

Texas Real Estate Forms Manual
Third Edition

Volume 2



TEXAS REAL ESTATE FORMS MANUAL

Third Edition

Volume 2

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Chapter 8

Deeds of Trust

§ 8.1 Use and Effect of Deed of Trust

A deed of trust is a mortgage with a power of sale. Although a deed of trust by its literal terms conveys the described property in trust to the trustee, its actual effect under Texas law is to create a lien against the property to secure a debt of the grantor of the lien to the beneficiary of the lien. The deed of trust is often used to establish a lien on property for which a lender has advanced purchase money, but it may also secure a loan or other obligation unrelated to the property. The primary advantage of the deed of trust over the type of mortgage used in many other states is that it provides the default remedy of nonjudicial foreclosure by a trustee's sale without the necessity of a lawsuit.

This chapter provides three basic forms: the deed of trust (form 8-1), the deed of trust to secure assumption (form 8-2), and the leasehold deed of trust (form 8-10). As discussed in this chapter, the forms may be adapted to a variety of situations.

The deed of trust often includes a security agreement and financing statement to cover personal property and fixtures associated with the real estate. For drafting instructions for using a deed of trust with a security agreement, see section 8.11:2 below.

The Texas Trust Code does not apply to a deed of trust. Tex. Prop. Code § 111.003(a).

§ 8.1:1 Terms and Conditions

The deed-of-trust form provided in this manual may be adapted to cover indebtedness other than

the note specifically described, such as future advances or overdrafts, and to serve as a security agreement for personal property. Due-on-sale clauses, prohibitions against further encumbrances, and tax and insurance reserve clauses may be added. Clauses for these purposes are suggested in form 8-9 in this chapter.

§ 8.1:2 Precautions for Deed of Trust

The lender's attorney should determine whether the property is the borrower's homestead and, if so, whether a valid lien can be created against it. The Texas Constitution and Property Code allow liens against homesteads only under certain conditions. *See* Tex. Const. art. XVI, § 50; Tex. Prop. Code ch. 41.

Article XVI, section 50, of the Texas Constitution was amended in 1997 to permit home equity lending under certain circumstances. Home equity lending is discussed in chapter 11 in this manual. The attorney is cautioned against using the forms in this chapter for that purpose. In particular, the attorney should be aware that nonjudicial foreclosure is not available in home equity loans.

Trustees foreclosing under a deed of trust must comply exactly with all requirements of Property Code section 51.002, which specifies in detail the procedures for a trustee's sale. *See* Tex. Prop. Code § 51.002. Trustees must also comply with any additional requirements imposed by the deed of trust. Under certain circumstances, a lender, trustee, or substitute trustee may rescind a nonjudicial foreclosure sale involving residential real property. *See* Tex. Prop. Code § 51.016. *See* section 14.6:8 in this

manual. Foreclosures are discussed in chapter 14.

A deed of trust is generally a component of a “loan agreement” as defined in the Texas Business and Commerce Code statute of frauds for loan documents and requires the notice prescribed therein. *See* Tex. Bus. & Com. Code § 26.02. The notice of final agreement, form 10-14 in this manual, may be used to satisfy the statutory requirements.

Texas Finance Code chapter 343 regulates certain types of home loans. For example, “[a] lender may not replace or consolidate a low-rate home loan directly made by a government or nonprofit lender before the seventh anniversary of the date of the loan” unless the transaction meets the requirements of chapter 343 of the Texas Finance Code. Tex. Fin. Code § 343.101(b). *See* section 10.14 for further discussion.

§ 8.2 Considerations in Drafting Deed of Trust

§ 8.2:1 Parties

For general information about designation of parties, see the remarks at section 3.9 in this manual.

The party granting the deed-of-trust lien and the borrower in the note secured are not necessarily the same party. The attorney drafting the deed of trust must make certain that all parties are properly designated. Paragraph E.14. in the deed-of-trust form (form 8-1 in this chapter) recognizes that the party granting the lien and the party obligated to pay the note may not be the same. This provision is included to add versatility to the form. The attorney dealing with such a situation, however, should consider specifying in greater detail the obligations of the respective parties—for example, that while the borrower in the note is obligated to pay the note, the grantor

in the deed of trust is responsible for performance of the other covenants contained in the deed of trust, such as payment of ad valorem taxes. If the attorney elects to add such detail, the deed of trust should make clear that any default by either party is also a default by the other, entitling the lender to exercise the remedies contained in both the note and the deed of trust.

The lender should be identified by full name and, if the lender is a legal entity rather than a natural person, the type of entity. The lender’s name should appear exactly as it does in the note.

Individuals, not corporations, are usually named as trustees. Institutional lenders frequently prefer to designate one of their own officers or attorneys to serve in this capacity.

One or more persons may be authorized to exercise the power of sale under a security instrument. *See* Tex. Prop. Code § 51.0074(a).

§ 8.2:2 Description of Note

The deed of trust should provide at least basic information about the note so that the note may be clearly identified. Attorneys have different ideas about how much information the deed of trust should reveal about the note being secured, and some prefer not to disclose the payment terms. Usually, though, the note’s date, amount, borrower, lender, and, if desired, final maturity date are shown. If parties prefer not to disclose the payment terms, they may insert in the relevant space on the form a short phrase such as “As provided in the note” or “Monthly installments according to terms provided in the note.”

If the final maturity date of the note is stated, it should be possible to avoid any assertion that limitations began to run on execution of the note. Stating the final maturity date should also make limitations available in clearing title of old

time-barred deeds of trust. On the other hand, if this information is included in the deed of trust, it is critical that it be accurate and that any extensions granted by the lender be documented in a duly recorded extension agreement to preclude limitations barring a valid deed-of-trust lien against purchasers for value without notice.

§ 8.2:3 Property Description

For remarks and cautions in general about property descriptions, see section 3.7 in this manual. Also, note that the description of the property in the leasehold deed of trust (form 8-10 in this chapter) should be of the leasehold interest of the tenant granting the deed-of-trust lien.

§ 8.2:4 Prior Liens

If the deed of trust creates a first lien on the property, the word *none* is adequate for the space for listing prior liens on the form. If the lien is a second or other subordinate lien, all prior liens should be fully described.

In listing the prior liens, the attorney should not overlook previously recorded deeds of trust to secure assumption that affect the priority of subsequent liens.

§ 8.2:5 Other Exceptions to Conveyance and Warranty

For remarks about reservations from conveyance and exceptions to conveyance and warranty, see sections 5.2:6 and 5.2:7 in this manual.

§ 8.2:6 Vendor's Lien Clauses

If a vendor's lien clause is used it should be added to paragraph 19. of "General Provisions" in the deed of trust. See form 8-3 in this chapter. Clause 8-3-3 may be used if no vendor's lien is expressly retained in the deed and the note evidences money used to purchase the property.

§ 8.2:7 Mechanic's Lien Clauses

If a mechanic's lien contract with power of sale is used (such as that in chapter 20 in this manual), a deed of trust is not necessary but should be used if there is a third-party lender. If a mechanic's lien contract without a power of sale is used and a contractor wants to reserve the right to a nonjudicial foreclosure in a separate deed of trust, a clause like clause 8-9-1 should be added to paragraph 19. of "General Provisions."

§ 8.2:8 Clauses Extending Existing Liens

If an existing lien is extended, the clauses in form 8-4 in this chapter should be added to paragraph 19. of "General Provisions."

Extension of Existing Deed-of-Trust Lien. The bracketed sentences of clauses 8-4-1 through 8-4-4 are appropriate if the renewed and extended note has been assigned to the lender secured by the deed of trust but should not be used if the lender secured by the deed of trust is the original lender in the note.

In the transaction described in clause 8-4-2, the sum of the unpaid balance of the prior note and the amount of cash advanced should equal the amount of the note secured by this deed of trust.

Alternative Renewal and Extension Language. Some attorneys prefer to use more comprehensive language renewing and extending the lien than that in extension clauses 8-4-1 through 8-4-4. The language suggested in clause 8-4-5 extends a deed-of-trust lien, but it can be modified to address other types of liens. If clause 8-4-5 is used, it replaces the sentence in clauses 8-4-1 through 8-4-4 beginning "Grantor acknowledges that the lien(s)"

Extension of Prior Lien to Be Released, Not Assigned. Clause 8-4-6 is drafted for use if a note and a deed of trust are being used to extend

a deed-of-trust lien, but it can be modified to extend other types of liens.

Extension of Lien to Only Part of Property.

Clause 8-4-7 extends a vendor's lien and a deed-of-trust lien as to only part of the property.

§ 8.2:9 Acknowledging Cash Advanced

Clause 8-3-3 in this chapter acknowledges the receipt of cash and is appropriate if all or part of the cash advanced is applied to the purchase price and no vendor's lien is retained in the deed. If cash is advanced and used for other purposes, one of the clauses in form 8-5 may be suitable or may be adapted, and it should be added to paragraph 19. of "General Provisions.

To Pay Ad Valorem Taxes. If the borrower files a sworn affidavit with the tax office authorizing the lender to pay taxes on the property, the tax office transfers the tax lien to the lender when the lender pays the taxes. The lien must be recorded in the real property records of the county in which the property is located, with a sworn statement and affidavit attesting to the transfer of the tax lien, and foreclosure on the lien may not be initiated for one year after its recording, unless the deed of trust or other agreement between the borrower and the lender provides otherwise. Tex. Tax Code §§ 32.06, 32.065. See clause 8-5-3. See also the section titled "Ad Valorem Taxes" in chapter 2 of this manual.

§ 8.2:10 Due-on-Sale Clause

The deed-of-trust form in this manual includes a due-on-sale clause, that is, a clause accelerating the underlying debt on the transfer of property. The attorney should remove this clause if it is not applicable to the transaction in question. Events triggering acceleration of the debt under the due-on-sale clause include transfer of the property by the owner, granting of subordinate

liens on the property, and transfers of equity interest in the owner, with exceptions for transfers to other family members or entities when no change of control results. Because many lenders evaluate the creditworthiness, track record, and management ability of the grantor, as well as the predicted cash flow of the property, during the underwriting process, they require that a deed of trust contain a due-on-sale clause to prevent a change of management or ownership (including current ownership of voting interests in business entities not publicly held) without an opportunity for the lender to reevaluate the security for the loan. Many lenders also require a due-on-sale clause that applies when subordinate liens are granted because historically many bankruptcy proceedings have been funded by subordinate lenders attempting to delay foreclosure proceedings. The Texas Real Estate Commission's Seller Financing Addendum contains an election that includes a due-on-sale clause. Federal law prohibits the enforcement of a due-on-sale clause for owner-occupied residential property under certain circumstances. See 12 U.S.C. § 1701j-3(d); 12 C.F.R. § 591.5(b). The exceptions to the due-on-sale clause in the residential deed of trust are derived from these federal restrictions.

Alternative due-on-transfer clauses are found at clauses 8-9-21 through 8-9-23 in this chapter.

§ 8.2:11 Confidentiality Notice

If any party to a deed of trust, including the trustee, is an individual, the deed of trust must contain the confidentiality notice required by Tex. Prop. Code § 11.008. See section 3.16 in this manual.

§ 8.3 Use and Effect of Subordinate Deed of Trust

A subordinate deed of trust is one that is either recorded after a previously recorded deed of trust or, less often, expressly made subordinate

to it by agreement of the lender. A deed of trust can also become subordinate by another lien's having a superpriority—for example, ad valorem tax liens. The most common uses of a subordinate deed of trust are in cases involving a borrower whose property is subject to an existing lien and who desires additional financing to be secured by the same property, and in cases involving seller financing.

A wraparound mortgage is a subordinate mortgage secured by real property on which a prior lien remains outstanding and unsatisfied and on which the original obligor remains obligated. The wraparound debt includes within it the balance of the underlying lien debt. In some wraparound mortgages the prior lien may be "wrapped" more than once.

In a wraparound financing transaction the borrower (usually the buyer) agrees to make payments on the wraparound mortgage to the lender (usually the seller) who, as required by the wraparound mortgage agreement, must in turn make payments on the prior, underlying, or wrapped lien to the prior lienholder. If the lender fails to pay off the first lien, the wraparound agreement normally gives the borrower the right to make the first-lien payments and receive credit on the wraparound note. The two primary reasons for a wraparound transaction are to take advantage of the spread in interest rates between the underlying and wrap notes and to provide the wrap-note lender with the assurances that the underlying note payments are made. Use of the forms provided in this manual for a wraparound transaction requires the use of specific clauses in both the note and the deed of trust. For examples of these, see clauses 6-6-4 and 8-9-11 in this manual.

§ 8.4 **Precautions for Subordinate Deed of Trust**

Subordinate lien financing involves a number of considerations for all the parties involved: the

borrower, the prior lender, and the subordinate lender. The borrower should ascertain that the creation of a subordinate lien will not be a default under the prior deed of trust, because subordinate encumbrances are expressly prohibited in many deeds of trust. The prior lender may have concerns about the ability of the borrower to service both the superior and subordinate lien debts. If the borrower should default on the subordinate lien debt and the subordinate lender should foreclose, the borrower, although still liable on the debt, will no longer be the owner of the property, and the incentive to repay the senior loan will obviously be diminished.

The party at greatest risk in subordinate lien financing transactions is the subordinate lender. Foreclosure of a superior lien extinguishes all subordinate liens. *See Exchange Savings & Loan Ass'n v. Monocrete Proprietary, Ltd.*, 629 S.W.2d 34 (Tex. 1982). In Texas, unlike many other jurisdictions, a subordinate lienholder is not entitled by law to notice of default on the prior lien debt or notice of foreclosure proceedings. The subordinate lienholder is likewise not entitled to share in the foreclosure proceeds, unless there is an excess after payment of costs and expenses in connection with the foreclosure and satisfaction of the prior lien debt. The subordinate lienholder may therefore want to obtain the prior lienholder's agreement to provide notice of any default by the borrower under the first-lien note and deed of trust and the opportunity to cure such default or require the borrower to provide continuing proof that payments on the prior lien debt have been made.

Another concern for the subordinate lender is the potential application of a "dragnet" or "other indebtedness" clause in the prior deed of trust. If the prior deed of trust secures debt of the borrower other than the prior lien note itself, there is a likelihood that the total debt secured by the prior lien will exceed the value of the property, and the subordinate lender's lien may be for all practical purposes worthless. These are issues

that the subordinate lender may want to address by an agreement with the prior lender, generally called a lender's "estoppel certificate" or an intercreditor agreement. See form 10-10 in this manual.

A subordinate lien transaction may be subject to chapter 342 of the Texas Finance Code if the property is a dwelling designed for occupancy by four or fewer families and the interest rate exceeds 10 percent per year. *See* Tex. Fin. Code §§ 342.001(4), 342.005. Chapter 342 applies to a secondary mortgage loan made by a person in the business of making, arranging, or negotiating those types of loans. Tex. Fin. Code § 342.005(3). The chapter does not apply to a secondary mortgage loan made by a seller of property to secure all or part of the unpaid purchase price. Tex. Fin. Code § 342.006. If a lender is in the business of making, arranging, or negotiating secondary mortgage loans, the lender must obtain a license from the Office of Consumer Credit Commissioner (the OCCC) unless the lender is a bank, savings bank, savings and loan association, credit union, or a residential mortgage loan originator licensed under chapter 156. *See* Tex. Fin. Code §§ 124.005, 339.004, 341.103–104, 342.051. Unless exempt under section 180.003, an individual who acts as a residential mortgage loan originator in the making, transacting, or negotiating of a secondary mortgage loan subject to chapter 342 must individually be licensed under chapter 342, be enrolled with the Nationwide Mortgage Licensing System and Registry as required by section 180.52, and comply with other applicable requirements of the Texas Secure and Fair Enforcement of Mortgage Licensing Act of 2009. Tex. Fin. Code ch. 180.

Chapter 342 loans are highly specialized and regulated, and thus if a subordinate lien transaction is subject to chapter 342, the attorney must carefully review the chapter to make sure all requirements have been met. Texas Finance Code section 341.502 provides that "[a] contract

for a loan under Chapter 342, a retail installment transaction under Chapter 348, or a home equity loan regulated by the Office of Consumer Credit Commissioner must be written in plain language designed to be easily understood by the average consumer." Tex. Fin. Code § 341.502(a). The Finance Commission of Texas is authorized to adopt model contracts for loans subject to that section. A lender may not use a contract other than a model contract unless the lender has submitted the contract to the OCCC for its approval. If the OCCC issues an order disapproving a submitted contract, the lender may not use the contract after the order takes effect. Tex. Fin. Code § 341.502(b)–(d). Plain-language model contracts and related rules for chapter 342, subchapter G, second-lien home improvement contracts are codified at 7 Tex. Admin. Code §§ 90.601–.604.

The attorney general of Texas determined that section 341.502(a) is applicable only to those loan transactions for which the consumer credit commissioner is the appointed regulating official and has no application to loan transactions subject to the regulatory authority of the banking commissioner, the savings and mortgage lending commissioner, the credit union commissioner, and federal regulatory officials. *See* Tex. Att'y Gen. Op. No. JC-0513 (2002).

Banks, savings and loan associations, and credit unions accordingly are not required to comply with the section 341.502 "plain language" contract requirements or to obtain a license to engage in the business of making subordinate lien loans subject to chapter 342. Tex. Fin. Code § 342.051(c)(1). These institutional lenders nevertheless are thought to be subject to other substantive law provisions of chapter 342, including, for example, the limitations of that chapter on the collection of authorized fees and charges, as enforced by the policies of their respective regulatory agencies. *See* Tex. Fin. Code §§ 342.308, 342.502.

Before using the deed-of-trust forms contained in this chapter of the manual for a loan subject to chapter 342 of the Texas Finance Code, the attorney should determine whether the lender is subject to the plain-language model contract provisions of Texas Finance Code section 341.502. The forms contained in this chapter have not been submitted to or approved by the OCCC.

If the attorney decides that the forms contained in this chapter may nevertheless be used for a loan regulated by chapter 342 of the Texas Finance Code, the forms still must be modified to comply with the requirements of that chapter. For example, the secondary mortgage loan documents for a loan made by a licensed lender must contain the name, mailing address, and telephone number of the OCCC. Tex. Fin. Code § 14.104. See clause 8-9-24 in this chapter. Neither the deed-of-trust forms nor the note forms in this manual contain that information. The attorney should include that information in both the deed-of-trust form and the note form when documenting a secondary mortgage loan if the lender has a license from the OCCC. Additionally, if a subordinate lien transaction is subject to chapter 342, the printed language in the deed of trust must be modified slightly. In paragraph 4. of "Grantor's Obligations, the phrase "issued by insurers and written on policy forms acceptable to Lender" must be struck. This change is necessary because Finance Code sections 342.404 through 342.405 and 342.413 prohibit a lender from approving the selection of insurance. See Tex. Fin. Code §§ 342.404-405, 342.413. Also, Finance Code section 342.404 provides that when insurance is required in connection with a loan made under that chapter, the lender must furnish the borrower a statement like the one in clause 8-9-9, which may be added to the deed of trust as a numbered paragraph under "General Provisions. See Tex. Fin. Code § 342.404.

The same chapter imposes other requirements if the lender sells or procures insurance related to the loan at a rate not fixed or approved by the State Board of Insurance. See Tex. Fin. Code § 342.405.

Finance Code section 342.307 limits the enforcement fees that may be included in secondary mortgage loan documents. To comply with this section, the attorney's fee provisions in the note, form 6-1, and the deed of trust should be modified if used in transactions subject to chapter 342 of the Finance Code. See Tex. Fin. Code § 342.307. In the note, the third paragraph, concerning attorney's fees, should be replaced with clause 6-6-15. See section 6.2:7. To modify the deed of trust, in paragraph E.16., after the words "the hands of an attorney" add "who is not an employee of Lender."

An institutional third-party lender may be required to provide the borrower a truth-in-lending disclosure (loan) form. An example of this form is included in chapter 12 in this manual. The clauses in form 8-8 are examples of second-lien clauses.

If the prior deed of trust contains a due-on-sale clause, the wraparound deed-of-trust conveyance, like other subordinate liens, may violate the due-on-sale clause.

