advantages and disadvantages of using particular entities. Then it will address in more detail the specific needs of each entity at closing.

(a) Advantages and Disadvantages in Choice of Entity.

In representing the purchaser of commercial real estate you will need to be aware of the advantages and disadvantages of the choice of entity for ownership of the property.

(i) Nominee Trusts.

Advantages: A nominee trust is a useful mechanism for shielding the beneficial owner of the property from public records and from the other parties to the transaction. They are also useful for wrapping around a general partnership which would otherwise would have difficulty showing authority at the land court.

Disadvantages: A nominee trust offers no liability protection to the beneficiary of the trust. Transfers of interest in a nominee trust require the payment of deeds excise tax (See DOR Directive 95-5 attached as Addendum E). Nominee trusts are unknown outside Massachusetts.

(ii) Corporations.

Advantages: Corporations are well known entities and have clear methods for approving transactions and demonstrating authority.

Disadvantages: The main disadvantage to the use of corporations is the corporate tax lien imposed by [MGL c. 62C §51](#), where the assets of a corporation selling all or substantially all of its assets are subject to the inchoate lien for three years after the transfer. It takes several weeks to get the lien waiver from the Department of Revenue to prove to a buyer that they are not taking the property subject to the lien. There are also the increased costs of an annual filing fee and paperwork for the corporation with the Secretary of State. Under the Internal Revenue Code, corporations cannot pass through losses to shareholders. Income from the property is taxed as income of the corporation, and dividends to shareholder are taxed again as income of the shareholder.

(iii) General Partnerships.

Advantages: The general partnership is flexible in allowing distributions of the profits. There are no filings and therefore there are no filing fees. There is no taxation at the partnership level.

Disadvantages: The general partnership offers no liability protection to the partners. It is also difficult to prove authority since there are no filings with the Secretary of State.

(iv) Limited Partnerships.

Advantages: Limited partnerships are well established entities with clear statutes and case law regarding liability and authority. There is no annual filing fee for limited partnerships in Massachusetts. There is no taxation at the partnership level.

Disadvantages: The general partner of the limited partnership is subject to the liabilities of the limited partnership.

(v) Limited Liability Companies.

Advantages: Limited liability companies (“LLCs”) are generally the best choice for ownership of commercial real estate. LLCs provide a flexible platform for authority of the LLC and the capital structure of the LLC. An LLC provides entity-level protection to the members and managers of an LLC. Unless an LLC elects to be treated as a corporation, there is no tax payable by the LLC.

Disadvantages: Given the flexibility of LLCs, an LLC Agreement can be expensive to draft. There is also a yearly filing fee of \$500 and an annual report to be filed.

(b) Nominee Trusts at a Commercial Real Estate Closing.

The declaration of trust for nominee trusts needs to be recorded in the registry of deeds (or filed with the land court) in the county where the property is located. The nominee trust will have a provision, generally section 4, similar to the following, whereby the trustee may take only

those actions authorized by the beneficiary as to the trust's property:

“Except as hereinafter provided in case of the termination of this Trust, the Trustees shall have no power to deal in or with the Trust Estate except as directed by all of the Beneficiaries.”

The trustee needs to deliver a trustee's certificate (see Addendum F for an example) to the seller or lender evidencing authority for the transactions. The trustee will need to have a direction from the beneficiaries (See Addendum G for an example) authorizing the trustee to take the action. The trustee's certificate will need to be recorded with the deed to the property. Since it will be recorded, the trustee's certificate will need to be notarized. The direction of beneficiaries should not be recorded to keep the identity of the beneficiary from the public record.

(c) Corporations at a Commercial Real Estate Closing.

Several documents are needed when a corporation is involved in a real estate closing. In all cases, you will need certified copies of the articles of incorporation, the bylaws, a vote and an incumbency certificate. You should obtain a long-form good standing certificate from the Secretary of State that lists the corporation's officers.

If a corporation is selling the property, you will also need to address the corporate tax lien issue. If the property is not all or substantially all of the assets of the corporation in Massachusetts, the deed

should state: *“This conveyance is not the sale of all or substantially all of the assets of the Grantor located in the Commonwealth.”* If the transaction is a sale of all or substantially all of the assets of the corporation, you will need a corporate tax lien waiver from the Department of Revenue.

Tax good standing certificates can be ordered online at <https://wfb.dor.state.ma.us/webfile/Certificate/Public/WebForms/Welcome.aspx>.

(d) General Partnerships at a Commercial Real Estate Closing.

The key document for a closing with a general partnership is the partnership agreement. There is no certificate available from the secretary of state.

The partnership agreement needs to be reviewed to determine which consents are required to sell, mortgage or purchase the property. At the closing, you will need a copy of the agreement certified by a partner and a copy of the consent of the partners.

(e) Limited Partnership at a Commercial Real Estate Closing.

The key documents for a closing with a limited partnership in Massachusetts are a certified copy of the limited partnership certificate and a copy of the limited partnership agreement, certified by the general partner.

Under the limited partnership statute, authority rests with the general partner, and any documents will need to be executed by the general partner.

Under the limited partnership statute, limited partners can participate in the management of the partnership. Therefore, it is important to review the limited partnership agreement to determine if the general partner needs consent of the limited partners to sell, mortgage or purchase the property.

At closing, you should get a certified copy of the limited partnership agreement, the certificate of limited partnership and the vote, if any, authorizing the transaction.

(f) Limited Liability Companies at a Commercial Real Estate Closing.

The key document for a closing with an LLC in Massachusetts is a long-form good standing certificate with managers from the secretary of state. This certificate will identify who is authorized to execute real estate documents. This information is unique to Massachusetts LLCs. Other states do not require this information in the certificate organizing an LLC. If the LLC is organized in another state, the information regarding who can execute real estate documents will need to be provided in the qualification. The long-form good standing certificate takes several

business days to be issued from the secretary of state. See Addendum H for an example.

For registered land, you cannot record the deed or mortgage without a recent long-form good standing certificate. The land court will file the good standing certificate with the deed or mortgage.

In Massachusetts if the manager of the LLC is an entity, that entity must also be an entity formed in Massachusetts or qualified to do business in Massachusetts.

At the closing, you should have the LLC agreement certified by the manager, as shown on the LLC certificate, and, if required, the vote of the managers and or members. The LLC agreement needs to be reviewed to determine the necessary consents.

(2) Patriot Act.

In 2001 the Federal government passed a law designated the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism," known as the USA Patriot Act. Title III of the Act, also known as the International Monetary Laundering Abatement and Financial Anti-Terrorism Act of 2001, made a number of amendments to the Anti-Money-Laundering provisions of the Bank Secrecy Act, which amendments are intended to make it easier to prevent, detect and prosecute international money laundering and financing terrorism.

In Section 352 of the Patriot Act, 31 U.S.C. § 5318(h) was amended to require the creation of anti-money laundering compliance programs by financial institutions. Under that Act, the Financial Crimes Enforcement Network of the Treasury Department ("FinCEN") temporarily exempted certain financial institutions, including individuals involved in real estate closings and settlements, from the Act's anti-money laundering requirements. The stated purpose of that exemption was to enable the Treasury Department to study the affected industries and to consider the extent to which anti-money-laundering requirements should be applied to them.

FinCEN issued an advanced notice of proposed rulemaking with respect to real estate closings and settlements. FinCEN posed a wide range of questions, including how to define "persons involved in real estate closings and settlements,"

the money-laundering risks posed by such persons, and whether they should be exempted from this requirement. Written comments were taken until June 9, 2003.

The Act would require every "financial institution," including "persons involved in real estate settlements and closings" to establish an anti-money-laundering compliance program that includes at a minimum:

- (i) The development of internal policies, procedures and controls;
- (ii) The designation of a compliance officer;
- (iii) An ongoing employee training program; and
- (iv) An independent audit function to test programs.

While the independent audit may prove to be the most intrusive and expensive requirement, the other requirements impose more fundamental concerns.

The request for comments stated that money-launderers have used real estate transactions to attempt to disguise the illegal source of their proceeds. For example, narcotics traffickers have purchased property with monetary instruments that they purchased in structured amounts, that is, multiple purchases each below the Bank's Secrecy Act reporting thresholds (\$10,000) that in aggregate exceeded the thresholds.

Also, traffickers have tried to launder cash proceeds by exchanging them for checks from a real estate company. According to FinCEN, the funds from illegal activities or funds intended to support illegal activities could be introduced into the financial system through the payment for real estate with a large cash down payment. In addition, multiple pieces of real estate could be bought and resold, exchanged, swapped, or syndicated, making it more difficult to trace the true origin of the funds.

Some examples provided by FinCEN of how the real estate industry is vulnerable to money laundering were apparently identified by the American Land Title Association. They include the following situations:

A prospective buyer pays for real estate with funds from a high risk country, or one that has been designated as a "primary money-laundering concern."

The seller requests that the proceeds of the sale of real estate be sent to a high-risk country.

A person seeking to purchase real estate in the name of a nominee has no apparently legitimate explanation for the use of a nominee.

A person acts as an agent for an undisclosed party and is reluctant to provide information about the party or the reason for the agency relationship.

A person does not appear to be sufficiently knowledgeable about the use or the purpose of the real estate being purchased.

A person appears to be buying or selling the same piece of real estate within a short period of time or is buying multiple pieces for no apparent, legitimate purpose.

A prospective purchaser or seller seeks to have documents reflect something other than the true nature of the transaction.

The person provides suspicious documentation to verify his or her identity.

Obviously, this list of "red-flag situations" could include some in which brokers, lawyers, title companies or lenders routinely find themselves; and then the statutory duties imposed under the Act may be visited upon them.

FinCEN points out that the Act, and the earlier Bank Secrecy Act, do not define a "person involved in a real estate closing or settlement as a financial institution." Also, according to FinCEN, the legislative history provides no insight into how Congress intended the term to be defined.

Therefore, a reasonable interpretation of the section could cover even participants other than those who actually conduct the real estate settlement. Among those potential participants are real estate brokers, attorneys, banks,

mortgage brokers, other financial entities, title insurance companies, and even appraisers and inspectors. The guiding principal, according to FinCEN, is to include those whose services can be abused by money launderers, including those who are positioned to identify the purpose and nature of the transaction.

Of primary concern for diligent lawyers, is that FinCEN has mentioned that attorneys often play a key role in real estate closings and "thus merit consideration along with all the other professionals involved in the closing" process. The report specifically states that FinCEN does not believe that the application of the Act's requirements to attorneys poses any obligations inconsistent with the attorney-client privilege. It states:

In fact, attorneys already must exercise due diligence when they receive funds from clients where there is an indication that the funds may be tainted, and cannot simply accept funds without the risk that their fees will be subject to forfeiture. When engaging in conduct subject to anti-money laundering regulations, attorneys, like other professionals, should take the basic steps contemplated by Section 352 to ensure that their services are not being abused by money launderers.

The proposal should be considered in conjunction with the broader range of recommendations issued by the Financial Action Task Force ("FATF"), providing that attorneys should be "gatekeepers" not only subject to the due diligence FinCEN currently proposes but also to whistleblowing requirements,

that is, the reporting of suspicious activities by clients. In fact, FATF has issued a revised version of its "The Forty Recommendations" in June which requires not only client investigation but the reporting of suspicious activities by attorneys who act in the buying and selling of real estate as well as the managing of client money, securities or assets, the organization or creation of companies, and the buying or selling of business entities. FATF, "The Forty Recommendations" (June 2003).

In light of all the critical and incisive comments, it appears that FinCEN will have its work cut out in trying to devise reasonable regulations to the Patriot Act that will accommodate both the needs of the government to combat terrorism and the needs of the real estate industry. All lawyers involved in real estate closings should follow the progress of the rules very carefully so that they and their clients do not find themselves targeted as lawbreakers in the new federal environment.

It is becoming common that buyers request information from the sellers about their status on the OFAC list. See Addendum I for a sample representation.

(3) Opinions.