The wraparound mortgage has usury implications that are not yet fully settled, centering primarily around the issue of whether the entire principal amount of the wraparound note or merely the difference between the principal amount of the wraparound note and the balance of the underlying note should be used for interest calculations. The attorney is referred to the December 31, 1981, letter from the OCCC, which may be obtained from that office, and to *Summers v. Consolidated Capital Special Trust*, 783 S.W.2d 580 (Tex. 1989), for two analyses of these issues.

The wraparound mortgage, like other subordinate lien mortgages, may be subject to chapter 342 of the Texas Finance Code.

§ 8.5 Considerations in Drafting Subordinate Deed of Trust

It is essential that a subordinate deed of trust contain terms and provisions identifying the prior lien and obligating the borrower to keep the prior note and deed of trust current and not in default. The clauses in form 8-8 in this chapter may be used for this purpose. The parties may wish to attempt to obtain an estoppel letter or intercreditor agreement from the prior lienholder. An example of such an instrument may be found at form 10-10.

There are additional considerations in drafting instruments for a wraparound transaction: modification of the warranty deed with vendor's lien (see chapter 5), promissory note (see chapter 6), and deed of trust (see sections 8.2:1 through 8.2:9 above). These forms should be completed according to the instructions in their respective sections of this manual, and then all three documents should be modified further according to the instructions in sections 8.5:1 through 8.5:3 below.

§ 8.5:1 Additional Clauses for Wraparound Deed of Trust

A deed of trust should be drafted according to the comments in sections 8.2:1 through 8.2:9 above and then modified to accommodate a wraparound transaction.

If the transaction is subject to chapter 342 of the Texas Finance Code, see section 8.4 above for a suggested modification of the form.

In the space following "General Provisions," a vendor's lien clause like clause 8-3-1 in this chapter should appear. Also, a wraparound

clause similar to clause 8-9-11 should be included in the same part of the deed of trust.

If the deed of trust securing the prior note requires monthly deposits to a reserve account for payment of taxes and insurance premiums, a similar requirement should be inserted in the wraparound deed of trust securing the wraparound note. A clause serving this purpose appears at 8-9-4. Also, language similar to that suggested in the second part of clause 8-9-11 should be added to the wraparound lien clause.

§ 8.5:2 Additional Documents for Use with Wraparound Mortgage

An additional document often used in wraparound transactions is a collection agreement specifying the terms by which the borrower makes payments on the subordinate lien note to an escrow agent, usually a bank, rather than to the lender. This procedure protects the borrower from the possibility that the lender will fail to forward part of the payment to the holder of the prior lien. The lender's failure to make payments on the prior lien would, of course, cause a default that the borrower would have to cure to avoid a foreclosure on the property. A collection agreement usually provides that the agent will use the borrower's subordinate lien payment to pay the prior lienholder and then remit the excess to the lender. A sample of such an agreement is found at form 10-7 in this manual.

§ 8.5:3 Other Comments

The prior note may be secured by liens other than those discussed in sections 8.2:6 through 8.2:9 above. If so, those liens should be described.

The lender sometimes adds to the clauses a provision that, as between the borrower and the lender, the lender is not required to make payments under the prior note or liens if the bor-

rower fails to make payments on the wraparound note.

The borrower often insists on another modification of the clauses to provide compensation beyond the amount tendered to cure a default by the lender in payment of the prior note. A common provision credits the borrower with 110 percent of the payment made to cure the default and characterizes the added 10 percent as liquidated damages to compensate for expenses incurred.

The borrower also will often include in the wraparound note a requirement that the lender must give notice regularly that the prior note payment has been made.

The wraparound note should be structured so that payments are due before payments are due on the prior note.

§ 8.5:4 Confidentiality Notice

If any party to a deed of trust, including the trustee, is an individual, the deed of trust must contain the confidentiality notice required by Tex. Prop. Code § 11.008. See section 3.16 in this manual.

§ 8.6 Use and Effect of Deed of Trust to Secure Assumption

The deed of trust to secure assumption may be used if the buyer assumes payment of a debt for which the seller is liable at the time of sale. If this instrument is used under these circumstances, the seller usually conveys title by deed with a vendor's lien reserved. The assumed debt and lien are evidenced by a note and deed of trust. The deed of trust to secure assumption provides that the lien it creates is released with the release of the prior deed of trust, unless before the release the seller files a notice with the proper county clerk setting forth any amount

the seller has advanced to cure a default in payment of the assumed lien.

The primary function of the deed of trust to secure assumption is to give the seller recourse against the property if the buyer defaults in payment of the debt secured by the first lien.

In a transaction involving the deed of trust to secure assumption the buyer is the grantor in the deed of trust to secure assumption and the grantee in the warranty deed. The seller is the grantor in the warranty deed, the lender in the deed of trust to secure assumption, and usually the borrower in the note and grantor in the deed of trust assumed.

Caution: The deed of trust to secure assumption is not appropriate for use in a wraparound mortgage transaction. Also, its use may violate a due-on-sale clause in the prior deed of trust.

§ 8.7 Considerations in Drafting Deed of Trust to Secure Assumption

Chapter 3 in this manual offers useful suggestions for completing the basic information required for this form, such as designation of parties and recording information. The property description should either repeat exactly the description in the deed of trust assumed or incorporate that description by reference. References to the deed of trust should include its recording information.

§ 8.7:1 Additional Clauses for Use with Deed of Trust to Secure Assumption

The assumption provision in the deed includes an indemnity against all damages caused by the assuming party's breach of its obligations. It is likely, considering the election-of-remedies provision of paragraph 3. under section D, "General Provisions," in the deed of trust to secure

assumption, that a cause of action for damages would survive action taken under the deed of trust to secure assumption.

§ 8.7:2 Warranty Deed Provisions for Use with Deed of Trust to Secure Assumption

The grantor in the warranty deed accompanying the deed of trust to secure assumption is the beneficiary (lender) of the deed of trust to secure assumption, and the buyer of the property is the grantee in the deed and the borrower (grantor) in the deed of trust to secure assumption.

The deed should contain an assumption clause like clause 5-6-1 in this manual and a clause for vendor's lien and deed of trust to secure assumption like clause 5-9-10 or 5-9-11.

§ 8.8 Use of Leasehold Deed of Trust

The leasehold deed of trust should be used if the grantor is encumbering a leasehold interest instead of a fee interest in real property. The grantor of the leasehold deed of trust must be the tenant under the lease encumbered by the leasehold deed of trust.

The attorney drafting the leasehold deed of trust must first determine if the tenant's interest in the lease may be encumbered. The encumbrance of a tenant's interest in a lease is considered a sublease under Texas law. *See Amco Trust, Inc. v. Naylor*, 317 S.W.2d 47 (Tex. 1958); *American National Bank & Trust Co. v. First Wisconsin Mortgage Trust*, 577 S.W.2d 312 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.), *disapproved on other grounds by Stewart Title Guaranty Co. v. Sterling*, 822 S.W.2d 1, 11 (Tex. 1991). Section 91.005 of the Property Code prohibits subleases without the prior consent of the landlord. Also, many leases in Texas expressly prohibit the subleasing or encumbering of the tenant's interest without the landlord's consent.

However, a tenant whose lease gives authorization to sublease any part of the leased premises also has the right to encumber the leasehold estate. *See Menger v. Ward*, 30 S.W. 853 (Tex. 1895).

Therefore, the attorney must find that the lease allows encumbrance of the tenant's interest without the landlord's consent or that any required landlord consent has been obtained before execution of the leasehold deed of trust. See form 8-11 in this chapter for a form of consent by landlord to a leasehold deed of trust that also includes additional representations and agreements by the landlord that a lender will require as a condition to making a loan secured by the leasehold deed of trust, including the opportunity to cure defaults by the tenant under the lease.

In addition to a description of the lease, the leasehold deed of trust contains affirmative and negative covenants and representations by the grantor that relate specifically to the lease that is being encumbered. These covenants are intended generally to cause the grantor to keep the lease in effect during the term of the loan in substantially the same status as the grantor represented it to be when the loan was made.

Certain covenants in the deed of trust (form 8-1) that may be inconsistent with the tenant's obligations under the lease (for example, payment of taxes, maintenance and repair, and insurance) have been deleted from the leasehold deed of trust in favor of the covenants by the grantor to observe and perform all of its obligations and to enforce the landlord's obligations under the lease.

§ 8.8:1 Confidentiality Notice

If any party to a deed of trust, including the trustee, is an individual, the deed of trust must contain the confidentiality notice required by

Tex. Prop. Code § 11.008. See section 3.16 in this manual.

§ 8.8:2 Title Insurance for Leasehold Deeds of Trust

A leasehold loan policy endorsement (T-5) is available, at no extra charge, for leasehold deeds of trust.

§ 8.9 Use of Consent to Leasehold Deed of Trust

If the lease does not allow encumbrance of the tenant's interest without the landlord's consent, the lease will also not contain the additional representations and agreements by the landlord that a lender will typically require as a condition to making a loan secured by the leasehold deed of trust. In this case, the lender not only must obtain the written consent of the landlord to the leasehold deed of trust but should also seek from the landlord certain representations about the status of the lease and certain affirmative and negative covenants designed to preserve the lease as viable collateral for the loan. The consent to leasehold deed of trust (form 8-11 in this chapter) may be used for this purpose.

Form 8-11 covers common issues of importance to the lender, including rights to give to the tenant notice and cure of tenant defaults, access to the leased premises to enforce a security interest in the tenant's personalty, free assignability of the lease at foreclosure and to a purchaser from the lender of the tenant's assets after foreclosure, and to demand a new lease on the same terms if the lease is terminated or rejected by a trustee in bankruptcy. The lender that is considering demanding a new lease should also be aware of the effect of the termination of the lease on any subleases in effect as of the termination and may wish to consider adding to form 8-11 a provision that allows the new tenant to reinstate desirable subleases without the landlord's consent.

§ 8.10 Additional Clauses

If used, clauses such as those in form 8-9 in this chapter should appear as numbered paragraphs following paragraph E.12. in the deed of trust (form 8-1), paragraph E.9. in the deed of trust to secure assumption (form 8-2), and paragraph G.11. in the leasehold deed of trust (form 8-10).

Both the deed of trust and the deed of trust to secure assumption may be modified to secure other obligations of the borrower such as guaranties and "subject to" transactions in which the borrower does not assume the underlying debt.

§ 8.10:1 Future Advances

Future advance clauses may be enforceable to the extent that they secure a debt that is within the reasonable contemplation of the parties when the deed of trust is executed. The lien securing a future advance may have priority over an intervening lien if the intervening lienholder has notice that the earlier lien secures future advances. Form 8-6 in this chapter contains several examples of future advance clauses. If the future indebtedness to be secured is that of someone other than the borrower granting the lien, these clauses should be modified accordingly.

Clause 8-6-4, in addition to future advances, also covers present or future debts of other borrowing entities in which the borrower has an interest.

§ 8.10:2 Partial Release

If the parties anticipate circumstances requiring partial release of the lien, such as subdivision of the property, they often include partial release provisions in the deed of trust or, if the terms are complex and lengthy, in a separate agreement referred to in the deed of trust. The partial release clause should specify exactly which part of the property will be released from the lien and

what amount of debt must be paid. The terms of release, especially an accurate description of the affected property, must be precise. The clauses in form 8-7 in this chapter are examples of partial release clauses. The first is for use if releases are by acre, the second if the property is subdivided at the time of the granting of the deed of trust, and the third if a separate agreement is used in connection with a seller-financed sale contemplating the buyer's subdivision of the property. Because each situation requiring a partial release is unique, these clauses must be adapted to the particular situation at hand.

For an example of a partial release of lien, see form 10-3 in this manual.

§ 8.10:3 Recordkeeping

If the property covered by the deed of trust is income-producing, the lender will frequently require the grantor to maintain records of operation on the property and make them available for the lender's review. Clause 8-9-14 in this chapter contains such a requirement.

§ 8.10:4 Financial Statements

If the loan is commercial, the lender will frequently require the grantor to prepare and submit to the lender periodic financial statements, either on request or on an annual basis. Such a requirement is also sometimes imposed in connection with residential construction loans, but rarely in connection with residential mortgage loans. Clause 8-9-15 in this chapter requires financial statements from the grantor.

§ 8.10:5 Appraisals

In the aftermath of the banking and thrift crisis of the 1980s, the requirements for appraisals of real property securing loans made by federally insured lenders were greatly strengthened and banking regulatory agencies were required to develop standards for appraisals. *See* 12 U.S.C.

§§ 3331, 3335. These standards were codified at 12 C.F.R. §§ 34.41-.47, 225.61-.67, 323.1-.7, 564.1-.8. Appraisals may be required not only in connection with the underwriting of the loan but also during its term. Clause 8-9-16 in this chapter allows the lender to obtain such appraisals at the grantor's expense.

§ 8.10:6 Further Assurances

Institutional lenders commonly require grantors to agree to reexecute documents, modify executed documents, or execute additional documents if the lender determines that it is necessary to secure or perfect the lender's liens or security interests or to correct errors in the loan documents. Such agreements, commonly called agreements for further assurances, may take the form of separate documents, or they may be included as clauses in the loan documents. Clause 8-9-17 in this chapter is a further assurance clause for use in the deed of trust.

§ 8.10:7 Insurance

The attorney may wish to substitute the more detailed insurance provisions found at clause 8-9-18 in this chapter for the existing provisions in the deed-of-trust form, particularly if the deed of trust covers income-producing property or secures a construction loan. If clause 8-9-18 is used, it replaces the clause at paragraph B.1. in the deed of trust. Form 8-12 describes specific endorsements and coverage that the lender may want to include.

If the lender requires contractual indemnity from the borrower independent of insurance, or for damages that would otherwise be the lender's responsibility (for example, arising out of the ordinary negligence or strict liability of the lender), form 8-12 may be used, adapted, or incorporated into the deed of trust. Clauses that indemnify the lender for the lender's negligence or other liability must be in type more conspicu-

ous than the other indemnity language in the document.

§ 8.10:8 Subordinate Liens

In the context of commercial loans, the lender may wish to prohibit junior liens against the property because their foreclosure would divest the grantor of title to the collateral for the loan, even though the foreclosure would not affect the prior lien position. Clause 8-9-19 in this chapter prohibits subordinate liens against the property covered by the deed of trust.

§ 8.10:9 Business Use

The applicability of several Texas statutes depends on whether loan proceeds are used primarily for business, commercial, investment, or similar purposes or are made primarily for personal, family, or household use. Texas Business and Commerce Code section 26.02 provides that the statute-of-frauds provisions for written loan agreements do not apply to certain loans made primarily for personal, family, or household use. *See* Tex. Bus. & Com. Code § 26.02(a)(2). Texas Civil Practice and Remedies Code section 15.020 excludes from the definition of a major transaction one entered into primarily for personal, family, or household purposes. Parties to a major transaction may agree in writing that a suit arising from the transaction may be brought in a specific county of the state. *See* Tex. Civ. Prac. & Rem. Code § 15.020. Texas Finance Code section 303.009(c) provides that credit extended for business, commercial, investment, or similar purposes may take advantage of interest rate ceilings up to 28 percent per year rather than the otherwise applicable 24 percent per year maximum rate ceiling. *See* Tex. Fin. Code § 303.009(c). Finance Code section 306.001(5) defines a commercial loan as a loan made primarily for business, commercial, investment, agricultural, or similar purposes and not including a loan made primarily for personal, family, or household use. *See* Tex. Fin. Code

§ 306.001(5). The Finance Code includes special provisions for commercial loans. For example, section 342.005 subjects a loan extended primarily for personal, family, or household use to the requirements of Finance Code chapter 342. *See* Tex. Fin. Code § 342.005. If a party is relying on any of these statutes as a basis for terms of a transaction, a statement of the purpose of the loan establishes a basis for that reliance. *See* clause 8-9-20 in this chapter.

§ 8.10:10 No Personal Liability

If the lender is satisfied that the collateral itself is ample security for the repayment of the loan, the lender may agree that the borrower will have no personal liability for the repayment of the loan and that the lender's sole recourse in the event of default is to foreclose on the collateral. Such agreements generally except from the "no personal liability" conditions certain "bad acts" by the borrower, such as failure to pay taxes, misapplication of insurance proceeds, failure to pay charges for labor and material that could give rise to liens against the property, and diversion of revenues from the operation of the property. *See* clause 8-9-26 in this chapter.

§ 8.10:11 Due-on-Sale Clause

Institutional lenders often base their willingness to make a loan on the creditworthiness of the borrower, rather than the expected cash flow of the property, and in such cases generally want the original borrower to own the property as long as the loan remains outstanding. *See* section 8.2:10 above for a discussion of due-on-sale clauses.

§ 8.11 Deed of Trust as Security Agreement and Financing Statement

In addition to creating a lien on the real property conveyed, the deed of trust with a few modifica-

tions can serve as a security agreement for personal property collateral related to the real estate and thus give the creditor the benefit of the secured transactions provisions of revised chapter 9 of the Texas Business and Commerce Code (Tex. Bus. & Com. Code §§ 9.101–.709). With other modifications described below, it may also serve as a financing statement for several classifications of collateral, including fixtures.

§ 8.11:1 Legal Considerations

The attorney should refer to revised chapter 9 of the Texas Business and Commerce Code for the requirements for creating and perfecting a security interest. *See* Tex. Bus. & Com. Code §§ 9.203, 9.308–.316, 9.502.

If the deed of trust, as security agreement, covers both personal and real property and the debtor defaults, the creditor may proceed under chapter 9 of the Code as to the personal property without prejudicing any rights with respect to the real property or “may proceed as to both the personal property and the real property in accordance with the rights with respect to the real property,” in which case the default provisions of chapter 9 do not apply. Tex. Bus. & Com. Code § 9.604(a). The deed of trust creates a lien on fixtures even without constituting a security agreement because chapter 9 does not prevent creation of an encumbrance on fixtures under real property law. *See* Tex. Bus. & Com. Code § 9.334(b). If the deed of trust, as security agreement, covers goods that are or become fixtures, the creditor may proceed under chapter 9 or may proceed in accordance with the rights with respect to real property, in which case the default provisions of chapter 9 do not apply. Tex. Bus. & Com. Code § 9.604(b).

A properly created and perfected security interest affords the creditor the benefit of the priorities established by chapter 9, which can protect the creditor against other creditors claiming the same collateral. In many cases, a valid security

interest may be perfected by the proper filing of a financing statement in the appropriate UCC filing offices. See section 9.5 in this manual for a discussion of the other means of perfecting an attached security interest. Chapter 9 generally requires that financing statements be filed in the office of the secretary of state. The proper place to file a financing statement covering as-extracted collateral (which includes oil, gas, or other minerals), timber to be cut, or fixtures, however, is the real estate recording office for a mortgage on the related real property. Tex. Bus. & Com. Code § 9.501(a). A deed of trust duly recorded in the proper office will be effective as a financing statement covering as-extracted collateral, timber, or fixtures if it—

1. provides the name of the debtor (grantor);
2. provides the name of the secured party (beneficiary) or the secured party’s representative;
3. indicates the goods, fixtures, or accounts that it covers;
4. indicates that it covers this type of collateral;
5. indicates that it is to be filed for record in the real property records;
6. provides a legally sufficient description of the real property to which the collateral is related; and
7. provides the name of a record owner if the debtor does not have an interest of record in the real property (for example, a leasehold estate not filed of record).

Tex. Bus. & Com. Code § 9.502(a), (b).

In addition to the foregoing minimum requirements, a real estate filing office may refuse to accept a deed of trust filed as a financing statement unless it also—

8. provides the debtor’s mailing address;

9. indicates whether the debtor is an individual or an organization;
10. if the debtor is an individual, indicates the debtor's surname; and
11. provides the mailing address of the secured party or its representative.

Tex. Bus. & Com. Code § 9.516(b)(3)(C), (4), (5).

The difference in legal effect between the absence from the deed of trust of any of the minimum requirements in items 1. through 7. above and the absence from the deed of trust of any of the requirements in items 8. through 11. above is that, in the former case, the deed of trust *will be ineffective* as a financing statement even if it is accepted for filing by the real estate filing office, whereas in the latter case the recorded deed of trust *will be effective* as a financing statement (as long as the requirements in items 1. through 7. are included). *See* Tex. Bus. & Com. Code § 9.520(c). If the deed of trust is to serve as a financing statement, the preparer should note the first boxed instruction in forms 8-1 and 8-2 in this chapter calling for the inclusion of the information set forth in items 8. through 11. above that is not already called for in those forms.