Lenders typically request what are commonly referred to as the “authority” and “enforceability” opinions from an independent legal counsel to ensure the integrity of the transaction. Traditionally, these opinions are given in loan transactions with respect to the borrower regarding a number of legal issues concerning the validity and effectiveness of the transaction. The following list of legal opinions is typical:

(a) Validity, enforceability. An opinion that the applicable documents executed by the applicable party are duly authorized and constitute the legal, valid, binding and enforceable obligations of the applicable party.

(b) Valid existence, good standing. An opinion that the applicable party is duly organized, validly existing under the laws of the jurisdiction of its formation, and is in good standing under the laws of such jurisdiction and any other jurisdictions in which it is required to qualify to do business.

(c) Power, authority. An opinion that the applicable party has the full power and authority to carry on its business and to enter into the applicable documents and the transactions thereby contemplated.

(d) No violation of laws or documents. An opinion that the execution, delivery, and performance of the applicable documents by the applicable party will not violate any law, regulation, order, or decree of any governmental

authority, or constitute a default under or conflict with the organizational documents or other agreements governing or to which the applicable party is a party.

(e) No consent. An opinion that no approval, consent, order, or authorization is required in connection with the execution, delivery, and performance of the applicable documents other than those approvals, consents, orders, and authorizations that have been obtained in connection with the closing of the transaction.

(f) Usury. An opinion that the payments set forth in the applicable documents do not violate applicable usury laws.

(g) Choice of law. An opinion that the governing law provisions set forth in the applicable documents are enforceable.

D. How to Minimize Tax on Gain.

A 1031 exchange is a tool for investors to keep appreciation in their investment properties by deferring the payment of capital gains taxes. The 1031 designation refers to the portion of the tax code that contains the rules and limitations on this type of property transfer. Section 1031 allows the exchange of investment or business property for other investment or business property, without paying capital gains tax if the property received is “like kind.” Section 1031 is a highly complicated and technical tax code section. The transaction must be handled correctly from the beginning, and expert legal advice is needed. This section is mentioned only as a summary.

(a) Eligible Property: Property held for productive use in a trade or business or for investment may be exchanged for other “like-kind” or “like-class” property under IRC §1031(a)(1). A person’s home is ineligible.

(b) Timing of Exchange: Generally, at the time of the sale of the “relinquished property,” the seller or “exchangor” does not yet know what property he or she wants to acquire, or the closing on the replacement property cannot be accomplished simultaneously with the sale of the relinquished property. In that case, an “intermediary” is used to defer the exchange and hold the sales proceeds from the sale of the relinquished property. It is critical that the proceeds from the sale of the relinquished property are not paid to the seller and remain

with the intermediary. Constructive receipt of the proceeds will invalidate the 1031 exchange.

(c) Identification of Replacement Property: If it is a deferred tax exchange, the exchangor must identify the replacement property within 45 days of the settlement on the relinquished property. The exchangor can identify up to three (3) possible replacement properties. Identification is given to the intermediary.

(d) Closing on Replacement Property: The exchangor must close on the purchase of the replacement property within 180 days of the closing on the relinquished property by the due date on the tax return for the exchangor

You must pay careful attention to the timing rules set up by the IRS. When you sell your property and title passes to the purchaser, the timing requirements to identify and acquire your replacement property begins. You will have 45 days to produce a written list of up to three potential replacement properties delivered to the intermediary. The replacement property must be one of those identified on the list.

If you wish to identify more than three potential replacement properties, there are only two ways to do this:

1. 200% Rule: You can identify more than 3 properties if all of them add up to no more than twice the sales price (fair market value) of the property(s) you sold; or

2. 95% Rule: You can identify as many properties as you wish as long as 95% of the fair market value of all property(s) identified is actually acquired. In other words, if you identify 5 properties worth a total of \$100,000, you need to acquire at least \$95,000 worth from that list.

(e) Strict Compliance. If you fail to properly and timely identify your potential replacement properties, or fail to acquire title to all of the replacement properties in time, the IRS could disallow your entire exchange.

Addendum A
Assignment and Assumption of Leases

This Assignment and Assumption of Leases (this "Assignment") is made and entered into as of the ___ day of _____, 20___, by and between _____, a _____ ("Seller"), and _____, a _____ ("Buyer").

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and pursuant to that certain Purchase and Sale Agreement between Seller and Buyer, Seller and Buyer agree as follows:

1. Seller does hereby bargain, sell, transfer, assign, convey, set over and deliver to Buyer all right, title and interest of the Seller into and under all of the leases described in Exhibit A attached hereto and all amendments, extensions and renewals thereof (the "Leases"), all of which cover premises located in _____, _____, commonly known as _____, more particularly described on Exhibit B attached hereto, including but not limited to all security deposits and any other deposits held pursuant to the Leases, all of which are listed on Exhibit B.
2. Buyer hereby accepts this assignment by Seller and assumes all obligations of Seller as the landlord/lessor under the Leases that arise, accrue or mature after the date of this Assignment.
3. Seller agrees to indemnify, defend and hold Buyer harmless from and against any damage, loss, cost, expense (including reasonable attorneys' fees), claim, liability, obligation or debt resulting from, or arising out of:
 - (a) any obligations or liabilities of the landlord/lessor under the Leases which matured, became due or accrued on or prior to the date hereof; or
 - (b) performance to be made by the landlord/lessor under the Leases on or prior to the date hereof.
4. Buyer agrees to indemnify, defend and hold Seller harmless from and against any damage, loss, cost, expense (including reasonable attorneys' fees), claim, liability, obligation or debt resulting from, or arising out of:
 - (a) any obligations or liabilities of the landlord/lessor under the Leases which mature, become due or accrue after the date hereof; or
 - (b) performance to be made by the landlord/lessor after the date hereof.
5. This Assignment may be executed in multiple counterparts each of which shall be deemed an original and all of which shall constitute one and the same instrument.

6. This Assignment shall be governed by and construed in accordance with the internal laws of the State of _____ without regard to conflicts of law principals.

EXECUTED under seal in one or more counterparts (all of which constitute but one and the same instrument) as of the date first above written.

Addendum B
Assignment and Assumption of Contracts

THIS ASSIGNMENT AND ASSUMPTION is made as of the ___ day of _____, 20___, between _____, a _____ (“Seller”), and _____, a _____ (“Buyer”).

RECITALS

Seller is conveying to Buyer by deed certain real property located in _____, _____, known as _____ as more particularly described in Exhibit A attached hereto, together with all improvements thereon (the “Real Property”).

It is the desire of Seller to assign and the desire of Buyer to assume only those contracts listed on Exhibit B (the “Contracts”) in connection with the ownership, operation, management and leasing of the Real Property.

[Alternative for a transfer of all assets: It is the desire of Seller to assign to Buyer all of Seller’s right, title and interest in and to all contracts for goods and services rendered in connection with the ownership, operation, management and leasing of the Real Property (the “Contracts”) including, without limitation, those contracts listed on Exhibit B attached hereto.]

CONVEYANCE AND AGREEMENT

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and pursuant to that certain Purchase and Sale Agreement between Seller and Buyer, Seller and Buyer agree as follows:

1. Seller hereby assigns to Buyer all of the Seller’s right, title and interest in and to the Contracts. Buyer hereby assumes all the liabilities and agrees to perform all of the obligations of the Seller accruing from and after the date hereof pursuant to the Contracts.
2. Seller shall indemnify, defend and hold Buyer harmless from and against any damage, loss, cost, expense (including reasonable attorneys’ fees), claim, liability, obligation or debt resulting from, or arising out of:
 - (a) any obligations or liabilities of the Seller under the Contracts which matured, became due or accrued on or prior to the date hereof; or
 - (b) performance to be made by the Seller under the Contracts which performance was to be made by the Seller on or prior to the date hereof.

3. Buyer shall indemnify, defend and hold Seller harmless from and against any damage, loss, cost, expense (including reasonable attorneys' fees), claim, liability, obligation or debt resulting from, or arising out of:

- (a) any obligations or liabilities of the Buyer under the Contracts which mature, become due or accrue after the date hereof; or
- (b) performance to be made by the Buyer under the Contracts which performance was to be made by the Buyer after the date hereof.

4. This Assignment may be executed in multiple counterparts, each of which shall be deemed an original and all of which shall constitute one and the same instrument.

5. This Assignment shall be governed by and construed in accordance with the laws of the State of _____.

EXECUTED under seal in one or more counterparts (all of which shall constitute but one and the same instrument) as of the date first above written.

Addendum C
Bill of Sale

THIS BILL OF SALE AND GENERAL ASSIGNMENT is made as of the ___ day of _____, 20___, by _____, a _____ (“Seller”) to _____, a _____ (“Buyer”).

RECITALS

Concurrently with the execution and delivery hereof, Seller is conveying to Buyer by deed certain real property located in _____, _____, known as _____ as more particularly described in Exhibit A attached hereto, together with all improvements thereon (the “Real Property”).

It is the desire of Seller to convey, transfer, set over and assign to Buyer all of Seller’s right, title and interest in and to all personal property, whether tangible or intangible, which is necessary [or incidental] to the proper ownership, use, enjoyment, occupancy and operation of the Real Property (collectively, the “Personal Property”), including, without limitation, the following:

- (i) All fixtures, fittings, appliances, apparatus, equipment, machinery, building supplies, inventory and other items of personal property, of every kind and character, if any, presently affixed or attached to, or placed or situated upon the Real Property and owned by Seller as of the date hereof;
- (ii) All assignable builders’, manufacturers’, and suppliers’ warranties and guaranties, express or implied, if any, which relate to the Real Property or the Personal Property described in (i) above and inure to the benefit of Seller and which are in effect as of the date hereof;
- (iii) All assignable use, occupancy, zoning, building and operating licenses and permits, if any, and all other licenses and approvals issued from time to time which are in effect as of the date hereof relating to the Real Property; [But] and
- (iv) [Excluding] All of the items, assets and properties listed on Exhibit B.

CONVEYANCE AND AGREEMENT

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and pursuant to that certain Purchase and Sale Agreement between Seller and Buyer, Seller and Buyer agree as follows:

1. Seller hereby sells, delivers, transfers, sets over and assigns unto Buyer the Personal Property, to have and to hold the same unto Buyer, Buyer’s successors and assigns, forever.

2. Seller hereby agrees to perform, execute and/or deliver any and all such further acts and assurances as Buyer may reasonably require to perfect Buyer's interest in the Personal Property.

3. Seller represents and warrants to Buyer that (a) Seller is the sole owner of and has good and marketable title to the Personal Property, free and clear of all liens, encumbrances, claims and demands, (b) Seller has not previously sold or assigned the Personal Property to any other party, and (c) Seller will freely and fully warrant and defend the Personal Property against the lawful claims of any person claiming by, through or under the Seller.

4. Seller makes no warranty, express or implied, as to the Personal Property, included, but not limited to the condition of the Personal Property, its merchantability or its fitness for any particular purpose. By Buyer's acceptance of this Bill of Sale, Buyer acknowledges that Buyer has fully inspected the Personal Property, and Buyer accepts the Personal Property in its present used and "as is" condition.

EXECUTED under seal as of the date first above written.

Addendum D
Deed Stamps Legislation

House, No. 4168

Text of an amendment, offered by Mr. Marzilli of Arlington, to the House Bill relative to the tax laws of the Commonwealth (House, No. [4163](#))

By adding at the end of House bill No. [4163](#) thirteen sections, as follows

SECTION 66. Chapter 64D of the General Laws is hereby amended by striking out section 1 and inserting in place thereof the following section:-

Section 1. There shall be levied, collected and paid the excise herein specified on each conveyance of real property or interest in real property: when the consideration for the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of the sale, exceeds \$100 and does not exceed \$500, \$2; and for each additional \$500 or fractional part thereof, \$2; provided, however, that in Barnstable county, the excise herein specified shall be \$1.50 for each \$500 or fractional part of said consideration, excluding a consideration of between \$0.00 and \$100. Said excise shall be payable at the registry of deeds in the county in which the real property lies, regardless of whether the conveyance is evidenced by a deed, instrument, or other writing or whether such deed, instrument, or other writing is otherwise recorded. Notwithstanding any other provisions of this section or any other general or special law to the contrary, Nantucket county may disburse and expend deposits in said Funds for the purpose of facilities and programs related to law enforcement, including the planning, improving or constructing of police stations and other related facilities and programs. This chapter shall not apply to any instrument or writing given to secure a debt or to any conveyance to which the commonwealth, a city or town of the commonwealth, or the United States or any of their agencies are a party.