No filing fee is required beyond the regular fee charged for recording the deed of trust with respect to a deed of trust that is effective as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut. Tex. Bus. & Com. Code § 9.525(e). Unlike a regular financing statement (which is effective, if not continued, for only five years from the date of filing), a deed of trust that satisfies the above requirements is effective as a fixture filing, and as a financing statement covering as-extracted collateral or timber to be cut, 'until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real property.' Tex. Bus. & Com. Code § 9.515(g).

For other documents and commentary relating to security agreements and financing statements, see chapter 9 in this manual.

§ 8.11:2 Modifications and Clauses

If the deed of trust is to serve as a security agreement or as a security agreement and a financing statement, a heading to that effect should be added beneath or beside the "Deed of Trust" heading.

Chapter 9, as effective July 1, 2001, retains the requirement that a security agreement reasonably identify the collateral. *See* Tex. Bus. & Com. Code §§ 9.108(a), 9.203(b)(3)(A). Reasonable identification of collateral may be by specific listing, category, type, quantity, computational formula, or any other method under which the identity of the collateral is objectively determinable. Tex. Bus. & Com. Code § 9.108(b). In a security agreement, an "all assets" or "all personal property" description is, however, insufficient. Tex. Bus. & Com. Code § 9.108(c). Even though an "all assets" or "all personal property" collateral description is insufficient in a security agreement, an indication in a financing statement that the collateral is "all assets or all personal property" is sufficient. Tex. Bus. & Com. Code § 9.504. Accordingly, if a deed of trust is to be used as a security agreement as well as a financing statement, the deed of trust must reasonably identify the collateral. If, however, the deed of trust is to serve only as a financing statement, an "all assets or all personal property" description is sufficient.

If the collateral is not affixed to the real estate conveyed, it may be sufficiently described, for security agreement purposes, by adding to the legal description of the realty a phrase such as "and all inventory, equipment, and consumer goods on the property." If the collateral is affixed to the real estate, it may still be described, for security agreement purposes, by a phrase or sentence added to the legal description

of the realty. A description of fixtures, for example, might be “and all goods that are or will be fixtures and that are or will be located on the property.”

To serve as a security agreement, the deed of trust must also clearly state that the borrower grants a security interest in the collateral to the lender. A clause such as 8-9-10 in this chapter should appear as a numbered paragraph under “General Provisions.”

In addition, if the deed of trust is to secure a construction loan, to take advantage of the priority afforded construction lenders by revised section 9.334, the attorney should add the personal property description and construction mortgage clauses found at clauses 8-9-12 and 8-9-13, respectively. The attorney should also give serious consideration to preparing a construction loan agreement to deal with such issues as retainage, conditions for advances, and storage of supplies and materials.

Additional Resources

Beyer, Gerry W. *Real Property*. 2nd ed. West's Texas Forms 13–15. St. Paul, MN: West, 2001. Supplement 2014.

Course, 2015. Austin: State Bar of Texas, 2015.

Nolan, John M., Michael F. Alessio, and Edward A. Peterson. "Texas Annotated Deed of Trust." In *Advanced Real Estate Strategies*

St. Claire, Frank A., and William V. Dorsaneo III. *Texas Real Estate Guide*. New York: Matthew Bender & Co., 2001.

[Reserved]

Form 8-1

Deed of Trust

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Basic Information

Date:

Grantor:

If the deed of trust is to be filed as a financing statement and if the grantor is an organization, the deed of trust should also indicate the type of organization, the jurisdiction of the organization, and an organizational identification number.

Grantor's Mailing Address:

Trustee[s]:

Trustee's Mailing Address[es]:

Lender:

Lender's Mailing Address:

Obligation

Note

Date:

Original principal amount:

Borrower:

Lender:

Maturity date:

If there is more than one note, repeat above information for each additional note and change the word *Note* to *Notes* in all applicable instances.

Other Debt: [include optional clauses from form 8-6 in this chapter or describe other debt]

Property (including any improvements):

For construction loans, include clause 8-9-12 immediately following the real property description.

Prior Lien: [Include recording information]

If there is more than one prior lien, repeat above information for each additional prior lien and change the words *Prior Lien* to *Prior Liens* in all applicable instances.

Other Exceptions to Conveyance and Warranty:

A. Granting Clause

For value received and to secure payment of the Obligation, Grantor conveys the Property to Trustee in trust. Grantor warrants and agrees to defend the title to the Property, subject to the Other Exceptions to Conveyance and Warranty. On payment of the Obligation and all other amounts secured by this deed of trust, this deed of trust will have no further effect, and Lender will release it at Grantor's expense.

B. Grantor's Obligations

Consider substituting all or part of clause 8-9-18, as appropriate, for clause B.1. to cover different risks specific to the activities on or regarding the property.

B.1. Grantor agrees to maintain all property and liability insurance coverages with respect to the Property, revenues generated by the Property, and operations on the Property that Lender reasonably requires ("Required Insurance Coverages"), issued by insurers and written on policy forms acceptable to Lender, and as to property loss, that are payable to Lender under policies containing standard mortgagee clauses, and deliver evidence of the Required Insurance Coverages in a form acceptable to Lender before execution of this deed of trust and again at least ten days before the expiration of the Required Insurance Coverages.

B.2. Grantor agrees to—

- a. keep the Property in good repair and condition;
- b. pay all taxes and assessments on the Property before delinquency, not authorize a taxing entity to transfer its tax lien on the Property to anyone other than Lender, and not request a deferral of the collection of taxes pursuant to section 33.06 of the Texas Tax Code;
- c. defend title to the Property subject to the Other Exceptions to Conveyance and Warranty and preserve the lien's priority as it is established in this deed of trust;
- d. obey all laws, ordinances, and restrictive covenants applicable to the Property;
- e. keep any buildings occupied as required by the Required Insurance Coverages;

- f. if the lien of this deed of trust is not a first lien, pay or cause to be paid all prior lien notes and abide by or cause to be abided by all prior lien instruments; and
- g. notify Lender of any change of address.

C. Lender's Rights

C.1. Lender or Lender's mortgage servicer may appoint in writing one or more substitute trustees, succeeding to all rights and responsibilities of Trustee.

C.2. If the proceeds of the Obligation are used to pay any debt secured by prior liens, Lender is subrogated to all the rights and liens of the holders of any debt so paid.

C.3. Lender may apply any proceeds received under the property insurance policies covering the Property either to reduce the Obligation or to repair or replace damaged or destroyed improvements covered by the policy. If the Property is Grantor's primary residence and Lender reasonably determines that repairs to the improvements are economically feasible, Lender will make the property insurance proceeds available to Grantor for repairs.

C.4. Notwithstanding the terms of the Note to the contrary, and unless applicable law prohibits, all payments received by Lender from Grantor with respect to the Obligation or this deed of trust may, at Lender's discretion, be applied first to amounts payable under this deed of trust and then to amounts due and payable to Lender with respect to the Obligation, to be applied to late charges, principal, or interest in the order Lender in its discretion determines.

C.5. If Grantor fails to perform any of Grantor's obligations, Lender may perform those obligations and be reimbursed by Grantor on demand for any amounts so paid, including attorney's fees, plus interest on those amounts from the dates of payment at the rate stated in the Note for matured, unpaid amounts. The amount to be reimbursed will be secured by this deed of trust.

C.6. COLLATERAL PROTECTION INSURANCE NOTICE

In accordance with the provisions of section 307.052(a) of the Texas Finance Code, the Beneficiary hereby notifies the Grantor as follows:

(A) the Grantor is required to:

- (i) keep the collateral insured against damage in the amount the Lender specifies;**
- (ii) purchase the insurance from an insurer that is authorized to do business in the state of Texas or an eligible surplus lines insurer; and**
- (iii) name the Lender as the person to be paid under the policy in the event of a loss;**

(B) the Grantor must, if required by the Lender, deliver to the Lender a copy of the policy and proof of the payment of premiums; and

(C) if the Grantor fails to meet any requirement listed in Paragraph (A) or (B), the Lender may obtain collateral protection insurance on behalf of the Grantor at the Grantor's expense.

C.7. If a default exists in payment of the Obligation or performance of Grantor's obligations and the default continues after any required notice of the default and the time allowed to cure, Lender may—

- a. declare the unpaid principal balance and earned interest on the Obligation immediately due;**

- b. exercise Lender's rights with respect to rent under the Texas Property Code as then in effect;
- c. direct Trustee to foreclose this lien, in which case Lender or Lender's agent will cause notice of the foreclosure sale to be given as provided by the Texas Property Code as then in effect; and
- d. purchase the Property at any foreclosure sale by offering the highest bid and then have the bid credited on the Obligation.

C.8. Lender may remedy any default without waiving it and may waive any default without waiving any prior or subsequent default.

D. Trustee's Rights and Duties

If directed by Lender to foreclose this lien, Trustee will—

- D.1.* either personally or by agent give notice of the foreclosure sale as required by the Texas Property Code as then in effect;
- D.2.* sell and convey all or part of the Property "AS IS" to the highest bidder for cash with a general warranty binding Grantor, subject to the Prior Lien and to the Other Exceptions to Conveyance and Warranty and without representation or warranty, express or implied, by Trustee;
- D.3.* from the proceeds of the sale, pay, in this order—
 - a. expenses of foreclosure, including a reasonable commission to Trustee;
 - b. to Lender, the full amount of principal, interest, attorney's fees, and other charges due and unpaid;
 - c. any amounts required by law to be paid before payment to Grantor; and

d. to Grantor, any balance; and

D.4. be indemnified, held harmless, and defended by Lender against all costs, expenses, and liabilities incurred by Trustee for acting in the execution or enforcement of the trust created by this deed of trust, which includes all court and other costs, including attorney's fees, incurred by Trustee in defense of any action or proceeding taken against Trustee in that capacity.

E. General Provisions

E.1. If any of the Property is sold under this deed of trust, Grantor must immediately surrender possession to the purchaser. If Grantor does not, Grantor will be a tenant at sufferance of the purchaser, subject to an action for forcible detainer.

E.2. Recitals in any trustee's deed conveying the Property will be presumed to be true.

E.3. Proceeding under this deed of trust, filing suit for foreclosure, or pursuing any other remedy will not constitute an election of remedies.

E.4. This lien will remain superior to liens later created even if the time of payment of all or part of the Obligation is extended or part of the Property is released.

E.5. If any portion of the Obligation cannot be lawfully secured by this deed of trust, payments will be applied first to discharge that portion.

E.6. Grantor assigns to Lender all amounts payable to or received by Grantor from condemnation of all or part of the Property, from private sale in lieu of condemnation, and from damages caused by public works or construction on or near the Property. After deducting any expenses incurred, including attorney's fees and court and other costs, Lender will either release any remaining amounts to Grantor or apply such amounts to reduce the Obliga-

tion. Lender will not be liable for failure to collect or to exercise diligence in collecting any such amounts. Grantor will immediately give Lender notice of any actual or threatened proceedings for condemnation of all or part of the Property.

E.7. Grantor collaterally assigns to Lender all present and future rent from the Property and its proceeds. Grantor warrants the validity and enforceability of the assignment. Grantor will apply all rent to payment of the Obligation and performance of this deed of trust, but if the rent exceeds the amount due with respect to the Obligation and the deed of trust, Grantor may retain the excess. If a default exists in payment of the Obligation or performance of this deed of trust, Lender may exercise Lender's rights with respect to rent under the Texas Property Code as then in effect. Lender neither has nor assumes any obligations as lessor or landlord with respect to any occupant of the Property. Lender may exercise Lender's rights and remedies under this paragraph without taking possession of the Property. Lender will apply all rent collected under this paragraph as required by the Texas Property Code as then in effect. Lender is not required to act under this paragraph, and acting under this paragraph does not waive any of Lender's other rights or remedies.

E.8. Interest on the debt secured by this deed of trust will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the debt or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the debt or, if the principal of the debt has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the debt.

E.9. In no event may this deed of trust secure payment of any debt that may not lawfully be secured by a lien on real estate or create a lien otherwise prohibited by law.

If a due-on-sale clause is desired, select one of the following.

Select the following for a residential deed of trust.

E.10. If Grantor transfers any part of the Property without Lender's prior written consent, Lender may declare the Obligation immediately payable and invoke any remedies provided in this deed of trust for default. If the Property is residential real property containing fewer than five dwelling units or a residential manufactured home, this provision does not apply to (a) a subordinate lien or encumbrance that does not transfer rights of occupancy of the Property; (b) creation of a purchase-money security interest for household appliances; (c) transfer by devise, descent, or operation of law on the death of a co-Grantor; (d) grant of a leasehold interest of three years or less without an option to purchase; (e) transfer to a spouse or children of Grantor or between co-Grantors; (f) transfer to a relative of Grantor on Grantor's death; (g) a transfer resulting from a decree of a dissolution of marriage, a legal separation agreement, or an incidental property settlement agreement by which the spouse of Grantor becomes an owner of the Property; or (h) transfer to an inter vivos trust in which Grantor is and remains a beneficiary and occupant of the Property.

Select the following for a commercial deed of trust.

E.10. Grantor may not sell, transfer, or otherwise dispose of any Property, whether voluntarily or by operation of law, without the prior written consent of Lender. If granted, consent may be conditioned upon (a) the grantee's integrity, reputation, character, creditworthiness, and management ability being satisfactory to Lender; and (b) the grantee's executing, before such sale, transfer, or other disposition, a written assumption agreement containing any terms Lender may require, such as a principal pay down on the Obligation, an increase in the rate of interest payable with respect to the Obligation, a transfer fee, or any other modification of the Note, this deed of trust, or any other instruments evidencing or securing the Obligation.

Grantor may not cause or permit any Property to be encumbered by any liens, security interests, or encumbrances other than the liens securing the Obligation and the liens securing ad valorem taxes not yet due and payable without the prior written consent of Lender. If granted, consent may be conditioned upon Grantor's executing, before granting such lien, a written modification agreement containing any terms Lender may require, such as a principal pay down on the Obligation, an increase in the rate of interest payable with respect to the Obligation, an approval fee, or any other modification of the Note, this deed of trust, or any other instruments evidencing or securing the Obligation.

Grantor may not grant any lien, security interest, or other encumbrance (a "Subordinate Instrument") covering the Property that is subordinate to the liens created by this deed of trust without the prior written consent of Lender. If granted, consent may be conditioned upon the Subordinate Instrument's containing express covenants to the effect that—

- a. the Subordinate Instrument is unconditionally subordinate to this deed of trust;
- b. if any action is instituted to foreclose or otherwise enforce the Subordinate Instrument, no action may be taken that would terminate any occupancy or tenancy without the prior written consent of Lender, and that consent, if granted, may be conditioned in any manner Lender determines;
- c. rents, if collected by or for the holder of the Subordinate Instrument, will be applied first to the payment of the Obligation then due and to expenses incurred in the ownership, operation, and maintenance of the Property in any order Lender may determine, before being applied to any indebtedness secured by the Subordinate Instrument;
- d. written notice of default under the Subordinate Instrument and written notice of the commencement of any action to foreclose or otherwise

enforce the Subordinate Instrument must be given to Lender concurrently with or immediately after the occurrence of any such default or commencement; and

- e. in the event of the bankruptcy of Grantor, all amounts due on or with respect to the Obligation and this deed of trust will be payable in full before any payments on the indebtedness secured by the Subordinate Instrument.

Grantor may not cause or permit any of the following events to occur without the prior written consent of Lender: if Grantor is (a) a corporation, the termination of the corporation or the sale, pledge, encumbrance, or assignment of any shares of its stock; (b) a limited liability company, the termination of the company or the sale, pledge, encumbrance, or assignment of any of its membership interests; (c) a general partnership or joint venture, the termination of the partnership or venture or the sale, pledge, encumbrance, or assignment of any of its partnership or joint venture interests, or the withdrawal from or admission into it of any general partner or joint venturer; or (d) a limited partnership, (i) the termination of the partnership, (ii) the sale, pledge, encumbrance, or assignment of any of its general partnership interests, or the withdrawal from or admission into it of any general partner, (iii) the sale, pledge, encumbrance, or assignment of a controlling portion of its limited partnership interests, or (iv) the withdrawal from or admission into it of any controlling limited partner or partners. If granted, consent may be conditioned upon (a) the integrity, reputation, character, creditworthiness, and management ability of the person succeeding to the ownership interest in Grantor (or security interest in such ownership) being satisfactory to Lender; and (b) the execution, before such event, by the person succeeding to the interest of Grantor in the Property or ownership interest in Grantor (or security interest in such ownership) of a written modification or assumption agreement containing such terms as Lender may require, such as a principal pay down on the Obligation, an increase in the rate of interest payable with respect to the Obligation, a transfer

fee, or any other modification of the Note, this deed of trust, or any other instruments evidencing or securing the Obligation.

Continue with the following.

E.11. When the context requires, singular nouns and pronouns include the plural.

E.12. The term *Note* includes all extensions, modifications, and renewals of the Note and all amounts secured by this deed of trust.

E.13. This deed of trust binds, benefits, and may be enforced by the successors in interest of all parties.

E.14. If Grantor and Borrower are not the same person, the term *Grantor* includes Borrower.

E.15. Grantor and each surety, endorser, and guarantor of the Obligation waive, to the extent permitted by law, all (a) demand for payment, (b) presentation for payment, (c) notice of intention to accelerate maturity, (d) notice of acceleration of maturity, (e) protest, [and] (f) notice of protest [**include if applicable:** and (g) rights under sections 51.003, 51.004, and 51.005 of the Texas Property Code].

E.16. Grantor agrees to pay reasonable attorney's fees, trustee's fees, and court and other costs of enforcing Lender's rights under this deed of trust if an attorney [**include if the transaction is a secondary mortgage loan:** who is not an employee of Lender] is retained for its enforcement.

E.17. If any provision of this deed of trust is determined to be invalid or unenforceable, the validity or enforceability of any other provision will not be affected.

E.18. The term *Lender* includes any mortgage servicer for Lender.

E.19. Grantor hereby grants Lender a right of first refusal with respect to Grantor's power to authorize any third party (other than Lender pursuant to its rights as set forth in this instrument) to pay ad valorem taxes on the Property and authorize a taxing entity to transfer its tax lien on the Property to that third party. Grantor's authorization to any third party (other than Lender) to pay the ad valorem taxes and receive transfer of a taxing entity's lien for ad valorem taxes shall be null and void and of no force and effect unless Lender, within ten days after receiving written notice from Grantor, fails to pay the ad valorem taxes pursuant to Lender's rights as set forth in this instrument.

E.20. Grantor represents that this deed of trust and the Note are given for the following purposes: **[list specific purposes]**.

[Name of grantor]

Include acknowledgment.

[Reserved]

Form 8-2

Deed of Trust to Secure Assumption

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Basic Information

Date:

Grantor:

If the deed of trust is to be filed as a financing statement and if the grantor is an organization, the deed of trust should also indicate the type of organization, the jurisdiction of the organization, and an organizational identification number.

Grantor's Mailing Address:

Trustee:

Trustee's Mailing Address:

Beneficiary:

Beneficiary's Mailing Address:

Note and Deed of Trust Assumed

Date:

Original principal amount:

Borrower:

Lender:

Recording information:

Property (including any improvements):

Prior Lien: [include recording information]

If there is more than one prior lien, repeat above information for each additional prior lien and change the words *Prior Lien* to *Prior Liens* in all applicable instances.

Other Exceptions to Conveyance and Warranty:

Consideration: Beneficiary has conveyed the Property to Grantor, who as part of the consideration promised to pay the Note Assumed and to be bound by the Deed of Trust Assumed.

A. Granting Clause

For value received and to secure Grantor's assumption, Grantor conveys the Property to Trustee in trust. Grantor warrants and agrees to defend the title to the Property, subject to the Other Exceptions to Conveyance and Warranty. If Grantor performs all the covenants of the Note and Deed of Trust Assumed and if Beneficiary has not filed a notice of advancement, a release of the Deed of Trust Assumed will release this deed of trust to secure assumption and Beneficiary's vendor's lien.

B. Grantor's Obligations

Grantor agrees to—

- B.1.* perform all the covenants of the Note and Deed of Trust Assumed; and
- B.2.* notify Beneficiary and Lender of any change of address.

C. Beneficiary's Rights

C.1. Beneficiary may appoint in writing a substitute trustee, succeeding to all rights and responsibilities of Trustee.

C.2. If Grantor fails to perform any of Grantor's obligations under the Note Assumed or Deed of Trust Assumed, Beneficiary may perform those obligations, advance funds required, and then be reimbursed by Grantor on demand for any amounts so advanced, including attorney's fees, plus interest on those amounts from the dates of payment at the highest legal rate. The amount to be reimbursed will be secured by this deed of trust to secure assumption.

C.3. COLLATERAL PROTECTION INSURANCE NOTICE

In accordance with the provisions of section 307.052(a) of the Texas Finance Code, the Beneficiary hereby notifies the Grantor as follows:

(A) the Grantor is required to:

- (i) keep the collateral insured against damage in the amount the Lender specifies;**
- (ii) purchase the insurance from an insurer that is authorized to do business in the state of Texas or an eligible surplus lines insurer; and**
- (iii) name the Lender as the person to be paid under the policy in the event of a loss;**

(B) the Grantor must, if required by the Lender, deliver to the Lender a copy of the policy and proof of the payment of premiums; and

(C) if the Grantor fails to meet any requirement listed in Paragraph (A) or (B), the Lender may obtain collateral protection insurance on behalf of the Grantor at the Grantor's expense.

C.4. Beneficiary may file a sworn notice of such advancement in the office of the county clerk in the county in which the Property is located. The notice will detail the dates, amounts, and purposes of the amounts advanced and the legal description of the Property.

C.5. If Grantor fails on demand to reimburse Beneficiary for the amounts advanced and such failure continues after Beneficiary gives Grantor notice of the failure and the time within which it must be cured, to the extent required by law or by written agreement, Beneficiary may—

- a. exercise Beneficiary's rights with respect to rent under the Texas Property Code as then in effect;
- b. direct Trustee to foreclose this lien, in which case Beneficiary or Beneficiary's agent will cause notice of the foreclosure sale to be given as provided by the Texas Property Code as then in effect; and
- c. purchase the Property at any foreclosure sale by offering the highest bid and then have the bid credited to the amount owed to Beneficiary.

D. Trustee's Rights and Duties

If directed by Beneficiary to foreclose this lien, Trustee will—

D.1. either personally or by agent give notice of the foreclosure sale as required by this deed of trust to secure assumption and the Texas Property Code as then in effect;

D.2. sell and convey all or part of the Property "AS IS" to the highest bidder for cash with a general warranty binding Grantor, subject to the Prior Lien and to the Other Exceptions to Conveyance and Warranty and without representation or warranty, express or implied, by Trustee;

D.3. from the proceeds of the sale, pay, in this order—

- a. expenses of foreclosure, including a reasonable commission to Trustee;
- b. to Beneficiary, the full amount advanced, attorney's fees, and other charges due and unpaid;
- c. any amounts required by law to be paid before payment to Grantor; and
- d. to Grantor, any balance; and

D.4. be indemnified, held harmless, and defended by Beneficiary against all costs, expenses, and liabilities incurred by Trustee for acting in the execution or enforcement of the trust created by this deed of trust to secure assumption, which includes all court and other costs, including attorney's fees, incurred by Trustee in defense of any action or proceeding taken against Trustee in that capacity.

E. General Provisions

E.1. If any of the Property is sold under this deed of trust to secure assumption, Grantor must immediately surrender possession to the purchaser. If Grantor does not, Grantor will be a tenant at sufferance of the purchaser, subject to an action for forcible detainer.

E.2. Recitals in any trustee's deed conveying the Property will be presumed to be true.

E.3. Proceeding under this deed of trust to secure assumption, filing suit for foreclosure, or pursuing any other remedy will not constitute an election of remedies.

E.4. This lien will be superior to liens later created even if Beneficiary has made no advancements when later liens are created.

E.5. If any portion of the advancements cannot be lawfully secured by this deed of trust to secure assumption, payments will be applied first to discharge that portion.

E.6. A sale of the Property under this deed of trust to secure assumption—

- a. is subject to Grantor's continuing obligation to make all payments owing on the Note Assumed and to perform all obligations under the Deed of Trust Assumed; and
- b. does not extinguish Trustee's right to conduct subsequent sales of the Property for future Grantor defaults under this deed of trust to secure assumption.

E.7. Grantor collaterally assigns to Beneficiary all present and future rent from the Property and its proceeds. Grantor warrants the validity and enforceability of the assignment. Grantor will apply all rent to payment of the Note Assumed and performance of the Deed of Trust Assumed, but if the rent exceeds the amount due with respect to the Note and Deed of Trust Assumed, Grantor may retain the excess. If a default exists in payment of the Note Assumed or performance of this deed of trust to secure assumption or of the Deed of Trust Assumed, Beneficiary may exercise Beneficiary's rights with respect to rent under the Texas Property Code as then in effect. Beneficiary neither has nor assumes any obligations as lessor or landlord with respect to any occupant of the Property. Beneficiary may exercise Beneficiary's rights and remedies under this paragraph without taking possession of the Property.

Beneficiary will apply all rent collected under this paragraph as required by the Texas Property Code as then in effect. Beneficiary is not required to act under this paragraph, and acting under this paragraph does not waive any of Beneficiary's other rights or remedies.

E.8. Interest on the debt secured by this deed of trust to secure assumption will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the debt or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the debt or, if the principal of the debt has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the debt.

E.9. Any action taken under this deed of trust to secure assumption will not extinguish the rights of Beneficiary to proceed against Grantor under the indemnity contained in the deed by which Borrower assumed the Note and Deed of Trust Assumed.

E.10. The term *Beneficiary* includes any mortgage servicer for Beneficiary.

E.11. When the context requires, singular nouns and pronouns include the plural.

E.12. This deed of trust to secure assumption binds, benefits, and may be enforced by the successors in interest of all parties.

E.13. Grantor waives and surrenders to Lender (a) Grantor's power to authorize anyone (other than Lender or Grantor) to pay ad valorem taxes on the Property and (b) Grantor's power to authorize a taxing entity to transfer its tax lien on the Property to anyone other than Lender. Grantor agrees and declares that any authorization from Grantor to another (other than Lender) to pay the taxes and transfer a tax lien on the Property is void.

[Name of grantor]

Include acknowledgment.

Form 8-3

Vendor's Lien Clauses

*If Vendor's Lien in Favor of Seller Is Retained in Deed***Clause 8-3-1**

The debt evidenced by the Note is in [include if applicable: part] payment of the purchase price of the Property; the debt is secured both by this deed of trust and by a vendor's lien on the Property, which is expressly retained in a deed [to Grantor of even date/of even date given by [name] to [name]]. This deed of trust does not waive the vendor's lien, and the two liens and the rights created by this deed of trust are cumulative. Lender may elect to foreclose either of the liens without waiving the other or may foreclose both.

Or

*If Vendor's Lien in Favor of Third Party Is Retained in Deed***Clause 8-3-2**

The debt evidenced by the Note is in part payment of the purchase price of the Property; the debt is secured by this deed of trust and by a vendor's lien on the Property, which is expressly retained in a deed [to Grantor of even date/of even date given by [name] to [name]]. The vendor's lien is transferred to Lender by the deed. This deed of trust does not waive the vendor's lien, and the two liens and the rights created by this deed of trust are cumulative. Lender may elect to foreclose either of the liens without waiving the other or may foreclose both.

*Vendor's Lien Clause for Use If Lien Is Not Retained in Deed***Clause 8-3-3**

Grantor expressly acknowledges a vendor's lien on the Property as security for the Note secured by this deed of trust, which represents funds advanced by Lender at Grantor's request and used in payment of [include if applicable: a portion of] the purchase price of the Property. This deed of trust does not waive the vendor's lien, and the two liens and the rights created by this deed of trust are cumulative. Lender may elect to enforce either of the liens without waiving the other or may enforce both.

Form 8-4

Clauses Extending Existing Liens*Extension of Existing Deed-of-Trust Lien***Clause 8-4-1**

The Note renews and extends the balance of [amount] DOLLARS (\$[amount]) that Grantor owes on a prior note in the original principal amount of [amount] DOLLARS (\$[amount]), which is dated [date], executed by [name], and payable to the order of [name]. The prior note is more fully described in and secured by a deed of trust on the Property, which is dated [date] and recorded in [recording data] of the real property records of [county] County, Texas. [Include if applicable: The prior note and the lien securing it have been transferred to Lender.] Grantor acknowledges that the lien securing the prior note is valid, that it subsists against the Property, and that by this deed of trust it is renewed and extended in full force to secure payment of the Note.

*Extension of Existing Deed-of-Trust Lien and Security for Cash Advanced***Clause 8-4-2**

The Note renews and extends the balance of [amount] DOLLARS (\$[amount]) that Grantor owes on a prior note in the original principal amount of [amount] DOLLARS (\$[amount]), which is dated [date], executed by [name], and payable to the order of [name]. The prior note is secured by a deed of trust on the Property from [name] to [name], Trustee, dated [date] and recorded in [recording data] of the real property records of [county] County, Texas. [Include if applicable: The prior note and the lien securing it have been transferred to Lender.] The Note also represents [amount] DOLLARS

(\$[amount]) in cash that Lender advanced to Grantor on [date] at Grantor's request. Grantor acknowledges receipt of the amount advanced. Grantor acknowledges that the lien securing the prior note is valid, that it subsists against the Property, and that by this deed of trust it is renewed and extended in full force until the Note secured by this deed of trust is paid.

Extension of Existing Vendor's Lien and Deed of Trust

Clause 8-4-3

The Note renews and extends the balance of [amount] DOLLARS (\$[amount]) that Grantor owes on a prior note in the original principal amount of [amount] DOLLARS (\$[amount]), which is dated [date], executed by [name], and payable to the order of [name]. The prior note is secured by two instruments, both of which create liens against the Property: a deed retaining a vendor's lien from [name] to [name], dated [date] and recorded in [recording data] of the real property records of [county] County, Texas; and a deed of trust from [name] to [name], Trustee, dated [date] and recorded in [recording data] of the real property records of [county] County, Texas. [Include if applicable: The prior note and the liens securing it have been transferred to Lender.] Grantor acknowledges that the liens securing the prior note are valid, that they subsist against the Property, and that by this deed of trust they are renewed and extended in full force until the Note is paid.

Extension of Mechanic's Lien Contract

Clause 8-4-4

The Note renews and extends the balance of [amount] DOLLARS (\$[amount]) that Grantor owes on a prior note in the original principal amount

of [amount] DOLLARS (\$[amount]), which is dated [date], executed by [name], and payable to the order of [name]. The prior note is secured by a mechanic's lien contract creating a lien on the Property, dated [date] and recorded in [recording data] of the real property records of [county] County, Texas. [Include if applicable: The prior note and the lien securing it have been transferred to Lender.] Grantor acknowledges that the lien securing the prior note is valid, that it subsists against the Property, and that by this deed of trust it is renewed and extended in full force until the Note is paid.

Alternative Renewal and Extension Language

Clause 8-4-5

If clause 8-4-5 is used, its language should replace the last sentence in one of the preceding clauses, which begins "Grantor acknowledges that the lien(s) securing the prior note

Grantor acknowledges and agrees that this extension and renewal will not be considered a novation of account or a new contract but that all rights, titles, powers, liens, security interests, and estates created by the prior note and deed of trust securing it constitute a valid and subsisting lien against the Property. Grantor also acknowledges that by this deed of trust Lender and Lender's heirs, successors, and assigns are subrogated to all rights, titles, powers, security interests, and liens that accrued to the original holder and owner of the prior note.

Extension of Prior Lien to Be Released, Not Assigned

Clause 8-4-6

The Note represents the amount of [amount] DOLLARS (\$[amount]) in cash that Lender advanced to Grantor and that Grantor used [include if applica-

ble: in part] to discharge a prior note in the original principal amount of **[amount]** DOLLARS (**[\$amount]**), which is dated **[date]**, executed by **[name]**, and payable to the order of **[name]**. The prior note is secured by a deed of trust on the Property from **[name]** to **[name]**, Trustee, dated **[date]** and recorded in **[recording data]** of the real property records of **[county]** County, Texas. Grantor acknowledges that the lien securing the prior note is valid, that it subsists against the Property, and that by this deed of trust it is renewed and extended in full force until the Note is paid, even though the prior lien is released and not assigned to Lender.

Extension of Lien to Only Part of Property

Clause 8-4-7

The Note represents the amount of **[amount]** DOLLARS (**[\$amount]**) in cash that Lender advanced to Grantor and that Grantor used **[include if applicable: in part]** to discharge a prior note in the original principal amount of **[amount]** DOLLARS (**[\$amount]**), which is dated **[date]**, executed by **[name]**, and payable to the order of **[name]**. The prior note is secured by two instruments, both of which create liens against real estate that includes the Property: a deed retaining a vendor's lien executed by **[name]** to **[name]**, dated **[date]** and recorded in **[recording data]** of the real property records of **[county]** County, Texas; and a deed of trust from **[name]** to **[name]**, Trustee, dated **[date]** and recorded in **[recording data]** of the real property records of **[county]** County, Texas. Grantor acknowledges that, to the extent they cover the Property, the liens securing the prior note are valid, that they subsist against the Property as well as the other real estate, and that by this deed of trust they are renewed and extended in full force until the Note is paid.

Form 8-5

Clauses Acknowledging Cash Advanced

To Individuals

Clause 8-5-1

The Note represents [amount] DOLLARS (\$[amount]) in cash that Lender advanced to Grantor on this day at Grantor's request and that Grantor acknowledges receiving.

To a Corporation

Clause 8-5-2

The Note represents [amount] DOLLARS (\$[amount]) in cash that Lender advanced to Grantor on this day at its request and that it will use under its charter powers to discharge corporate debts. Grantor represents to Lender that its board of directors has authorized its legally elected, qualified, and acting officers to execute the Note and this deed of trust.

To Pay Ad Valorem Taxes

Clause 8-5-3

The Note represents [amount] DOLLARS (\$[amount]) in cash that, at Grantor's request, Lender advanced to pay the following taxes [include if applicable: , including penalties, interest, and collection expenses,] assessed and owed on the Property, which Grantor now owns: [amount] DOLLARS (\$[amount]) to [county] County in payment of taxes for the years [specify];

and [amount] DOLLARS (\$[amount]) to the city of [city] in payment of taxes for the years [specify].

Grantor agrees that Lender is subrogated to the rights, liens, and equities of the tax authorities paid, and the same are renewed and extended by this deed of trust until the Note is paid.

To Pay Income Taxes

Clause 8-5-4

The Note includes [amount] DOLLARS (\$[amount]) that, at Grantor's request, Lender advanced to the United States Internal Revenue Service to discharge federal tax lien number [number], which is recorded in [recording data] of the federal tax lien records of [county] County, Texas. Grantor agrees that Lender is subrogated to all rights, titles, and liens held by the tax authority under this federal tax lien, which Grantor acknowledges to be valid and subsisting, and the same are renewed and extended by this deed of trust until the Note is fully paid.

Form 8-6

Other Indebtedness Clauses

Clause 8-6-1

This deed of trust also secures payment of any debt that Grantor may subsequently owe to Lender and that arises while Grantor owns the Property.

Or

Clause 8-6-2

This deed of trust also secures payment of any debt that Grantor may subsequently owe to Lender; when it accrues, any such future debt will bear interest at the rates provided in the Note, will be payable to Lender at the same place provided in the Note, and in all respects will be deemed a part of the debt secured by this deed of trust.

Or

Clause 8-6-3

This conveyance is also made in trust to secure payment of all other present and future debts that Grantor may owe to Lender, regardless of how any other such debt is incurred or evidenced. Payment on all present and future debts of Grantor to Lender will be made at [specify] in [county] County, Texas, and the debts will bear interest as provided in notes or other evidences of debt that Grantor will give to Lender. This conveyance is also made to secure payment of any renewal or extension of any present or future debt that Grantor owes to Lender, including any loans and advancements from Lender to Grantor under the provisions of this deed of trust. When Grantor repays all debts owed to Lender, this deed-of-trust lien will terminate only if Lender

releases this deed of trust at the request of Grantor. Until Lender releases it, this deed of trust will remain fully in effect to secure other present and future advances and debts, regardless of any additional security given for any debt and regardless of any modification.

Or

Clause 8-6-4

This deed of trust, to the extent permitted by law, also secures payment of all other present and future debts, obligations, and liabilities owed to Lender by Grantor as a partner, venturer, or member of any partnership, joint venture, association, or other group, regardless of how the other debts, obligations, and liabilities are incurred and regardless of whether they are evidenced by a note, open account, overdraft, endorsement, surety agreement, guarantee, or other document.

Form 8-7

Partial Release Clauses

Clause 8-7-1

If no default exists under any of the terms and conditions of this deed of trust or the Note, and if no event has occurred that, with notice, passage of time, or both, would be an event of default, Grantor is entitled to partial releases of the lien of the deed of trust on the following terms and conditions:

1. Releases will be granted by tracts of not less than **[number]** acre[s] each, successively and contiguously, beginning with the **[specify]** portion of the Property and proceeding **[specify]**. Each tract to be released will be approximately **[specify, e.g., rectangular]** in shape and will have as its boundary a portion of the Property's frontage on **[specify]**, and as its **[specify]** boundary an approximately equal portion of the **[specify]** boundary of the Property. No release will be granted that would deny frontage or disproportionately reduce the frontage on **[specify]** available to the unreleased portion of the Property or cause the unreleased portion of the property to be less than **[specify area]**. Access from the unreleased portion of the Property to **[specify]** must be at least **[number]** (**[number]**) feet wide.
2. To obtain a release, a principal amount of \$**[amount]** per [acre/ square foot] in cash must be paid on the Note. All payments for partial releases will be applied as a prepayment on the Note.
3. At the time a partial release is requested, the party requesting the release must furnish to the holder of the Note a calculation of area

by field notes and a plat of survey, indicating the area to be released and its relationship to the portion of the Property not to be released. All expenses incident to the granting of partial releases will be borne by the party requesting the release, including but not limited to the cost of the survey, Lender's attorney's fees, and recording costs. Under no circumstances will the unreleased portion be incapable of supporting a building permit.

Or

Clause 8-7-2

If no default exists under the Note or this deed of trust, and if no event has occurred that, with notice, passage of time, or both, would be an event of default, Grantor may have released from all liens securing the Note one or more lots out of the Property by paying to Lender the release price per lot as follows:

1. The release price per lot will be the greater of \$[amount] or the net proceeds from the sale of that lot. "Net proceeds" is the gross sales price received by Grantor, or any person or entity related to or affiliated with Grantor, less the expenses of sale, including title insurance premiums, survey fees, real estate commissions not to exceed 6 percent of the gross sales price, reasonable attorney's fees, filing fees, recording fees, and other reasonable and customary closing costs in connection with the sale. Only those real estate commissions paid to parties other than Grantor, including persons or entities affiliated with Grantor, may be counted as deductible expenses.

2. The release price paid by Grantor will be applied by Lender as a prepayment on the Note. All payments for partial releases will be applied as a prepayment on the Note.

3. At the time a partial release is requested, the party requesting the release must furnish to the holder of the Note a calculation of area by field notes and a plat of survey, indicating the area to be released and its relationship to the portion of the Property not to be released. All expenses incident to the granting of partial releases will be borne by the party requesting the release, including but not limited to the cost of the survey, Lender's attorney's fees, and recording costs.

Or

Clause 8-7-3

Grantor is entitled to partial releases from the vendor's lien and this deed of trust as provided in an agreement of even date between Grantor and Lender.

[Reserved]

Form 8-8

Second-Lien Clauses for Use with Subordinate Deeds of Trust**Clause 8-8-1**

The lien created by this deed of trust will be subordinate to the lien securing payment of a note, and any renewals, extensions, and modifications thereof, in the original principal amount of [amount] DOLLARS (\$[amount]), which is dated [date], executed by [name], payable to the order of [name], and more fully described in a deed of trust recorded in [recording data] of the real property records of [county] County, Texas. If default occurs in payment of any part of principal or interest of that \$[amount] note or in observance of any covenants of the deed of trust securing it, the entire debt secured by this deed of trust will immediately become payable at the option of Lender.