For purposes of this chapter, unless otherwise expressly stated:

(a) “Conveyance” means the transfer or transfers, directly or indirectly, of any interest in real property by any method, including but not limited to sale, exchange, grant, assignment, trust indenture, or transfer or acquisition of a controlling interest in any entity with an interest in real property.

(b) “Interest in real property” includes, but is not limited to, an estate in fee simple, a beneficial interest, a life estate, a perpetual easement, or a leasehold or sublease interest, ordinary or proprietary, but only where the sum of the term of the lease or sublease and any options for renewal, extension, or the like exceeds 49 years.

(c) “Transfer or acquisition of a controlling interest” occurs, in the case of a corporation which has an interest in real property, when a person, or group of persons acting in concert, transfers or acquires, directly or indirectly (including through the transfer or acquisition of an interest in another entity), a total of more than 50 per cent of the total combined voting stock of such corporation, or more than 50 per cent of the capital, profits, or beneficial interest in such voting stock of such corporation. In the case of any partnership, limited liability company, association, trust, or other entity having an interest in real property, the transfer or acquisition of a controlling interest therein occurs when a person, or group of persons acting in concert, transfers or acquires, directly or indirectly (including through the transfer or acquisition of an interest in another entity), a total of more than 50 per cent or more of the capital, profits, or beneficial interest in such entity.

Persons are deemed to be “acting in concert” when, in accordance with regulations promulgated by the commissioner, they have a relationship such that one person influences or controls the actions of another. Where the individuals or entities are not commonly controlled or owned, persons shall be deemed to be acting in concert when, in accordance with regulations promulgated by the commissioner, the unity with which the sellers or purchasers have negotiated and will consummate the transfer of ownership interests indicates that they are acting as a single entity. If the transfers or acquisitions are completely independent, each seller selling or purchaser buying without regard to the identity of the other sellers or purchasers, then the transfers or acquisitions shall be treated as separate transfers or acquisitions.

For purposes of determining whether a controlling interest is transferred or acquired, only transfers or acquisitions of interests occurring on or after September 1, 2005 shall be added together. Where there is a transfer or acquisition of an interest in an entity that has an interest in real property on or after September 1, 2005, and subsequently there is a transfer or acquisition of an additional interest or interests in the same entity, the transfers or acquisitions shall be added together to determine if a transfer or acquisition of a controlling interest has occurred. No transfer or acquisition of an interest in an entity that has an interest in real property will be added to another transfer or acquisition in the same entity if they occur more than three years apart, unless the transfers or acquisitions are so timed as part of a plan to avoid the excises herein specified.

Notwithstanding the above, no bona fide pledge of stock, partnership, or other interest as loan collateral nor any conveyance of publicly traded stock, partnership, or other interest, shall be deemed subject to taxation under this chapter.

SECTION 67. Section 2 of chapter 64D of the General Laws, as appearing in the 2004 Official Edition, is hereby amended by striking the section and inserting in its place the following:-

Section 2. The excise imposed by this chapter shall be paid by the person who conveys the real property or interest therein, or for whose benefit the real property or interest therein is conveyed. When the conveyance consists of a transfer or an acquisition of a controlling interest in an entity with an interest in real property, the "person who conveys" such interest means, but is not limited to, a shareholder, partner, or other interest-holder transferring stock, a partnership interest, or another equity interest, respectively. The payment of the excise shall be denoted by "stamps," as that term is defined in section three of this chapter, affixed to or printed directly on the deed, instrument or writing evidencing the conveyance, or if none, to a form prescribed by the commissioner for such purpose. In any case in which a conveyance subject to the excise imposed herein is not evidenced by a deed, instrument, or writing that will be recorded, the same shall be evidenced by recording the stamp form required by this section. The person affixing or printing a stamp shall cancel the same by writing or stamping thereon the initials of his name and the date when the

same is affixed or printed, in such manner that it cannot be used again; provided, however, that the stamp shall not be so defaced as to prevent determination of its denomination and genuineness.

The word "person" shall, for the purposes of this chapter, include political subdivisions of the commonwealth, individuals, partnerships, corporations, trusts, limited liability companies, societies, associations, or any other form of unincorporated enterprise.

SECTION 68. Section 3 of chapter 64D of the General Laws, as appearing in the 2004 Official Edition, is hereby amended by striking the section and inserting in its place the following:-

Section 3. Stamps for the purpose of paying the excise under this chapter shall be prepared in such form, of such denominations and in such quantities as the commissioner may prescribe. He shall make provision for the sale of such stamps in such places and at such times as he deems necessary. He shall provide for the custody of the stamps and other equipment used in the production of said stamps in such manner as he deems expedient. For purposes of this section, the term "stamps" shall include both adhesive stamps and computer generated images printed directly on a deed, instrument, writing, or form required by section 2 of this chapter.

The commissioner may cause to be installed in any registry of deeds one or more metering machines, so called, through which said stamps can be sold and may remove any such machine if he deems it expedient. The commissioner may also approve computer hardware and software, purchased at the expense of the registry, to produce stamps. Upon the installation of such a metering machine or machines or approved computer hardware and software the register of deeds of said registry shall sell stamps to persons requiring the same for affixation or printing to deeds, instruments, writings, or forms in accordance with the provisions of this chapter.

Each register of deeds shall on or before the tenth day of each month account to the commissioner on a form prescribed and furnished by him for all sales made by said register during the preceding calendar month and shall turn over to the commissioner all moneys received from said sales, less any adjustments approved by him. Each register of deeds, with the approval of the advisory board on county expenditures

and the county commissioners, shall for the purposes of purchasing equipment or services relative to electronic reporting, indexing, computers and systems designed to modernize and maintain registry records, retain interest earned on the deposit of excise stamp fees. Each such register shall, annually, furnish to the county treasurer a financial report regarding such interest and the expenditure thereof in accordance with accepted accounting procedures.