Or

Clause 8-8-2

If Grantor fails to pay any part of principal or interest secured by a prior lien or liens on the Property when it becomes payable or defaults on any prior lien instrument, the entire debt secured by this deed of trust will immediately become payable at the option of Lender.

[Reserved]

Form 8-9

Additional Clauses for Deeds of Trust*Mechanic's Lien Clause***Clause 8-9-1**

The Note secured by this deed of trust is given in part payment for improvements on the Property that Lender has agreed to make for Grantor under a mechanic's lien contract of even date between Grantor as owner and Lender as contractor creating a lien against the Property to secure the Note. Grantor acknowledges that the lien created by the mechanic's lien contract is valid, that it subsists against the Property, and that by this deed of trust it is renewed and extended in full force and effect until the Note is fully paid.

*Homestead Disclaimer and Designation***Clause 8-9-2**

Grantor represents to Lender that no part of the Property is exempt as homestead from forced sale under the Texas Constitution or other laws.

Include the following paragraph only if there is no separate designation of homestead executed by the grantor. A separate instrument is preferable. See form 10-8 in this manual.

All real estate constituting Grantor's homestead exempt from forced sale under the Texas Constitution or other laws consists of the following: **[include legal description of homestead]**.

Or

Clause 8-9-3

See comment in clause 8-9-2 concerning desirability of a separate homestead and disclaimer instrument.

Grantor represents to Lender that no part of the Property is either the residential or business homestead of Grantor and that Grantor neither resides nor intends to reside in nor conducts nor intends to conduct business on the Property. Grantor renounces all present and future rights to a homestead exemption for the Property. Grantor's homestead and residence is property in [county] County, Texas, known as [address], [city], Texas. Grantor acknowledges that Lender relies on the truth of representations in this paragraph in making the loan secured by this deed of trust.

*Tax and Insurance Reserve or Escrow Account***Clause 8-9-4**

Grantor agrees to make an initial deposit in a reasonable amount to be determined by Lender and then make monthly payments to a fund for taxes and insurance premiums on the Property. Monthly payments will be made on the payment dates specified in the Note, and each payment will be one-twelfth of the amount that Lender estimates will be required annually for payment of taxes and insurance premiums. The fund will accrue no interest, and Lender will hold it without bond in escrow and use it to pay the taxes and insurance premiums. If Grantor has complied with the requirements of this paragraph, Lender must pay taxes before [the end of the calendar year/delinquency]. Grantor agrees to make additional deposits on demand if the fund is ever insufficient for its purpose. If an excess accumulates in the fund, Lender may either credit it to future monthly deposits until the excess is exhausted or refund it to Grantor. When Grantor makes the final payment on the Note, Lender will

credit to that payment the whole amount then in the fund [**include if applicable:** or, at Lender's option, refund it after the Note is paid]. If this deed of trust is foreclosed, any balance in the fund over that needed to pay taxes, including taxes accruing but not yet payable, and to pay insurance premiums will be paid under section C, "Trustee's Rights and Duties." [**Include if applicable:** If the Property is transferred, any balance then in the fund will still be subject to the provisions of this paragraph and will inure to the benefit of the transferee.] Deposits to the fund described in this paragraph are in addition to the [**include if applicable:** monthly] payments provided for in the Note.

Assignment of Insurance Policies and Unearned Premiums

Clause 8-9-5

If the Property is transferred by foreclosure, the transferee will acquire title to all insurance policies on the Property, including all paid but unearned premiums.

Evidence of Payment of Taxes

Clause 8-9-6

Clause 8-9-6 should not be used if the escrow clause at 8-9-4 is used.

Grantor agrees to furnish on Lender's request evidence satisfactory to Lender that all taxes and assessments on the Property have been paid when due.

*Evidence of Payment of Taxes and Insurance***Clause 8-9-7**

Grantor will furnish to Lender or other holder of the Note annually, before taxes become delinquent, copies of tax receipts showing that all taxes on the Property have been paid. Grantor will annually furnish to Lender or other holder of the Note evidence of current paid-up insurance naming Lender or other holder of the Note as an insured.

*Inspection of Collateral***Clause 8-9-8**

Grantor agrees to allow Lender or Lender's agents to enter the Property at reasonable times and inspect it and any personal property in which Lender is granted a security interest by this deed of trust.

*Consumer Credit Insurance Notice***Clause 8-9-9**

GRANTOR MAY FURNISH ANY INSURANCE REQUIRED BY THIS DEED OF TRUST EITHER THROUGH EXISTING POLICIES OWNED OR CONTROLLED BY GRANTOR OR THROUGH EQUIVALENT COVERAGE FROM ANY INSURANCE COMPANY AUTHORIZED TO TRANSACT BUSINESS IN TEXAS.

*Deed of Trust as a Security Agreement***Clause 8-9-10**

In addition to creating a deed-of-trust lien on all the real and other property described above, Grantor also grants to Lender a security interest in all of

the above-described personal property pursuant to and to the extent permitted by the Texas Uniform Commercial Code.

If the security agreement covers nonfixtures and other personalty, continue with the following.

In the event of a foreclosure sale under this deed of trust, Grantor agrees that all the Property may be sold as a whole at Lender's option and that the Property need not be present at the place of sale.

Wraparound Lien

Clause 8-9-11

The lien created by this deed of trust is subordinate to the lien securing the unpaid balance of a prior promissory note in the original principal amount of [amount] DOLLARS (\$[amount]), which is described in and secured by a deed of trust recorded in [recording data] of the real property records of [county] County, Texas. Grantor has not assumed payment of the prior note, but Lender is obligated to pay it according to its terms. Lender agrees to timely pay all installment payments due on the prior note and to deliver to Grantor a good and sufficient release of the prior deed of trust at or before the time Grantor pays the Note secured by this deed of trust to Lender. The warranty deed with vendor's lien referred to above provides that in the event of default in payment of the prior note, Grantor will have the right to cure any such default as long as Grantor is not in default in payment of the Note secured by this deed of trust or in default in performance of the covenants of this deed of trust. If Grantor cures a default in payment of the prior note, Grantor may receive credit on the Note secured by this deed of trust for all amounts so paid as of the date of the payment, in accordance with the terms of the Note.

If the deed of trust securing the prior note requires monthly deposits to a reserve account for payment of taxes and insurance premiums, continue with the following.

If Lender fails to make when due any deposit to the tax and insurance reserve fund provided for under the deed of trust securing payment of the prior note, Grantor will have the right to make the deposit to the tax and insurance reserve fund as long as Grantor is not in default in payment of the Note secured by this deed of trust or in performance of the covenants of this deed of trust. If Grantor makes such a deposit, Grantor will receive credit on the tax and insurance reserve fund provided for in this deed of trust for all amounts so deposited, as of the date of the deposit.

Clauses for Deed of Trust for Construction Loan

To create a deed of trust for a construction loan, include clauses 8-9-10, 8-9-12, and 8-9-13 in the deed of trust.

Clause 8-9-12

Include clause 8-9-12 immediately following the real property description.

, together with the following personal property:

All fixtures, supplies, building materials, and other goods of every nature now or hereafter located, used, or intended to be located or used on the Property;

All plans and specifications for development of or construction of improvements on the Property;

All contracts and subcontracts relating to the construction of improvements on the Property;

All accounts, contract rights, instruments, documents, general intangibles, and chattel paper arising from or by virtue of any transactions relating to the Property;

All permits, licenses, franchises, certificates, and other rights and privileges obtained in connection with the Property;

All proceeds payable or to be payable under each policy of insurance relating to the Property; and

All products and proceeds of the foregoing.

Notwithstanding any other provision in this deed of trust, the term "Property" does not include personal effects used primarily for personal, family, or household purposes.

Clause 8-9-13

Include clause 8-9-13 above the signatures. In paragraph 1, select the appropriate Code reference depending on the date of the transaction.

E. Construction Loan Mortgage

1. This deed of trust is a "construction mortgage" within the meaning of section 9.334 of the Texas Business and Commerce Code. The liens and security interests created and granted by this deed of trust secure an obligation incurred for the construction of improvements on land [**include if applicable:** , including the acquisition cost of the land].

2. Grantor agrees to comply with the covenants and conditions of the construction loan agreement, if any, executed in connection with the Note and this deed of trust. All advances made by Lender under the construction loan

agreement will be indebtedness of Grantor secured by the liens created by this deed of trust, and such advances are conditioned as provided in the construction loan agreement.

3. All amounts disbursed by Lender before completion of the improvements to protect the security of this deed of trust up to the principal amount of the Note will be treated as disbursements under the construction loan agreement. All such amounts will bear interest from the date of disbursement at the rate stated in the Note, unless collections from Grantor of interest at that rate would be contrary to applicable law, in which event such amounts will bear interest at the rate stated in the Note for matured, unpaid amounts and will be payable on notice from Lender to Grantor requesting payment.

4. From time to time as Lender deems necessary to protect Lender's interests, Grantor will, on request of Lender, execute and deliver to Lender, in such form as Lender directs, assignments of any and all rights or claims that relate to the construction of improvements on the Property.

5. In case of breach by Grantor of the covenants and conditions of the construction loan agreement, Lender, at its option, with or without entry on the Property, may (a) invoke any of the rights or remedies provided in the construction loan agreement, (b) accelerate the amounts secured by this deed of trust and invoke the remedies provided in this deed of trust, or (c) do both.

6. If, after commencement of amortization of the Note, the Note and this deed of trust are sold by Lender, after the sale the construction loan agreement will cease to be a part of this deed of trust, and Grantor will not assert any right of setoff, counterclaim, or other claim or defense arising out of or in con-

nection with the construction loan agreement against the obligations of the Note and this deed of trust.

If property is homestead, include the following, which must appear in a minimum of ten-point bold-faced type or equivalent "next to" the grantor's signature line. Tex. Prop. Code § 41.007(a).

IMPORTANT NOTICE: You and your contractor are responsible for meeting the terms and conditions of this contract. If you sign this contract and you fail to meet the terms and conditions of this contract, you may lose your legal ownership rights in your home. KNOW YOUR RIGHTS AND DUTIES UNDER THE LAW.

Recordkeeping

Clause 8-9-14

Grantor agrees to (1) keep at Grantor's address, or such other place as Lender may approve, accounts and records reflecting the operation of the Property and copies of all written contracts, leases, and other instruments that affect the Property; (2) prepare financial accounting records in compliance with [generally accepted/sound/cash basis federal income tax] accounting principles consistently applied; and (3), at Lender's request from time to time, permit Lender to examine and make copies of such books, records, contracts, leases, and other instruments at any reasonable time.

Financial Statements

Clause 8-9-15

Grantor agrees to deliver to Lender, at Lender's request from time to time, [audited/reviewed/compiled/internally prepared] financial statements of

Grantor and each guarantor of the Note prepared in accordance with [generally accepted/sound/cash basis federal income tax] accounting principles consistently applied, in detail reasonably satisfactory to Lender and certified to be true and correct by [**include if applicable:** the chief financial officer of] Grantor [**include if applicable:** and accompanied by an opinion of an independent certified public accountant].

Appraisals

Clause 8-9-16

If Lender orders an appraisal of the Property while a default exists or to comply with legal requirements affecting Lender, Grantor, at Lender's request, agrees to reimburse Lender for the cost of any such appraisal. [**Include if applicable:** Lender agrees to deliver to Grantor a copy of any such appraisal within ten days of receipt of Grantor's reimbursement]. If Grantor fails to reimburse Lender for any such appraisal within ten days of Lender's request, that failure is a default under this deed of trust.

Further Assurances

Clause 8-9-17

Grantor agrees to execute, acknowledge, and deliver to Lender any document requested by Lender, at Lender's request from time to time, to (1) correct any defect, error, omission, or ambiguity in this deed of trust or in any other document executed in connection with the Note or this deed of trust; (2) comply with Grantor's obligations under this deed of trust and other documents; (3) subject to and perfect the liens and security interests of this deed of trust and other documents any property intended to be covered thereby; and (4)

protect, perfect, or preserve the liens and the security interests of this deed of trust and other documents against third persons or make any recordings, file any notices, or obtain any consents requested by Lender in connection therewith. Grantor agrees to pay all costs of the foregoing.

Insurance

Clause 8-9-18

B.1. Grantor agrees to maintain, at Grantor's expense, the following insurance plus such other insurance policies with other coverages or increased coverages as Lender may require from time to time ("Required Insurance Coverages"):

B.1.a. Liability Insurance Policies

- i. commercial general liability insurance on Insurance Services Office ("ISO") standard occurrence-based form, covering Grantor and Grantor's operations on the Property and containing contractual liability coverage for broad-form indemnities [./, and/;]

Include one or more of the following paragraphs as applicable and modify paragraph numbers as appropriate.

Include the following if the grantor uses motor vehicles in its operations.

- ii. business automobile liability insurance covering owned, nonowned, or rented automobiles [./; [and]]

And/Or

Include the following if the grantor is operating the property with its own employees.

- iii. workers' compensation insurance and employer's liability insurance covering Grantor [./; [and]]

And/Or

Include the following if the property will be leased to third parties or if the grantor employs a third-party property manager.

- iv. for any third party-manager or lessee of the Property (a) commercial general liability insurance equivalent to the ISO standard occurrence-based form, covering the manager or lessee and its operations on the Property and containing contractual liability coverage for broad-form indemnities, (b) business automobile liability insurance covering owned, nonowned, or rented automobiles, and (c) workers' compensation insurance and employer's liability insurance covering the manager or lessee [./; [and]]

And/Or

Include the following if construction will occur at the property.

- v. for all contractors and subcontractors performing construction at the Property, (a) commercial general liability insurance equivalent to the ISO standard occurrence-based form, covering the contractor or subcontractor and its operations on the Property and containing contractual liability coverage for broad-form indemnities, (b) business automobile liability insurance covering owned, nonowned, or rented automobiles, and (c) workers' compensation insurance and

employer's liability insurance covering the contractor or subcontractor [./; [and]]

And/Or

Include the following if a third-party design professional is employed to design improvements at the property.

- vi. for all engineers, architects, and other design professionals performing work with respect to the Property, (a) professional liability insurance, [**include the following if the design professional will be performing part of its duties at the property:** (b) commercial general liability insurance equivalent to the ISO standard occurrence-based form, covering the design professional and its operations on the Property and containing contractual liability coverage for broad-form indemnities,] [(b)/(c)] business automobile liability insurance covering owned, nonowned, or rented automobiles, and [(c)/(d)] workers' compensation insurance and employer's liability insurance covering the design professional.

Continue with the following.

Each commercial general and business automobile liability insurance policy will name Lender as an additional insured on an additional insured endorsement acceptable to Lender.

B.1.b. Property Insurance Policies

Include one or more of the following paragraphs as applicable and modify paragraph numbers as appropriate.

Include the following if the property includes a completed building or if a building is under construction, for the period after completion of construction.

- i. commercial property insurance using ISO form CP 00 10, "Building and Personal Property Coverage Form," and CP 10 30, "Causes of Loss—Special Form," insuring against all direct physical loss or damage to the Property except for exclusions or limitations acceptable to Lender, including optional coverages for agreed value and replacement cost (without deduction for depreciation), and endorsements to cover equipment breakdown (formerly boiler and machinery), higher limits for increased costs to comply with an ordinance or law, higher limits for debris removal, business income and rental value (formerly business interruption), [and] terrorism [include the following if the property is in a "Special Flood Hazard Area" as defined in the National Flood Insurance Program and flood insurance in excess of the National Flood Insurance Program limits is desired: , and flood coverage] [./; [and]]

And/Or

Include the following if the property is in a "Special Flood Hazard Area" as defined in the National Flood Insurance Program.

- ii. flood insurance policy covering the Property issued pursuant to the National Flood Insurance Program [./; [and]]

And/Or

Include the following for while any improvements on the property are under construction and in lieu of commercial property insurance.

- iii. a builder's risk property insurance policy written on a completed value, nonreporting form and on an all-risks basis, with no exclusions unacceptable to Lender, with coverage extensions, if necessary, to eliminate coinsurance and to cover collapse, debris removal, soft costs such as loan interest, real estate taxes, and additional legal, architectural, and engineering costs, [include the following if the property is in a "Special Flood Hazard Area" as defined in the National Flood Insurance Program: floods,] loss of rents, testing of mechanical equipment, and increased costs due to ordinance or law [./; [and]]

And/Or

Include the following if the property will be leased to third parties or if the grantor employs a third-party property manager.

- iv. for third-party property managers and lessees, commercial property insurance using CP 10 30, "Causes of Loss—Special Form," insuring against all direct physical loss or damage to the furniture fixtures, equipment, and other business personal property of the property manager or lessee. In addition, lessees' commercial property insurance policies will cover any leasehold improvements or betterments constructed by or for the lessee.

Continue with the following.

Any commercial general or builder's risk policy carried by Grantor will contain standard mortgagee or lender loss payable clauses providing that (i) the insurer will pay the loss or damage directly to Lender, (ii) Lender will have the

right to receive payment under the policy even if the insurance company has denied Grantor's claim or Grantor has failed to comply with the terms of the policy, (iii) the insurer will give written notice to Lender of cancellation ten days before its cancellation for nonpayment or thirty days before cancellation for any other reason, and (iv) the insurer will give written notice to Lender if the policy has not been renewed ten days before its expiration.

B.2. General Insurance Policy Requirements

Any reference to an ISO form in this deed of trust is to the most recent edition of the form or equivalent.

The Required Insurance Coverages will (a) be issued by companies reasonably acceptable to Lender, (b) be in a form and with exclusions, endorsements, and amendments acceptable to Lender, and (c) have limits, deductibles, and self-insured retention acceptable to Lender.

Grantor will deliver evidence of the Required Insurance Coverages in a form acceptable to Lender at least ten days before the expiration of the Required Insurance Coverages; the original of each policy, coincident with the execution of this deed of trust; and the original of each renewal policy, not less than ten days before the expiration of the initial policy or each immediately preceding renewal policy. In case of Grantor's failure to keep the Property insured or to provide evidence that the Property is insured, as required herein, Lender, after notice to Grantor, at its option may acquire the Required Insurance Coverages at Grantor's sole expense.

*Subordinate Liens***Clause 8-9-19**

Grantor agrees not to grant any lien or security interest in the Property or to permit any junior encumbrance to be recorded or any claim to otherwise become an encumbrance against the Property. If an involuntary encumbrance is filed against the Property, Grantor agrees, within thirty days, to either remove the involuntary encumbrance or provide a bond acceptable to Lender against the involuntary encumbrance.

*Business Use***Clause 8-9-20**

Grantor warrants to Lender and agrees that the proceeds of the Note will be used primarily for business or commercial purposes and not primarily for personal, family, or household purposes.

*Due on Transfer—Nonresidential Property***Clause 8-9-21**

Lender may declare the debt secured by this deed of trust immediately payable and invoke any remedies provided in this deed of trust for default if Grantor transfers any of the Property to a person who is not a permitted transferee without Lender's consent or, if Grantor is not a natural person, if any person owning a direct or indirect interest in Grantor transfers such interest to a person that is not a "permitted transferee" without Lender's consent. "Permitted transferee" for a natural person means that person's spouse or children, any trust for that person's benefit or the benefit of the person's spouse or children, or any corporation, partnership, or limited liability company in which the

direct and beneficial owner of all the equity interest is a natural person or that person's spouse or children or any trust for the benefit of them; and the heirs, beneficiaries, executors, administrators, or personal representatives of a natural person on the death of that person or on the incompetency or disability of that person for purposes of the protection and management of that person's assets; and for a person that is not a natural person, any other person controlling, controlled by, or under common control with that person.

Clause 8-9-22

If all or any part of the Property is sold, transferred, or conveyed without the prior written consent of Lender or other holder of the Note, Lender or other holder of the Note may, at its sole option, declare the outstanding principal balance of the Note plus accrued interest immediately due and payable. Lender or other holder of the Note has no obligation to consent to any such sale or conveyance of the Property, and Lender or other holder of the Note is entitled to condition any consent on a change in the interest rate that will thereafter apply to the Note and any other change in the terms of the Note or Deed of Trust that Lender or other holder of the Note in its sole discretion deems appropriate. A lease for a period longer than three years, a lease with an option to purchase, or a contract for deed will be deemed to be a sale, transfer, or conveyance of the Property for purposes of this provision. Any deed under threat or order of condemnation, any conveyance solely between makers, and the passage of title by reason of death of a maker or by operation of law will not be construed as a sale or conveyance of the Property. The creation of a subordinate lien without the consent of Lender or other holder of the Note will be construed as a sale or conveyance of the Property, but any subsequent sale under a subordinate lien

to which Lender or other holder of the Note has consented will not be construed as a sale or conveyance of the Property.

Due-on-Sale Clause (Residential)

Clause 8-9-23

If Grantor transfers any part of the Property without Lender's prior written consent, Lender may declare the debt secured by this deed of trust immediately payable and invoke any remedies provided in this deed of trust for default. If the Property is residential real property containing fewer than five dwelling units or a residential manufactured home occupied by Grantor, exceptions to this provision are limited to (1) a subordinate lien or encumbrance that does not transfer rights of occupancy of the Property; (2) creation of a purchase-money security interest for household appliances; (3) transfer by devise, descent, or operation of law on the death of a co-Grantor; (4) grant of a leasehold interest of three years or less without an option to purchase; (5) transfer to a spouse or children of Grantor or between co-Grantors; (6) transfer to a relative of Grantor on Grantor's death; and (7) transfer to an inter vivos trust in which Grantor is and remains a beneficiary and occupant of the Property.

Office of Consumer Credit Commissioner

Clause 8-9-24

Lender is subject to regulation by the Office of Consumer Credit Commissioner of the state of Texas. The name, mailing address, and telephone numbers of the office are:

Office of Consumer Credit Commissioner
2601 North Lamar Boulevard
Austin, TX 78705-4207
512-936-7600
800-538-1579

No Recourse

Clause 8-9-25

Grantor will not have any recourse liability for repayment of the principal and interest of the Note or the performance of any covenants and agreements of Grantor in this Deed of Trust. The sole remedy of Lender or other holder of the Note in the event of a default by Grantor under the Note or this Deed of Trust will be to foreclose the liens and security interests granted in this Deed of Trust, and Lender or other holder of the Note will not be entitled to any personal judgment against Grantor.

Partial Recourse

Clause 8-9-26

Grantor has no personal liability for the obligations under this deed of trust or under the Note, and no personal judgment may be taken and no claim for personal liability may be made against Grantor. Lender's sole remedy for default under the Note or this deed of trust is the foreclosure of the liens and security interests created hereunder. Exceptions to the foregoing provisions are limited to, and Grantor is liable for, the following: taxes, assessments, and charges for labor, materials, or other amounts that if unpaid may create an encumbrance against the Property; unpaid premiums for insurance required

hereunder; damage to the Property if any insurance required hereunder is not maintained; all rents, issues, profits, and income derived from the Property after a default occurs and not expended for operating expenses of the Property; tenant security deposits for leases of the Property; any condemnation or insurance proceeds not paid or applied as required hereunder; [include if applicable: damage to and depreciation of the Property beyond normal wear and tear caused by the negligence of Grantor or the failure of Grantor to keep the Property in good repair and condition; the return of or reimbursement for all personal property taken from the Property by or on behalf of Grantor;] damages resulting from any fraud or misrepresentation by Grantor; damages resulting from any breach of any warranty of title; interest on the Note from the date of default through foreclosure, payment, or settlement of the debt; all interest on the Note during any bankruptcy proceeding of Grantor and all reasonable attorney's fees and expenses incurred as a result of Grantor's bankruptcy; and all attorney's fees and expenses incurred by Lender to collect any of the foregoing amounts.

Full Recourse

Clause 8-9-27

Grantor will have full recourse liability for repayment of the principal and interest of the Note and the performance of all covenants and agreements of Grantor in this Deed of Trust.

*Assumption without Consent***Clause 8-9-28**

The Property may be sold, transferred, or conveyed without the consent of Lender or other holder of the Note, provided any subsequent buyer or transferee assumes in writing for the benefit of Lender or other holder of the Note the obligation to pay the Note and to perform the covenants and agreements in this Deed of Trust in accordance with the terms of those instruments. No such assumption will release Grantor from any liabilities or obligations arising under the Note or Deed of Trust. Neither the creation of a subordinate lien nor a sale thereunder will be construed as a sale or conveyance of the Property.

*Assumption with Consent***Clause 8-9-29**

The Property may be sold, transferred, or conveyed provided that (1) any subsequent buyer assumes in writing for the benefit of Lender or other holder of the Note the obligation to pay the Note and to perform the covenants and agreements in this Deed of Trust in accordance with the terms of those instruments and (2) Grantor or the subsequent buyer obtains prior written consent to the sale from Lender or other holder of the Note. Consent will be based on the subsequent buyer's credit history, with no change in interest rate or terms, and may not be unreasonably withheld, conditioned, or delayed. No such assumption will release Grantor from any liabilities or obligations arising under the Note or Deed of Trust. If all or any part of the Property is sold, conveyed, leased for a period longer than three years, leased with an option to purchase, otherwise sold (including by contract for deed), or otherwise transferred or conveyed without prior written consent of Lender or other holder of the

Note, Lender or other holder of the Note may, at its sole option, declare the outstanding principal balance of the Note plus accrued interest immediately due and payable. Any deed under threat or order of condemnation, any conveyance solely between Grantors, and the passage of title by reason of death of a Grantor or by operation of law will not be construed as a sale or conveyance of the Property. **[Select one of the following:** Neither the creation of a subordinate lien nor a sale thereunder will be construed as a sale or conveyance of the Property./The creation of a subordinate lien without the consent of Lender will be construed as a sale or conveyance of the Property, but any subsequent sale under a subordinate lien to which Lender or other holder of the Note has consented will not be construed as a sale or conveyance of the Property.]

With Escrow

Clause 8-9-30

Grantor will deposit with Lender or other holder of the Note, in addition to the principal and interest installments, a pro rata part of the estimated annual ad valorem taxes on the Property and a pro rata part of the estimated annual insurance premiums for the improvements on the Property. These tax and insurance deposits are only estimates and may be insufficient to pay total taxes and insurance premiums. Grantor must pay any deficiency within thirty days after notice from Lender or other holder of the Note. Grantor's failure to pay the deficiency will constitute a default under the Deed of Trust. If any superior lienholder on the Property is collecting escrow payments for taxes and insurance, this paragraph will be inoperative as long as payments are being made to the superior lienholder.

Cross-Default

Clause 8-9-31

Any act or occurrence that would constitute default under the terms of any lien superior to the lien securing the Note will constitute a default under this Deed of Trust securing the Note.

Form 8-10

Leasehold Deed of Trust

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Basic Information

Date:

Grantor:

Grantor's Mailing Address:

Trustee:

Trustee's Mailing Address:

Lender:

Lender's Mailing Address:

Obligation

Note

Date:

Original principal amount:

Borrower:

Lender:

Maturity date:

Other Debt: [include optional clauses from form 8-6 in this chapter or describe other debt]

Property (including any improvements): The Leasehold Estate.

Lease

Date:

Landlord:

Tenant: Grantor

Premises:

Amendments (if applicable):

Leasehold Estate: All of Tenant's rights under the Lease.

Prior Lien: [include recording information]

Other Exceptions to Conveyance and Warranty:

A. Granting Clause

For value received and to secure payment of the Obligation, Grantor conveys the Property to Trustee in trust. Grantor warrants and agrees to defend the title to the Property, subject to the Other Exceptions to Conveyance and Warranty. On payment of the Obligation and all other amounts secured by this deed of trust, this deed of trust will have no further effect, and Lender will release it at Grantor's expense.

B. Grantor agrees to—

B.1. perform all of Tenant's obligations under the Lease and deliver, on Lender's written request, satisfactory evidence of timely payment of all rents and other charges due under the Lease;

B.2. enforce Landlord's obligations under the Lease;

B.3. within [number] days after receipt, deliver a copy of each notice received by Grantor from Landlord to Lender;

B.4. timely exercise each option to extend the term of the Lease as long as the Obligation remains unpaid and concurrently deliver to Lender a copy of the notice doing so. If Grantor does not exercise an option to extend the term of the Lease, Lender may, at its option, exercise the option on behalf of Grantor. Grantor appoints Lender its attorney-in-fact to execute and deliver all instruments necessary to extend the term of the Lease or to exercise any other rights, powers, or privileges under the Lease; this power, being coupled with an interest, is irrevocable as long as the Obligation remains unpaid;

B.5. use commercially reasonable efforts to deliver to Lender, within twenty days after written request by Lender, an estoppel certificate from Landlord setting forth (a) that the Lease has not been modified or, if it has been modified, the date of each modification (together with copies of each modification), (b) the date to which all rent has been paid by Tenant under the Lease, and (c) whether there are any defaults of Tenant under the Lease and, if there are, setting forth the nature of the default(s) in reasonable detail;

B.6. execute and deliver on the request of Lender any instruments required to permit Lender to cure any default under the Lease or preserve the interest of Lender in the Leasehold Estate;

B.7. defend title to the Property subject to the Other Exceptions to Conveyance and Warranty and preserve the lien's priority as it is established in this deed of trust;

B.8. obey all laws, ordinances, and restrictive covenants applicable to the Property;

B.9. if the lien of this deed of trust is not a first lien, pay or cause to be paid all prior lien notes and abide by or cause to be abided by all prior lien instruments; and

B.10. notify Lender of any change of address.

C. Grantor agrees not to—

C.1. do or permit anything to be done that will impair the security of this deed of trust or will be grounds for terminating the Lease; or

C.2. consent, without Lender's prior written consent, to (a) any waiver, cancellation, or amendment of any provision of the Lease or (b) the subordination of the Lease to any mortgage of the fee interest of Landlord in the Premises.

D. Grantor represents that—

D.1. the Lease is enforceable;

D.2. except as set forth above, there are no amendments to the Lease; and

D.3. Grantor is not in default under the Lease and, to the best of Grantor's knowledge, Landlord is not in default under the Lease, and no event exists that, with the passage of time or the giving of notice, or both, would constitute a default under the Lease.

E. Lender's Rights

E.1. Lender or Lender's mortgage servicer may appoint in writing a substitute trustee, succeeding to all rights and responsibilities of Trustee.

E.2. If the proceeds of the Obligation are used to pay any debt secured by prior liens, Lender is subrogated to all the rights and liens of the holders of any debt so paid.

E.3. Notwithstanding the terms of the Note to the contrary, and unless applicable law prohibits, all payments received by Lender from Grantor with respect to the Obligation or this deed of trust may, at Lender's discretion, be applied first to amounts payable under this deed of trust and then to amounts due and payable to Lender with respect to the Obligation, to be applied to late charges, principal, or interest in the order Lender in its discretion determines.

E.4. If Grantor fails to perform any of Grantor's obligations, Lender may perform those obligations and be reimbursed by Grantor on demand for any amounts so paid, including attorney's fees, plus interest on those amounts from the dates of payment at the rate stated in the Note for matured, unpaid amounts. The amount to be reimbursed will be secured by this deed of trust.

E.5. **COLLATERAL PROTECTION INSURANCE NOTICE**

In accordance with the provisions of section 307.052(a) of the Texas Finance Code, the Beneficiary hereby notifies the Grantor as follows:

(A) the Grantor is required to:

- (i) keep the collateral insured against damage in the amount the Lender specifies;**
- (ii) purchase the insurance from an insurer that is authorized to do business in the state of Texas or an eligible surplus lines insurer; and**
- (iii) name the Lender as the person to be paid under the policy in the event of a loss;**

(B) the Grantor must, if required by the Lender, deliver to the Lender a copy of the policy and proof of the payment of premiums; and

(C) if the Grantor fails to meet any requirement listed in Paragraph (A) or (B), the Lender may obtain collateral protection insurance on behalf of the Grantor at the Grantor's expense.

E.6. If a default exists in payment of the Obligation or performance of Grantor's obligations and the default continues after any required notice of the default and the time allowed to cure, Lender may—

- a. declare the unpaid principal balance and earned interest on the Obligation immediately due;
- b. exercise Lender's rights with respect to rent under the Texas Property Code as then in effect;
- c. direct Trustee to foreclose this lien, in which case Lender or Lender's agent will cause notice of the foreclosure sale to be given as provided by the Texas Property Code as then in effect; and
- d. purchase the Property at any foreclosure sale by offering the highest bid and then have the bid credited on the Obligation.

E.7. Lender may remedy any default without waiving it and may waive any default without waiving any prior or subsequent default.

E.8. If Grantor fails to perform any of its obligations, covenants, or agreements under the Lease, Lender may do any act it deems necessary to cure such failure. Lender may enter the Premises with or without notice and to do anything that Lender deems necessary or prudent to do.

E.9. If Lender elects to make any payments or do any act or thing required to be paid or done by Grantor as Tenant under the Lease, Lender will be fully subrogated to the rights of Landlord, and any sums advanced by Lender are a part of the Obligation.

F. Trustee's Rights and Duties

If directed by Lender to foreclose this lien, Trustee will—

F.1. either personally or by agent give notice of the foreclosure sale as required by the Texas Property Code as then in effect;

F.2. sell and convey all or part of the Property "AS IS" to the highest bidder for cash with a general warranty binding Grantor, subject to the Prior Lien and to the Other Exceptions to Conveyance and Warranty and without representation or warranty, express or implied, by Trustee;

F.3. from the proceeds of the sale, pay, in this order—

- a. expenses of foreclosure, including a reasonable commission to Trustee;
- b. to Lender, the full amount of principal, interest, attorney's fees, and other charges due and unpaid;
- c. any amounts required by law to be paid before payment to Grantor; and
- d. to Grantor, any balance; and

F.4. be indemnified, held harmless, and defended by Lender against all costs, expenses, and liabilities incurred by Trustee for acting in the execution or enforcement of the trust created by this deed of trust, which includes all court and other costs, including attorney's fees, incurred by Trustee in defense of any action or proceeding taken against Trustee in that capacity.

G. General Provisions

G.1. If any of the Property is sold under this deed of trust, Grantor must immediately surrender possession to the purchaser. If Grantor fails to do so, Grantor will become a tenant at sufferance of the purchaser, subject to an action for forcible detainer.

G.2. Recitals in any trustee's deed conveying the Property will be presumed to be true.

G.3. Proceeding under this deed of trust, filing suit for foreclosure, or pursuing any other remedy will not constitute an election of remedies.

G.4. This lien will remain superior to liens later created even if the time of payment of all or part of the Obligation is extended or part of the Property is released.

G.5. If any portion of the Obligation cannot be lawfully secured by this deed of trust, payments will be applied first to discharge that portion.

G.6. Grantor assigns to Lender all amounts payable to or received by Grantor from condemnation of all or part of the Property, from private sale in lieu of condemnation, and from damages caused by public works or construction on or near the Property. After deducting any expenses incurred, including attorney's fees and court and other costs, Lender will either release any remaining amounts to Grantor or apply such amounts to reduce the Obligation. Lender will not be liable for failure to collect or to exercise diligence in collecting any such amounts. Grantor will immediately give Lender notice of any actual or threatened proceedings for condemnation of all or part of the Property.

G.7. Grantor collaterally assigns to Lender all present and future rent from the Property and its proceeds. Grantor warrants the validity and enforceability of the assignment. Grantor will apply all rent to payment of the Obligation and performance of this deed of trust, but if the rent exceeds the amount due with respect to the Obligation and the deed of trust,

Grantor may retain the excess. If a default exists in payment of the Obligation or performance of this deed of trust, Lender may exercise Lender's rights with respect to rent under the Texas Property Code as then in effect. Lender neither has nor assumes any obligations as lessor or landlord with respect to any occupant of the Property. Lender may exercise Lender's rights and remedies under this paragraph without taking possession of the Property. Lender will apply all rent collected under this paragraph as required by the Texas Property Code as then in effect. Lender is not required to act under this paragraph, and acting under this paragraph does not waive any of Lender's other rights or remedies.

G.8. Interest on the debt secured by this deed of trust will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the debt or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the debt or, if the principal of the debt has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the debt.

G.9. In no event may this deed of trust secure payment of any debt that may not lawfully be secured by a lien on real estate or create a lien otherwise prohibited by law.

G.10. When the context requires, singular nouns and pronouns include the plural.

G.11. The term *Note* includes all extensions, modifications, and renewals of the Note and all amounts secured by this deed of trust.

G.12. This deed of trust binds, benefits, and may be enforced by the successors in interest of all parties.

G.13. If Grantor and Borrower are not the same person, the term *Grantor* includes Borrower.

G.14. Grantor and each surety, endorser, and guarantor of the Obligation waive all demand for payment, presentation for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, protest, and notice of protest, to the extent permitted by law.

G.15. Grantor agrees to pay reasonable attorney's fees, trustee's fees, and court and other costs of enforcing Lender's rights under this deed of trust if this deed of trust is placed in the hands of an attorney [**include if the transaction is a secondary mortgage loan:** who is not an employee of Lender] for enforcement.

G.16. If any provision of this deed of trust is determined to be invalid or unenforceable, the validity or enforceability of any other provision will not be affected.

G.17. As long as the Obligation remains unpaid, unless Lender otherwise consents in writing, the fee title to the Premises and the Leasehold Estate will not merge but will always remain separate, notwithstanding a union of the estates.

G.18. This deed of trust does not constitute an assignment of the Lease, and Lender has no liability or obligation under the Lease by reason of its acceptance of this deed of trust. Lender is liable for the obligations of Tenant arising out of the Lease for only that period of time after Lender has acquired, by foreclosure or otherwise, and is holding Grantor's interest in the Leasehold Estate.

G.19. The term *Lender* includes any mortgage servicer for Lender.

G.20. Grantor represents that this deed of trust and the Note are given for the following purposes: [**list specific purposes**].

[Name of grantor]

[Reserved]

Form 8-11

Consent to Leasehold Deed of Trust

Basic Information

Date:

Landlord:

Landlord's Mailing Address:

Tenant:

Tenant's Mailing Address:

Lender:

Lender's Mailing Address:

Lease (between Landlord and Tenant)

Date:

Premises:

Recording information (if applicable):

Amendments (if applicable):

Obligation

Note

Date:

Maker: Tenant

Payee: Lender

Original principal amount:

Maturity date:

Deed of Trust

Date:

Trustee:

Recording information (if known):

Other Debt (if any):

A. Landlord's Agreements and Representations

A.1. Landlord consents to the encumbrance by Tenant of Tenant's interest under the Lease pursuant to the Deed of Trust.

A.2. Landlord represents to Lender that (a) the Lease is in effect, (b) except as set forth above, there are no amendments to the Lease, (c) no default under the Lease has occurred by Landlord or by Tenant, and (d) to Landlord's actual knowledge, no event has occurred that, with the passage of time or the giving of notice or both, is a default by Landlord or Tenant under the Lease.

A.3. Until the Obligation is satisfied, Landlord will not (a) take any action to terminate the Lease or exercise any other remedy for default by Tenant under the Lease without first complying with the requirements of this agreement or (b) modify or cancel the Lease without Lender's prior written consent.

A.4. Lender has the right to access and remove from the Premises Tenant's personal property to enforce Lender's security interest, either during the term of the Lease or within [number] days after the expiration or termination of the Lease or rejection of the Lease in bankruptcy. If Lender exercises this right after the end of the Lease term, Lender must, for that period, pay all rent and comply with all other requirements of Tenant under the Lease as a condition to exercising this right. Landlord subordinates to Lender's security interest any lien that Landlord has in any of Tenant's personal property located at the Premises.

A.5. Landlord will concurrently send to Lender a copy of any notice of default sent to Tenant. Landlord will accept performance by Lender of any term of the Lease.

A.6. The Lease will not be terminated because of a default by Tenant unless (a) notice of the default is delivered to Lender; (b) Lender has not cured a monetary default within fifteen days after the expiration of any of Tenant's notice and cure periods set forth in the Lease; (c) Lender has not cured a nonmonetary default within thirty days after the expiration of any of Tenant's cure periods in the Lease or, if the default is curable but cannot be cured within the thirty-day period, (i) Lender has not notified Landlord within the thirty-day period that it intends to cure the default, (ii) Lender has not diligently commenced to cure the default, or (iii) Lender does not prosecute the cure to completion within a reasonable period of time after the expiration of any applicable cure periods in the Lease, but not to exceed sixty days; and (d) with respect to a nonmonetary default of such a nature that it is not reasonably susceptible of being cured by Lender (e.g., a nonpermitted assignment by Tenant), Lender is not otherwise paying rent and performing all of Tenant's obligations that, by their nature, Lender may perform.