The machines or computer equipment shall, upon installation, be subject to inspection by the commissioner or his duly appointed agent or agents at any time.

Each register of deeds shall give to the commissioner a bond, in a penal sum and with sureties approved by the commissioner, conditioned satisfactorily to account for money received by said register in his official capacity from the sale of said stamps. The premium for such bond shall be paid by the state treasurer upon certification by the commissioner.

The provisions of sections three A and three B of this chapter shall not be applicable to any registry of deeds during the period within which a metering machine or approved computer hardware or software is installed therein, nor to any registry operated by the state secretary.

SECTION 69. Section 3A of chapter 64D of the general laws, as appearing in the 2004 Official Edition, is hereby amended by striking in line 5 the following word:- adhesive.

SECTION 70. Section 4 of chapter 64D of the General Laws, as appearing in the 2004 Official Edition, is hereby amended by adding after the word "affixed" in line 1 the following words:- or printed.

SECTION 71. Section 6 of chapter 64D of the General Laws, as appearing in the 2004 Official Edition, is hereby amended by striking the section and inserting in its place the following:-

Section 6. The commissioner shall administer and enforce the excise imposed by this chapter and shall promulgate such regulations as are necessary to implement the provisions of this chapter. At any time after the making of a conveyance subject to the excise imposed by this chapter, he may investigate and ascertain whether said excise, in the proper amount, was paid. For this purpose, the commissioner may exercise all powers granted to him under section 70 of chapter 62C. Whoever refuses to produce the books,

papers, records, or other data required to be produced under section 70, or fails to preserve the same for 3 years or such longer period as the commissioner may by regulation provide, or alters, cancels or obliterates any part thereof, or makes any false entry therein, shall be punished by a fine of not less than \$500 nor more than \$5,000, or by imprisonment for not less than 3 months nor more than 2 years, or both.

SECTION 72. Section 6A of chapter 64D of the General Laws, as appearing in the 2004 Official Edition, is hereby amended by striking the first sentence thereof and inserting in its place the following:-

Whoever signs and delivers to a purchaser or purchasers, or to any person or persons designated by such purchaser or purchasers, a deed, instrument, writing, or form required by section 2 of this chapter which does not have the stamps required by this chapter affixed thereto or printed thereon, or whoever leaves or causes to be left for recording or registration in any registry of deeds within the commonwealth an original deed, instrument, writing, or form which does not have the stamps required by this chapter affixed thereto or printed thereon, or a duplicate deed, instrument, writing, or form without first having left or caused to be left for recording or registration in a registry of deeds within the commonwealth the original thereof, shall be subject to such penalty, not exceeding \$100, as the commissioner may determine.

SECTION 73. Section 6B of chapter 64D of the General Laws, as appearing in the 2004 Official Edition, is hereby amended ,by striking the section and inserting the following in its place:-

Section 6B. The register of deeds may refuse to record or register any deed, instrument, writing, or form required by section 2 of this chapter which does not have the stamps required by this chapter, as determined by the register, affixed thereto printed thereon.

SECTION 74. Section 8 of chapter 64D of the General Laws, as appearing in the 2004 Official Edition, is hereby amended by adding after the word “affixed” in line 7 the following words:- or printed.

SECTION 75. Section 9 of chapter 64D of the General Laws, as appearing in the 2004 Official Edition, is hereby amended by striking the words “an adhesive” in 1 and replacing them with the following:- a stamp.

SECTION 76. Section 10 of chapter 64D of the General Laws, as appearing in the 2004 Official Edition, is hereby amended by striking the word “taxes” in line 1 and replacing it with the following:-
excise.

SECTION 77. Section 11 of chapter 64D of the General Laws, as appearing in the 2004 Official Edition, is hereby amended by striking the section and inserting in its place the following:-

Section 11. There shall be established upon the books of each county that has not been abolished pursuant to the provisions of chapter 34B a separate fund, maintained separate and apart from all other funds and accounts of each county, to be known in each case as the Deeds Excise Fund.

Notwithstanding the provisions of any general or special law and of this chapter to the contrary, and except for Barnstable county and all counties that have been abolished pursuant to the provisions of chapter 34B or other applicable provision of law, on the first day of each month, 42.5 per cent of the excises collected pursuant to the provisions of this chapter shall be transmitted to the Deeds Excise Fund for each county. For Barnstable county, on the first day of each month, 28.33 per cent of the excises collected pursuant to the provisions of this chapter, but not including the additional excise authorized under the provisions of section 2 of chapter 163 of the acts of 1988, shall be transmitted to the Deeds Excise Fund.

Notwithstanding the provisions of any general or special law and of this chapter to the contrary, and except for Barnstable county and all counties that have been abolished pursuant to the provisions of chapter 34B or other applicable provision of law, on the first day of each month, 7.5 per cent of the excises collected pursuant to the provisions of this chapter shall be transmitted to the County Correction Fund established in section 13. For Barnstable county, on the first day of each month, 5 per cent of the excises collected pursuant to the provisions of this chapter, but not including the additional excise authorized under the provisions of said section 2 of said chapter 163, shall be transmitted to said County Correction Fund. The remaining percentage of excises collected under the provisions of this chapter, including all excises collected under the provisions of this chapter in all counties that have been abolished pursuant to the

provisions of chapter 34B or other applicable provision of law shall be transmitted to and retained by the general fund in accordance with the provisions of section 10.

SECTION 78. Sections 66 - 77 of this act shall be effective the first day of the fourth month following the date of passage.