A.7. If Lender acquires Tenant's interest under the Lease pursuant to foreclosure proceedings or otherwise, Lender is not required to cure any default under the Lease existing prior to such acquisition if the default cannot be cured by the payment of money or is personal to Tenant and, therefore, not susceptible of cure by Lender.

A.8. The following transfers of Tenant's interest under the Lease are permitted and do not require the consent of Landlord as long as the transferee assumes all of Tenant's obligations under the Lease: (a) a transfer resulting from a foreclosure under the Deed of Trust, (b) a deed in lieu of foreclosure of the Deed of Trust, and (c) a subsequent transfer by Lender or its designee if they acquire such interest.

A.9. On request by Lender, Landlord will deliver to Lender estoppel certificates related to the Lease and copies of documents creating or evidencing the Lease, certified by Landlord.

B. General Provisions

B.1. Until the Obligation is satisfied, Landlord and Tenant will not subordinate the Lease to any lien that may be placed on Landlord's interest in the Premises unless the lienholder enters into a subordination and nondisturbance agreement reasonably acceptable to Landlord, Tenant, and Lender.

B.2. If the Lease is terminated for any reason before expiration of its stated term or is rejected in bankruptcy, Landlord will, within fifteen days after Lender requests it, deliver to Lender or its designee a new lease of the Premises on the following terms:

- a. The new lease will be for the remainder of the term of the Lease, effective on the date of termination or rejection, and will contain the same terms contained in the Lease.
- b. The new lease will be executed by Landlord and Lender or its designee within ten days after receipt by Lender of the new lease.
- c. On execution of the new lease, the new tenant will cure all monetary defaults that existed under the Lease upon its termination or rejection.

- d. Within thirty days after the execution of the new lease, the new tenant will cure all nonmonetary defaults that existed upon termination or rejection that are curable or, if any nonmonetary default is curable but cannot be cured within the thirty-day period, (i) the new tenant must notify Landlord within the thirty-day period that the new tenant intends to cure the default, (ii) the new tenant must diligently commence to cure the default, and (iii) the new tenant must diligently prosecute the cure to completion within a reasonable period of time after execution of the new lease, but not to exceed sixty days.
- e. All noncurable defaults that existed under the Lease on its termination or rejection shall be waived.
- f. Any new lease will have the same priority as the Lease.
- g. Landlord will hold for the account of the new tenant any moneys then held by or payable to Landlord that Tenant would have been entitled to receive but for the termination or rejection of the Lease.

B.3. To the extent of any inconsistency between the terms contained in the Lease and the terms set forth in this agreement, the terms of this agreement will control.

B.4. If the ownership of the fee and leasehold interests in the Premises become vested in the same person or entity, that occurrence will not result in a merger of title as long as the Deed of Trust remains outstanding.

B.5. Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the

intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

B.6. This agreement will not be affected by (a) any renewal or modification of the Obligation, (b) the invalidity or unenforceability of any document evidencing or securing the Obligation, (c) the release or other disposition of any collateral for the Obligation, (d) the exercise or nonexercise of any right or remedy with respect to the Obligation, or (e) any waiver, consent, release, delay or other action, inaction, or omission with respect to the Obligation.

[Name of landlord]

[Name of tenant]

[Name of lender]

Form 8-12

Insurance and Indemnity Agreement

Basic Information

Date:

Borrower:

Borrower's Mailing Address:

Lender:

Lender's Mailing Address:

Obligation

Note

Date:

Original principal amount:

Borrower:

Lender:

Maturity date:

Other Debt: [describe other debt]

Property (including any improvements):

A. Borrower's Covenants

Borrower agrees to—

A.1. comply with the requirements set forth in the attached Insurance Addendum;

A.2. INDEMNIFY, DEFEND, AND HOLD LENDER AND ITS SHAREHOLDERS, MEMBERS, PARTNERS, AGENTS, CONTRACTORS, OFFICERS, AND EMPLOYEES HARMLESS FROM (a) ANY HARM TO OR IMPAIRMENT OR LOSS OF PROPERTY OR ITS USE, (b) HARM TO OR DEATH OF A PERSON, OR (c) "PERSONAL AND ADVERTISING INJURY" AS DEFINED IN THE FORM OF LIABILITY INSURANCE BORROWER IS REQUIRED TO MAINTAIN (AND ANY RESULTING OR RELATED CLAIM, ACTION, LOSS, LIABILITY, OR REASONABLE EXPENSE, INCLUDING ATTORNEY'S FEES AND OTHER FEES AND COURT AND OTHER COSTS), OCCURRING IN ANY PORTION OF THE PROPERTY DURING THE PERIOD THE OBLIGATION IS OUTSTANDING. **THE INDEMNITY CONTAINED IN THIS PARAGRAPH IS (a) INDEPENDENT OF BORROWER'S INSURANCE, (b) WILL NOT BE LIMITED BY COMPARATIVE NEGLIGENCE STATUTES OR DAMAGES PAID UNDER WORKERS' COMPENSATION OR SIMILAR EMPLOYEE BENEFIT ACTS, (c) WILL SURVIVE REPAYMENT OF THE OBLIGATION OR FORECLOSURE OF THE PROPERTY BY LENDER OR EXECUTION BY BORROWER OF A DEED IN LIEU OF FORECLOSURE WITH RESPECT TO THE PROPERTY, AND (d) WILL APPLY EVEN IF THE HARM, IMPAIRMENT, LOSS, OR INJURY IS CAUSED IN WHOLE OR IN PART BY THE ORDINARY NEGLIGENCE OR STRICT LIABILITY OF THE INTENDED BENEFICIARY OF THE INDEMNITY, BUT WILL NOT APPLY TO THE EXTENT THE HARM, IMPAIRMENT, LOSS, OR INJURY IS CAUSED BY THE SOLE OR GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE INTENDED BENEFICIARY OF THE INDEMNITY.**

B. General Provisions

B.1. When the context requires, singular nouns and pronouns include the plural.

B.2. The term *Note* includes all extensions, modifications, and renewals of the Note.

B.3. This agreement binds, benefits, and may be enforced by the successors in interest of all parties.

B.4. Borrower agrees to pay reasonable attorney's fees, trustee's fees, and court and other costs of enforcing Lender's rights under this agreement if this agreement is placed in the hands of an attorney for enforcement.

B.5. If any provision of this agreement is determined to be invalid or unenforceable, the validity or enforceability of any other provision will not be affected.

[Name of borrower]

Addendum to Insurance and Indemnity Agreement

Texas law prohibits additional insured coverage in a construction contract, or in an agreement collateral to or affecting a construction contract, except that pertaining to a single family house, townhouse, duplex, or directly related land development, or to a public works project of a municipality. Tex. Ins. Code ch. 151. See section 17.2:4 in this manual.

Insurance and Indemnity Agreement

Date:

Borrower:

Lender:

This addendum is part of the Insurance and Indemnity Agreement.

A. Borrower agrees to maintain (or, if applicable, cause Borrower's third-party manager, lessee, general contractor, or third-party design professional to maintain) the property and/or liability insurance policies below (mark applicable boxes) containing contractual liability coverage for broad-form indemnities, plus any other coverages and increased coverages as

Lender may reasonably require:

FROM BORROWER AND BORROWER'S THIRD-PARTY MANAGER

Type of Insurance or Endorsement	Minimum Policy or Endorsement Limit
---	--

Liability Policies Required of Both Borrower and Borrower's Third-Party Manager in All Situations:

<input type="checkbox"/> Commercial general liability (occurrence basis)	Per occurrence:	\$ _____
	General aggregate:	\$ _____

Or

- | | | | |
|--------------------------|---|--------------------|----------|
| <input type="checkbox"/> | Business owner's policy or commercial package coverage policy | Per occurrence: | \$ _____ |
| | | General aggregate: | \$ _____ |

Required Endorsements to Both Borrower's and Borrower's Third-Party Manager's Commercial General Liability or Business Owner's Policy:

- | | | |
|--------------------------|--|----------|
| <input type="checkbox"/> | Designated location(s) general aggregate limit | \$ _____ |
| <input type="checkbox"/> | _____ | \$ _____ |

Include any other desired endorsements. See chapter 17

Additional Liability Insurance Policies Required of Borrower or Borrower's Third-Party Manager:

- | | | |
|--------------------------|--|-----------|
| <input type="checkbox"/> | Workers' compensation | \$500,000 |
| <input type="checkbox"/> | Employer's liability | \$ _____ |
| <input type="checkbox"/> | Business automobile liability | \$ _____ |
| <input type="checkbox"/> | Liquor law or dramshop liability | \$ _____ |
| <input type="checkbox"/> | Garagekeepers liability | \$ _____ |
| <input type="checkbox"/> | Hotel safe deposit box legal liability | \$ _____ |
| <input type="checkbox"/> | Innkeepers liability | \$ _____ |
| <input type="checkbox"/> | Bailee customer's liability | \$ _____ |
| <input type="checkbox"/> | Comprehensive crime insurance
(or, in the alternative, a fidelity bond) | \$ _____ |
| <input type="checkbox"/> | Excess liability | \$ _____ |
| | <i>Or</i> | |
| <input type="checkbox"/> | Umbrella liability
(occurrence basis) | \$ _____ |

Additional Liability Insurance Policies Required during Construction Period:

FROM GENERAL CONTRACTOR

Type of Insurance or Endorsement	Minimum Policy or Endorsement Limit
---	--

General Liability Insurance Policy Required of General Contractor:

- | | | |
|---|--------------------|----------|
| <input type="checkbox"/> Commercial general liability
(occurrence basis) | Per occurrence: | \$ _____ |
| | General aggregate: | \$ _____ |

Required Endorsements to General Contractor's Commercial General Liability Policy:

- | | | |
|--|--|----------|
| <input type="checkbox"/> Designated construction project(s) gen-
eral aggregate limit | | \$ _____ |
| <input type="checkbox"/> _____ | | \$ _____ |

Include any other desired endorsements. See chapter 17

Additional Liability Insurance Policies Required of General Contractor:

- | | | |
|---|-----------|----------|
| <input type="checkbox"/> Workers' compensation | \$500,000 | |
| <input type="checkbox"/> Employer's liability | \$ _____ | |
| <input type="checkbox"/> Business automobile liability | \$ _____ | |
| <input type="checkbox"/> Professional liability | \$ _____ | |
| <input type="checkbox"/> Excess liability | \$ _____ | |
| <i>Or</i> | | |
| <input type="checkbox"/> Umbrella liability
(occurrence basis) | | \$ _____ |

FROM DESIGN PROFESSIONAL (ARCHITECT, ENGINEER, ETC.)

Type of Insurance or Endorsement	Minimum Policy or Endorsement Limit
---	--

Professional Liability Insurance Policy Required:

- | | |
|---|----------|
| <input type="checkbox"/> Professional liability | \$ _____ |
|---|----------|

Property Insurance Policies If No Construction Is Contemplated or, If Construction Is Contemplated, for the Period After Construction Is Completed:

- | | | |
|--------------------------|-----------------------------|---|
| <input type="checkbox"/> | Causes of loss—special form | 100 percent of replacement cost of the Property |
| | <i>Or</i> | |
| <input type="checkbox"/> | Business owner's policy | 100 percent of replacement cost of the Property |

Required Endorsements to Causes of Loss or Business Owner's Policy:

- | | | |
|--------------------------|---|--|
| <input type="checkbox"/> | Business income and additional expense | Sufficient limits to address reasonably anticipated business interruption losses for a period of ____ months |
| <input type="checkbox"/> | Boiler and machinery | \$ _____ |
| <input type="checkbox"/> | Flood (if Property is located within a 100-year floodplain (FEMA Flood Zone "A" or any subdesignation of Zone "A")) | \$ _____ |
| <input type="checkbox"/> | Earth movement | \$ _____ |
| <input type="checkbox"/> | Ordinance or law coverage | \$ _____ |
| <input type="checkbox"/> | Terrorism coverage (if Property is valued over \$ _____) | \$ _____ |
| <input type="checkbox"/> | Glass | Sufficient limits to cover plate glass |
| <input type="checkbox"/> | Signs | Sufficient limits to cover exterior signage |

Include any other desired endorsements. See chapter 17

Property Insurance Policy during Construction Period:

- | | | |
|--------------------------|---|---|
| <input type="checkbox"/> | Builder's risk on a "completed value" basis | 100 percent of replacement cost of the improvements to be constructed |
|--------------------------|---|---|

Required Endorsements to Builder's Risk Insurance:

- | | | |
|--------------------------|--|--|
| <input type="checkbox"/> | Additional expenses due to delay in completion | Sufficient limits to address reasonably anticipated business interruption losses for a period of ____ months |
|--------------------------|--|--|

- | | | |
|--------------------------|---|--------------|
| <input type="checkbox"/> | Agreed value | \$ _____ |
| <input type="checkbox"/> | Agreed penalty | \$ _____ |
| <input type="checkbox"/> | Damage arising from error, omission, or deficiency in design, specifications, workmanship, or materials, including collapse | \$ _____ |
| <input type="checkbox"/> | Debris removal additional limit | \$ _____ |
| <input type="checkbox"/> | Earthquake | \$ _____ |
| <input type="checkbox"/> | Expediting expenses | \$ _____ |
| <input type="checkbox"/> | Flood | \$ _____ |
| <input type="checkbox"/> | Freezing | \$ _____ |
| <input type="checkbox"/> | Ordinance or law | \$ _____ |
| <input type="checkbox"/> | Pollutant cleanup and removal | \$ 1,000,000 |
| <input type="checkbox"/> | Preservation of property | \$ _____ |
| <input type="checkbox"/> | Replacement cost | \$ _____ |
| <input type="checkbox"/> | Testing | \$ _____ |

B. Borrower agrees to comply with the following additional insurance requirements:

B.1. The commercial general liability (or business owner's policy or commercial package coverage policy) must be endorsed to name Lender as an "additional insured" and must not be endorsed to exclude the partial, contributory, or comparative negligence of Lender from the definition of "insured contract."

B.2. Additional insured endorsements must not exclude coverage for the sole or contributory ordinary negligence of Lender.

B.3. Property insurance policies must contain waivers of subrogation of claims against Lender.

B.4. Evidence of insurance and copies of any additional insured endorsements with respect to Borrower's insurance must be delivered by Borrower to Lender in a form acceptable to Lender at least ten days before the expiration of the policies; the original of each pol-

icy, coincident with the execution of the documents representing the Obligation; and the original of each renewal policy, not less than ten days before the expiration of the initial policy or each immediately preceding renewal policy. In case of Borrower's failure to keep the Property insured or to provide evidence that the Property is insured, as required herein, Lender, after notice to Grantor, at its option may acquire the Required Insurance Coverages at Grantor's sole expense.

B.5. COLLATERAL PROTECTION INSURANCE NOTICE

In accordance with the provisions of section 307.052(a) of the Texas Finance Code, the Beneficiary hereby notifies the Grantor as follows:

(A) the Grantor is required to:

- (i) keep the collateral insured against damage in the amount the Lender specifies;**
- (ii) purchase the insurance from an insurer that is authorized to do business in the state of Texas or an eligible surplus lines insurer; and**
- (iii) name the Lender as the person to be paid under the policy in the event of a loss;**

(B) the Grantor must, if required by the Lender, deliver to the Lender a copy of the policy and proof of the payment of premiums; and

(C) if the Grantor fails to meet any requirement listed in Paragraph (A) or (B), the Lender may obtain collateral protection insurance on behalf of the Grantor at the Grantor's expense.

B.6. Certificates of insurance and copies of any additional insured endorsements with respect to a third-party manager's, contractor's, subcontractor's, or design professional's insurance must be delivered by Borrower to Lender before such party enters the Property and thereafter at least ten days before the expiration of the policies.

C. Borrower agrees to obtain the approval of Lender with respect to the following: the forms of Borrower's (or third-party manager's, general contractor's, or design professional's) insurance policies, endorsements, and certificates and other evidence of insurance; the amounts of any deductibles or self-insured retentions amounts under Borrower's (or third-party manager's, general contractor's, or design professional's) insurance; and the creditworthiness and ratings of the insurance companies issuing Borrower's (or third-party manager's, general contractor's, or design professional's) insurance.

Chapter 9

Security Agreements

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[Reserved]

Chapter 9

Security Agreements

§ 9.1 Introduction

Chapter 9 of the Texas Business and Commerce Code, titled “Secured Transactions,” governs consensual security interests in personal property and fixtures.

Important Reminder: This chapter presents an overview of chapter 9. It is necessarily limited in scope. It does not address a number of specialized areas of secured transactions within the scope of chapter 9. The rules for creating and perfecting a security interest are complex. Accordingly, in the context of any particular transaction to which chapter 9 is relevant, the practitioner should consult the statutory text, the official comments, secondary sources, and any relevant case law.

§ 9.2 Scope of Chapter 9

§ 9.2:1 Generally

Generally, chapter 9 governs any interest, regardless of its form, in personal property and fixtures created by contract that secures payment or performance of an obligation. Tex. Bus. & Com. Code § 9.109(a)(1). That interest is called a security interest. Tex. Bus. & Com. Code § 1.201(b)(35). The property subject to a security interest is called collateral. Tex. Bus. & Com. Code § 9.102(a)(12). Chapter 9 also generally governs sales of accounts, chattel paper, payment intangibles, and promissory notes. Tex. Bus. & Com. Code § 9.109(a)(3). Chapter 9 also includes agricultural liens and all consignments, even true consignments, within its scope. Tex. Bus. & Com. Code § 9.109(a)(2), (4).

§ 9.2:2 Form of Transaction Irrelevant

The form of the transaction or the label that the parties give to the transaction is irrelevant for determining whether chapter 9 applies. Rather, whether chapter 9 governs a transaction is based on the economic reality of the transaction. The parties may characterize a transaction as a sale or a lease of goods, but if in economic reality a security interest is created, chapter 9 governs. Tex. Bus. & Com. Code § 9.109(a)(1). The parties are not required to provide in their documents that a ‘security interest’ is being created under a “security agreement.” The parties may use other terms, such as *assignment*, *hypothecation*, *conditional sale*, *trust deed*, and so forth. Chapter 9 governs if a security interest in personal property is created. Tex. Bus. & Com. Code § 9.109(a)(1) (“regardless of its form”). Similarly, it is generally irrelevant whether title to collateral is in the name of the debtor or the secured party. Tex. Bus. & Com. Code § 9.202.

§ 9.2:3 Exclusions from Scope

Chapter 9 governs most consensual security interests in personal property and fixtures. Certain consensual interests in personal property collateral are not governed by chapter 9. These interests include common-law bailments and true leases of personal property, the latter being governed by Texas UCC chapter 2A (*see* Tex. Bus. & Com. Code ch. 2A). True consignments, with exceptions for small and consumer consignments, are governed by chapter 9. Tex. Bus. & Com. Code § 9.102(a)(20) (defining ‘consignment’), § 9.109(a)(4).

Chapter 9 also excludes from its scope certain security interests on personal property collateral.

Federal Preemption: Chapter 9 does not apply to the extent it is preempted by federal law. Tex. Bus. & Com. Code § 9.109(c)(1). *See also* Tex. Bus. & Com. Code § 9.109 cmt. 8.

Landlord's, Statutory, and Common-Law Liens; Agricultural Liens: Landlord's liens and statutory and common-law liens for services or materials, except for agricultural liens, are not governed by chapter 9. Tex. Bus. & Com. Code § 9.109(d)(1), (2). Agricultural liens are governed by chapter 9. Agricultural liens are generally nonpossessory statutory liens on a debtor's farm products in favor of a landlord or supplier of goods or services for the debtor's farming operations. Tex. Bus. & Com. Code § 9.102(a)(5) (defining "agricultural lien"), §§ 9.109(a)(2), 9.109(d)(1), (2).