Addendum E

DOR Directive 95-5: Deeds Excise on Transfers of Beneficial Interests in Nominee Trusts

MASSACHUSETTS DEPARTMENT OF REVENUE

DOR Directive 95-5

Deeds Excise

Deeds Excise on Transfers of Beneficial Interests in Nominee Trusts

INTRODUCTION: Title to real estate in Massachusetts may be taken in the name of a nominee trust. The Massachusetts nominee trust is based in common law and has been described as creating a principal-agent rather than a true trustee-beneficiary relationship. See *Apahouser Lock and Security Corporation v. Carvelli*, 528 N.E. 2d 133 (Mass. App. Ct. 1988). Generally, in a nominee trust arrangement, the names of the beneficiaries are set forth on an unrecorded schedule of beneficial interests, the trustees act only as directed by the beneficiaries, and the beneficiaries may terminate the trust at any time. A sale of real estate held by a nominee trust may be accomplished by an assignment of beneficial interests accompanied by the resignation of the trustee and appointment of a successor trustee.

ISSUE: Are sales and transfers of beneficial interests in nominee trusts for consideration in excess of one hundred dollars subject to the deeds excise?

DIRECTIVE: Sales and transfers of beneficial interests in nominee trusts for a consideration in excess of one hundred dollars are subject to the deeds excise. The excise stamps should be affixed to the assignments of beneficial interest, whether or not these documents are recorded.

DISCUSSION OF LAW:

G.L. c. 64D, §1, provides that there shall be levied, collected and paid an excise upon a “deed, instrument, or writing, whereby any lands, tenements or other realty sold shall be granted, assigned, transferred or otherwise conveyed to, or vested in, the purchaser or purchasers...when the consideration of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds one hundred dollars.” Thus, under the statute, an excise is due upon any instrument or writing transferring an interest in real estate; the excise is not restricted to “deeds.” Moreover, the excise is not limited to deeds, instruments, or writings that will be recorded.

In cases involving nominee trusts, Massachusetts courts have often looked behind the nominee trust entity and treated the beneficial owner as the true owner of the real estate. The Supreme Judicial Court ruled that “where a statutory limitation on damages protects the beneficiary of a nominee trust,... the beneficiary reasonably can be regarded as the true owner, and the limitation should apply to property held in trust for the beneficiary.” See *Morrisson v. Lennett*, 415 Mass. 857, 616 N.E.2d 92 (1993). The SJC has also ruled that real estate trusts in which the beneficiary has complete control of the trust property may be disregarded for personal income tax purposes, thereby permitting the beneficial owner to deduct losses associated with the real estate on his personal income tax return. See *Bertram A. Druker v. State Tax Commission*, 374 Mass. 198, 372 N.E.2d 208 (1978).

In determining if the deeds excise is applicable, the Department has previously looked at the substance rather than the form of a transaction. In Letter Ruling 90-1, the Department ruled that transfers of ownership of cooperative apartments are subject to deeds excise. The substance of

the transaction (stock transfer and proprietary lease to the new owner) is the right to occupy a specific apartment with maximum incidents of ownership. The transaction is therefore subject to the deeds excise, even though title to the real estate remains with the corporation, and the proprietary lease may not be recorded. See also LR 79-52, in which the Department ruled that leases for very extended periods are subject to the deeds excise.

Similarly, looking behind the nominee trust entity, the substance of a sale and assignment of beneficial interests in a nominee trust is to transfer incidents of ownership of the real estate to the new beneficial owners. Such an assignment for a consideration in excess of one hundred dollars is therefore subject to the excise on deeds, instruments, or writings imposed by G.L. c. 64D, § 1.

/s/Mitchell Adams

Mitchell Adams

Commissioner of Revenue

May 9, 1995

Addendum F

Trustee's Certificate for Nominee Trust

TRUSTEE'S CERTIFICATE

We, _____ and _____, the Trustees of [INSERT NAME OF TRUST] do hereby certify as follows:

1. That we are the Trustees of the [INSERT NAME OF TRUST], under a Declaration of Trust dated _____, _____ and recorded with the [INSERT NAME OF REGISTRY] at Book _____, Page _____ (the "Trust").
2. That said Trust is in full force and effect and has not been modified nor amended in any respect;
3. That we, as Trustees of said Trust, are authorized, empowered and directed by all of the Beneficiaries of said Trust to [INSERT DESCRIPTION OF TRANSACTION - ex: convey the land and buildings owned by the Trust known as _____ to _____] upon such terms and conditions as We, as Trustees, deem to be best or desirable;
4. Further, that under Section ____ of the Trust, _____, as Trustee, is authorized, empowered and directed to sign, seal, execute, acknowledge and deliver in the Trust's name and behalf, such deed and any and all other instruments which he, as Trustee, deems necessary or incidental to the effectuation of the sale of the Trust Property as aforesaid.
5. No Beneficiary of the Trust is a minor, a corporation selling all or substantially all of its Massachusetts assets, or a personal representative of an estate subject to estate tax liens.

_____, as Trustee of
[INSERT NAME OF TRUST] and not
individually

_____, as Trustee of
[INSERT NAME OF TRUST] and not
individually

Addendum G
Form of Direction of Beneficiary

DIRECTION OF BENEFICIARY

The undersigned, being the sole beneficiary of _____ Trust, under a Declaration of Trust dated _____ and filed with the Norfolk County Registry District of the Land Court on _____ as Document No. _____ (hereinafter the "Trust"), hereby authorizes, instructs and directs _____, as sole Trustee of the Trust (the "Trustee"), as follows:

(a) to take any and all actions as may be necessary and/or appropriate to acquire the land and improvements thereon located at _____, Massachusetts (the "Property"), including, but not limited to, the execution of certificates, affidavits and such other instruments as the Trustee shall deem necessary or appropriate in connection therewith;

(b) to execute and deliver any and all other papers and instruments and perform any and all acts which the Trustee may in its sole discretion deem necessary or advisable in connection with any of the foregoing matters with said execution thereof to be sufficient evidence of such determination; and

(c) to execute and deliver to _____ Bank ("Bank") a Mortgage Note and such other documents as shall be requested by Bank in connection with a \$_____ loan (the "Loan") from Bank to the Trustee, in its capacity as Trustee of the Trust and to secure said Loan by a Mortgage and Security Agreement and a Conditional Assignment of Leases and Rents on the Property and to execute and deliver any and all other papers and instruments and perform any and all acts which the Trustee may in its sole discretion deem necessary or advisable in connection therewith, with said execution thereof to be sufficient evidence of such determination.

WITNESS our hand and seal this _____ day of _____.

Addendum H

Limited Liability Company Long Form Good Standing



The Commonwealth of Massachusetts
Secretary of the Commonwealth
State House, Boston, Massachusetts 02133

William Francis Galvin
Secretary of the
Commonwealth

November 21, 2005

TO WHOM IT MAY CONCERN:

I hereby certify that a certificate of organization of a Limited Liability Company was filed in this office by

CONCORD INVESTORS, LLC

in accordance with the provisions of Massachusetts General Laws Chapter 156C on **November 3, 2005**.

I further certify that said Limited Liability Company has filed all annual reports due and paid all fees with respect to such reports; that said Limited Liability Company has not filed a certificate of cancellation or withdrawal; and that, said Limited Liability Company is in good standing with this office.

I also certify that the names of all managers listed in the most recent filing are: **TRAVIS J. SNELL, BRUCE A. GURALL**

I further certify, the names of all persons authorized to execute documents filed with this office and listed in the most recent filing are: **TRAVIS J. SNELL, BRUCE A. GURALL**

The names of all persons authorized to act with respect to real property listed in the most recent filing are: **TRAVIS J. SNELL, BRUCE A. GURALL**



In testimony of which,
I have hereunto affixed the
Great Seal of the Commonwealth
on the date first above written.

William Francis Galvin
Secretary of the Commonwealth

Addendum H

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Addendum I
Sample OFAC Representation

OFAC. As of the Closing Date, Each Transferor hereby represents, warrants, covenants and agrees as follows:

(a) No Transferor, any direct or indirect interest holder in any Transferor (collectively, the “Transferor Parties”), or any affiliate of any Transferor is subject to sanctions of the United States government or in violation of any federal, state, municipal or local laws, statutes, codes, ordinances, orders, decrees, rules or regulations (“Laws”) relating to terrorism or money laundering, including, without limitation, Executive Order No. 13224, 66 Fed. Reg. 49079 (published September 25, 2001) (the “Terrorism Executive Order”) or a Person similarly designated under any related enabling legislation or any other similar Executive Orders (collectively with the Terrorism Executive Order, the “Executive Orders”), the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Public Law 107-56, the “Patriot Act”), any sanctions and regulations promulgated under authority granted by the Trading with the Enemy Act, 50 U.S.C. App. 1-44, as amended from time to time, the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-06, as amended from time to time, the Iraqi Sanctions Act, Publ. L. No. 101-513; United Nations Participation Act, 22 U.S.C. § 287c, as amended from time to time, the International Security and Development Cooperation Act, 22 U.S.C. § 2349 aa-9, as amended from time to time, The Cuban Democracy Act, 22 U.S.C. §§ 6001-10, as amended from time to time, The Cuban Liberty and Democratic Solidarity Act, 18 U.S.C. §§ 2332d and 2339b, as amended from time to time, and The Foreign Narcotics Kingpin Designation Act, Publ. L. No. 106-120, as amended from time to time.

(b) None of the Transferor, the Transferor Parties or any affiliate of Transferors is (i) listed on the Specially Designated Nationals and Blocked Persons List (the “SDN List”) maintained by the Office of Foreign Assets Control (“OFAC”), Department of the Treasury, and/or on any other similar list (“Other Lists” and, collectively with the SDN List, the “Lists”) maintained by the OFAC pursuant to any authorizing statute, Executive Order or regulation (collectively, “OFAC Laws and Regulations”); or (ii) a Person (a “Designated Person”) either (A) included within the term “designated national” as defined in the Cuban Assets Control Regulations, 31 C.F.R. Part 515, or (B) designated under Sections 1(a), 1(b), 1(c) or 1(d) of the Terrorism Executive Order or a Person similarly designated under any related enabling legislation or any other similar Executive Orders (collectively, the “Executive Orders”), including a “Prohibited Person”. The OFAC Laws and Regulations and the Executive Orders are collectively referred to as the “Anti Terrorism Laws”. “Prohibited Person” is defined as follows:

(i) a person or entity that is listed in the Annex to the Terrorism Executive Order, or is otherwise subject to the provisions of the Terrorism Executive Order or any other Executive Order;

- (ii) a person or entity owned or controlled by, or acting for or on behalf of, any person or entity that is listed in the Annex to the Terrorism Executive Order, or is otherwise subject to the provisions of the Terrorism Executive Order or any other Executive Order;
 - (iii) a person or entity with whom any Transferor is prohibited from dealing or otherwise engaging in any transaction by any terrorism or anti-money laundering Law, including the Terrorism Executive Order, any other Executive Order and the Patriot Act;
 - (iv) a person or entity who commits, threatens or conspires to commit or supports “terrorism” as defined in the Terrorism Executive Order or any other Executive Order; or
 - (v) (a person or entity that is named as a “specially designated national and blocked person” on the most current list published by the U.S. Treasury Department Office of Foreign Asset Control at its official website, <http://www.treas.gov/ofac/tlstdn.pdf> or any replacement website or other replacement official publication of such list.
- (c) Transferor and its Transferor Parties have, required and shall require, and have taken and shall take all reasonable measures to ensure compliance with the requirement that no Transferor Parties or Affiliates of any Transferor is or shall, be listed on any Lists be a Designated Person, or be in violation of any Laws, including any OFAC Laws and Regulations.
- (d) None of Transferor, the Transferor Parties or any Affiliate of Transferor is or will (i) conduct any business or engage in making or receiving any contribution of funds, goods or services to or for the benefit of any Designated Person, (ii) deal in, or otherwise engage in, any transaction relating to any property or interest in property blocked pursuant to any Executive Order or the Patriot Act, or (iii) engage in or conspire to engage in any transaction that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in any Executive Order or the Patriot Act.

Each Transferor covenants and agrees to deliver any certification or other evidence requested from time to time by Buyer, in its sole discretion, confirming Transferor’s compliance with the provisions of this Section.