Security Interest Granted by State or Foreign Government or Governmental Unit: A security interest granted by a state or foreign government or governmental unit is included within the scope of chapter 9 if no other state or foreign statute governs security interests created by that entity. Tex. Bus. & Com. Code § 9.109(c)(2), (3); *see also* Tex. Bus. & Com. Code § 9.102(a)(45) (defining "governmental unit"), § 9.102(a)(77) (defining "state"). Texas Government Code chapter 1208 governs creation, validity, and perfection of security interests granted by Texas governmental subdivisions; security interests granted by Texas political subdivisions are not governed by chapter 9. *See* Tex. Gov't Code ch. 1208.

Certain Sales of Payment Intangibles and Promissory Notes: Chapter 9 govern sales of accounts, chattel paper, payment intangibles, and promissory notes but excludes from its scope sales of these types of collateral for collection or in satisfaction of preexisting debt. Tex. Bus. & Com. Code § 9.109(d)(5), (7).

Insurance Claims; Health-Care Insurance Receivables: With one exception, chapter 9 excludes transfers of insurance claims as original collateral. Chapter 9 governs transfers of insurance claims, as original collateral, arising out of the provision of health-care goods and services. Tex. Bus. & Com. Code § 9.102(a)(46) (defining "health care insurance receivable"), § 9.109(d)(8).

Commercial Tort Claims: Noncommercial tort claims, such as consumer personal injury claims, are excluded from chapter 9. Chapter 9 does govern security interests in commercial tort claims. Tex. Bus. & Com. Code § 9.102(a)(13) (defining "commercial tort claim"), § 9.109(d)(12).

Deposit Accounts: Chapter 9 excludes from its scope an assignment of a deposit account in a consumer transaction. Chapter 9 governs an assignment of a deposit account in a transaction that is not a consumer transaction. Tex. Bus. & Com. Code § 9.102(a)(26) (defining "consumer transaction"), § 9.102(a)(29) (defining "deposit account"), § 9.109(d)(13). Chapter 9 provides rules governing the priority dispute between a depository bank exercising its right of set-off against a deposit account and a secured party claiming a security interest in the same account, whether as original collateral in a nonconsumer transaction or as proceeds. Tex. Bus. & Com. Code §§ 9.109(d)(10)(A), 9.340.

Real Property Interests: Chapter 9 contains a real property interest exclusion. With an exception for fixtures, the creation or transfer of an interest in or a lien on real property, including a lease or rents (as defined in Tex. Prop. Code § 64.001) thereunder, is not governed by chapter 9. Tex. Bus. & Com. Code § 9.109(d)(11). The Texas UCC contains a nonuniform expansion to this exclusion and also excludes from chapter 9 "the interest of a vendor or vendee in a contract for deed to purchase an interest in real property, or the interest of an optionor or optionee in an

option to purchase an interest in real property.” Tex. Bus. & Com. Code § 9.109(d)(11). By comparison, however, the definition of “account” under chapter 9 explicitly includes rights to payment for property (real or personal) sold. Tex. Bus. & Com. Code § 9.102(a)(2).

Effect of Exclusion: Even though a type of property may be excluded from chapter 9, a secured party may be able to obtain a security interest in property of that type using other federal or Texas statutes or common law.

§ 9.3 Definitions

§ 9.3:1 Security Interest, Security Agreement, Collateral

Under chapter 9, security interest basically means “an interest in personal property or fixtures that secures payment or performance of an obligation.” Tex. Bus. & Com. Code § 1.201(b)(35). Additionally, security interests include “any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note.” Tex. Bus. & Com. Code § 1.201(b)(35).

A security agreement is an “agreement that creates or provides for a security interest. Tex. Bus. & Com. Code § 9.102(a)(74).

Collateral is “the property subject to a security interest. Tex. Bus. & Com. Code § 9.102(a)(12). To conform the scope of the term *collateral* to the scope of the term *security interest*, the definition of the term *collateral* includes “proceeds accounts, chattel paper, payment intangibles, and promissory notes that have been sold; and goods [under] a consignment. Tex. Bus. & Com. Code § 9.102(a)(12).

§ 9.3:2 Parties

Secured Party: The person to whom a security interest is granted is called the “secured

party.” Tex. Bus. & Com. Code § 9.102(a)(73)(A). A secured party also includes a buyer of accounts, chattel paper, payment intangibles, or promissory notes (Tex. Bus. & Com. Code § 9.102(a)(73)(D)); a holder of an agricultural lien (Tex. Bus. & Com. Code § 9.102(a)(73)(B)); and a consigner (Tex. Bus. & Com. Code § 9.102(a)(73)(C)). When a secured party acts as a representative for holders of secured obligations, the representative may include not just an indenture trustee “or the like” but also any trustee, agent, or collateral agent. Tex. Bus. & Com. Code § 9.102(a)(73)(E).

Debtor and Obligor: The debtor is the person who has a property interest, other than a security interest or other lien, in the collateral. Tex. Bus. & Com. Code § 9.102(a)(28)(A). The debtor also includes a seller of accounts, chattel paper, payment intangibles, or promissory notes (Tex. Bus. & Com. Code § 9.102(a)(28)(B)); a person who has a property interest in collateral subject to an agricultural lien (Tex. Bus. & Com. Code § 9.102(a)(28)(A)); and a consignee (Tex. Bus. & Com. Code § 9.102(a)(28)(C)). The obligor is the person who owes the secured obligation. Tex. Bus. & Com. Code § 9.102(a)(60).

Secondary Obligor: A secondary obligor is a person who is secondarily obligated on the secured obligation or who has a right of recourse against others with respect to the secured obligation. Tex. Bus. & Com. Code § 9.102(a)(72). For example, a guarantor is a secondary obligor.

§ 9.3:3 Collateral Categories

Chapter 9 classifies collateral into categories.

Goods: Goods are all things that are movable at the time the security interest attaches, including fixtures. Tex. Bus. & Com. Code § 9.102(a)(44). Money, documents, instruments, investment property, accounts, chattel paper, general intangibles, deposit accounts, letter-of-credit rights, and minerals before

extraction are not goods. Software embedded in goods and customarily viewed as a part of the goods (for example, the computer chip in the airbag in an automobile) is considered goods. There are four subcategories of goods: consumer goods, inventory, farm products, and equipment. Tex. Bus. & Com. Code § 9.102(a)(23), (33), (34), (48).

Consumer goods are goods used or bought for use primarily for personal, family, or household purposes. Tex. Bus. & Com. Code § 9.102(a)(23).

Inventory consists of goods, other than farm products, held by a person for sale or lease or consisting of raw materials, work in process, or materials consumed in business. Tex. Bus. & Com. Code § 9.102(a)(48).

Farm products are crops, livestock, or other supplies produced or used in farming operations, and they include products of crops or livestock in their unmanufactured state. For goods to be farm products, the debtor has to be engaged in farming operations with respect to the goods. Farming operations include aquatic farming operations. Farm products include aquatic goods produced in aquacultural operations. *See* Tex. Bus. & Com. Code § 9.102(a)(34), (35).

Equipment is the residual subcategory of goods. It consists of goods that are not consumer goods, inventory, or farm products. Tex. Bus. & Com. Code § 9.102(a)(33).

Investment Property: Investment property comprises certificated and uncertificated securities, securities accounts, and security entitlements, all of which are defined in Texas UCC chapter 8. Tex. Bus. & Com. Code § 9.102(a)(49); *see* Tex. Bus. & Com. Code § 8.102(a)(15) (defining “security”), § 8.501 (defining “securities account”), § 8.102(a)(17) (defining “security entitlement”). Investment property also includes commodity contracts (*see* Tex. Bus. & Com. Code § 9.102(a)(15)) and

commodity accounts (*see* Tex. Bus. & Com. Code § 9.102(a)(14)). Tex. Bus. & Com. Code § 9.102(a)(49).

Other Semi-Intangibles: Certain writings or records represent other rights of the debtor. These are defined in chapter 9 as documents, instruments, and chattel paper.

Documents: A document is a document of title, such as a bill of lading or warehouse receipt, including a deemed warehouse receipt under Business and Commerce Code section 7.201(b). Tex. Bus. & Com. Code § 9.102(a)(30); *see also* Tex. Bus. & Com. Code §§ 1.201(b)(16), 7.102(a)(5), 7.201(b).

A document may be electronic or tangible. *See* Tex. Bus. & Com. Code § 1.201(b)(16).

Instruments: An instrument is a negotiable instrument governed by Texas UCC chapter 3 or another writing evidencing a right to the payment of money that, in the ordinary course of business, is transferred by delivery with any necessary endorsement or assignment. A negotiable instrument or other writing is not an instrument, as defined, if it is a lease or investment property. Tex. Bus. & Com. Code § 9.102(a)(47). A credit card slip is not an instrument. Tex. Bus. & Com. Code § 9.102(a)(47)(iii). The Texas legislature has adopted nonuniform language providing that a nonnegotiable certificate of deposit is not an instrument. Tex. Bus. & Com. Code § 9.102(a)(47)(iv).

The term *promissory note* is a subcategory of the collateral category “instrument.” Tex. Bus. & Com. Code § 9.102(a)(66). A promissory note is an instrument evidencing a promise to pay (rather than an order to pay, such as a check). An instrument, such as a certificate of deposit, by a bank acknowledging receipt of funds is not a promissory note. Tex. Bus. & Com. Code § 9.102(a)(66).

Chattel Paper: Chattel paper means writings or records that evidence both a monetary obligation and a security interest in or a lease of specific goods. A charter for the use or hire of a vessel is not chattel paper. Tex. Bus. & Com. Code § 9.102(a)(11). Chattel paper may be evidenced by writings or electronic records. Tex. Bus. & Com. Code § 9.102(a)(11), (70) (defining "record"). Chattel paper also includes a monetary obligation secured by a security interest in specific goods and software used in those specific goods. Tex. Bus. & Com. Code § 9.102(a)(11).

Letter-of-Credit Rights: Chapter 9 uses the term *letter-of-credit right* to mean a right to payment or performance under a letter of credit, whether the letter of credit is written or electronic. The term does not include the debtor's drawing rights as beneficiary under the letter of credit. Tex. Bus. & Com. Code § 9.102(a)(51). A letter-of-credit right may be a supporting obligation (see the discussion in this section below) or original collateral.

Other Intangibles: Pure intangibles that are not investment property are accounts, deposit accounts, commercial tort claims, or general intangibles.

Accounts: "Account" is defined to include a right to payment, whether earned by performance or not, for property (real or personal, tangible and intangible, not just goods) sold; for services rendered; for intellectual property licensed; for a suretyship obligation incurred; for a policy of insurance issued; arising out of the use of a credit card; and as government sponsored or licensed lottery winnings. A charter for the lease or hire of a vessel is an account. In addition, a health-care-insurance receivable is a subcategory of the collateral category account. Tex. Bus. & Com. Code § 9.102(a)(2).

A health-care-insurance receivable is an interest in or claim under a policy of insurance that is a right to payment of a monetary obligation for

health-care goods or services provided. Tex. Bus. & Com. Code § 9.102(a)(46).

Deposit Accounts: A deposit account is a demand, time, savings, passbook, or similar account maintained with a bank (*see* Tex. Bus. & Com. Code § 9.102(a)(8), defining "bank") but does not include investment property or an account evidenced by an instrument. Tex. Bus. & Com. Code § 9.102(a)(29). As defined, a deposit account includes an uncertificated certificate of deposit, for which there is no separate writing evidencing the bank's obligation to pay. The Texas legislature has adopted nonuniform changes to the definition of deposit account to include a nonnegotiable certificate of deposit and to the definition of instrument to exclude from the latter a nonnegotiable certificate of deposit. Tex. Bus. & Com. Code § 9.102(a)(29), (47). The Texas UCC also has a definition for the term *nonnegotiable certificate of deposit*. *See* Tex. Bus. & Com. Code § 9.102(a)(59). Accordingly, the official comment 12 to Tex. Bus. & Com. Code § 9.102 is not accurate for a nonnegotiable certificate of deposit governed by the Texas UCC's version of revised chapter 9.

Commercial Tort Claims: A commercial tort claim is a claim of an organization (*see* Tex. Bus. & Com. Code § 1.201(b)(25), defining "organization") arising in tort. Tex. Bus. & Com. Code § 9.102(a)(13)(A). A commercial tort claim is also a claim of an individual arising in tort if the claim arose out of the individual's business and does not include damages for death or personal injury. Tex. Bus. & Com. Code § 9.102(a)(13)(B). After a commercial tort claim is contractually settled, it ceases to be a commercial tort claim. A right to payment of the contractually settled commercial tort claim may be evidenced by an instrument, chattel paper, or the settlement agreement itself. In the latter case, the right to payment is a payment intangible. *See* Tex. Bus. & Com. Code § 9.109 cmt. 15.

General Intangibles: General intangibles are any personal property other than goods, accounts, chattel paper, commercial tort claims, deposit accounts, documents, instruments, investment property, letter-of-credit rights, or money. Tex. Bus. & Com. Code § 9.102(a)(42). There are two special subcategories within the category of general intangibles: payment intangibles and software.

A payment intangible is a general intangible under which the principal obligation of the account debtor (*see* Tex. Bus. & Com. Code § 9.102(a)(3), defining ‘account debtor’) is to pay money. Tex. Bus. & Com. Code § 9.102(a)(62).

Software is a computer program and includes related supporting information. However, software embedded in goods and customarily viewed as a part of the goods is treated as part of the goods and not as software under chapter 9. Tex. Bus. & Com. Code § 9.102(a)(76).

Not all intangible personal property included in the collateral category of a general intangible is a payment intangible or software. Intangible personal property exists that is neither a payment intangible nor software that nevertheless is a general intangible.

Proceeds: Proceeds are generally not considered a separate category of collateral. Rather, a secured party has a claim to proceeds that is derived from the secured party’s security interest in other collateral. Proceeds include whatever is acquired on the sale, lease, license, exchange, or other disposition of collateral (Tex. Bus. & Com. Code § 9.102(a)(65)(A)) and also include collections of and distributions with respect to collateral (Tex. Bus. & Com. Code § 9.102(a)(65)(B)), rights arising out of collateral (Tex. Bus. & Com. Code § 9.102(a)(65)(C)), and claims, including insurance payable, for loss, defects, or damage to collateral (Tex. Bus. & Com. Code § 9.102(a)(65)(D), (E)). Cash proceeds are a

subcategory of proceeds and consist of proceeds that are money, checks, deposit accounts, or the like. Tex. Bus. & Com. Code § 9.102(a)(9).

Supporting Obligations: A supporting obligation is a credit enhancement, such as a guaranty and letter-of-credit right, that supports underlying collateral consisting of an account, chattel paper, a document, a general intangible, an instrument, or investment property. Tex. Bus. & Com. Code § 9.102(a)(78). A supporting obligation is incident to the collateral it supports. Collections of and distributions with respect to a supporting obligation are proceeds of the underlying collateral and of the supporting obligation itself. This characterization as proceeds has significance under the priority rules for proceeds.

§ 9.4 Creation and Attachment of Security Interest

§ 9.4:1 Generally

A security agreement may provide for or create a security interest. Tex. Bus. & Com. Code § 9.102(a)(74). A security interest is not enforceable against a debtor until it attaches. Tex. Bus. & Com. Code § 9.203(a). Attachment occurs if—

1. value has been given (see section 9.4:2 below);
2. the debtor has rights in the collateral (see section 9.4:3 below); and
3. one of these conditions is met:
 - a. the debtor has authenticated a security agreement that contains a description of the collateral (see section 9.4:4 below);
 - b. under a security agreement with the debtor, the secured party has possession of the collateral (other than a certificated secu-

- urity) (see section 9.4:5 below); or
- c. the secured party has control of the collateral if the collateral is investment property, a deposit account, electronic chattel paper, a letter-of-credit right, or an electronic document (see section 9.4:6 below).

Tex. Bus. & Com. Code § 9.203(b).

§ 9.4:2 Value

Value includes any consideration sufficient to support a simple contract. Examples include lending money, making a binding commitment to lend money, issuing a guarantee, or acting as an accommodation party. Value also includes satisfaction, in whole or in part, of a preexisting claim. Tex. Bus. & Com. Code § 1.204.

§ 9.4:3 Rights in Collateral

A debtor may grant a security interest only in those rights in collateral that the debtor holds. Similarly, a secured party may not enjoy greater rights in the collateral than the debtor holds, unless the Texas UCC provides otherwise. Tex. Bus. & Com. Code § 9.203(b) cmt. 6. The power of a debtor to transfer collateral is sufficient to satisfy the rights-in-the-collateral requirement. Tex. Bus. & Com. Code § 9.203(b)(2). Attachment of a security interest is conditioned on the debtor's having rights in the collateral or the power to transfer rights in the collateral to a secured party. Limited rights in collateral, short of full ownership, are sufficient for a security interest to attach. A security interest attaches only to those rights a debtor has in collateral, however broad or limited those rights may be.

A security agreement may create or provide for a security interest in after-acquired collateral. Tex. Bus. & Com. Code § 9.204(a). A security interest in after-acquired collateral attaches

when the debtor acquires rights in the after-acquired collateral.

§ 9.4:4 Security Agreement

Purpose and Effect: A debtor's authentication of a security agreement describing the collateral provides evidence, similar to the evidence required to satisfy the statute of frauds, that the parties intend to create a security interest in the described collateral. That action also renders the security interest enforceable against the debtor and results in the security interest attaching to the described collateral. Tex. Bus. & Com. Code § 9.203(a), (b)(3)(A).

Authenticated by Debtor: A security agreement must be authenticated by the debtor. Tex. Bus. & Com. Code § 9.203(b)(3)(A). The term *authenticated* includes a signature on a writing; a process of adopting or accepting a retrievable electronic transmission; and attaching to or logically associating with a retrievable electronic record an electronic sound, symbol, or process with the intent of adopting or accepting that record. Tex. Bus. & Com. Code § 9.102(a)(7), (70).

Reasonable Identification of Collateral: Chapter 9 requires security agreements to reasonably identify the collateral. Tex. Bus. & Com. Code §§ 9.108(a), 9.203(b)(3)(A). Reasonable identification of collateral may be by specific listing, category, type, quantity, computational formula, or any method under which the identity of the collateral is objectively determinable. Tex. Bus. & Com. Code § 9.108(b). In a security agreement, an all-asset description is, however, insufficient. Tex. Bus. & Com. Code § 9.108(c). A description by type alone is insufficient if the collateral is a commercial tort claim or, in a consumer transaction, if the collateral is consumer goods, a security entitlement, a securities account, or a commodity account. Tex. Bus. & Com. Code § 9.108(e). If the collateral is timber to be cut, a real estate description is

required in the security agreement. Tex. Bus. & Com. Code § 9.203(b)(3)(A).

After-Acquired Property: Security agreements may contain after-acquired property clauses. Tex. Bus. & Com. Code § 9.204(a). A secured party generally may not obtain a security interest in after-acquired consumer goods unless the debtor acquires rights in the consumer goods within ten days after the secured party gives value. Tex. Bus. & Com. Code § 9.204(b)(1). A security interest in a commercial tort claim attaches only to one existing at the time the security agreement is entered into. A security interest will not attach to an after-acquired commercial tort claim. Tex. Bus. & Com. Code § 9.204(b)(2).

Future Advances and Cross-Collateralization: A security interest under chapter 9 may secure future advances, and the security agreement may provide for cross-collateralization of obligations. Tex. Bus. & Com. Code § 9.204(c). Comment 5 to section 9.204 expressly rejects the holdings of cases that require future advances to be of the same type or otherwise related to the original advance. Tex. Bus. & Com. Code § 9.204 cmt. 5.

§ 9.4:5 Possession

Possession of collateral by a secured party pursuant to a security agreement with (but not necessarily authenticated by) a debtor also evidences that the parties intend to create a security interest in the possessed collateral. If a secured party so possesses the collateral, the security interest is enforceable against the debtor and attaches. Tex. Bus. & Com. Code § 9.203(a), (b)(3)(B), (C). A secured party may possess the collateral itself or through a third party who possesses the collateral.

Generally, a secured party will not rely on possession of the collateral pursuant to an unauthenticated security agreement with the debtor

to create an enforceable, attached security interest in collateral. Rather, secured parties will generally obtain an authenticated security agreement, as described in section 9.4:4 above. In addition to being a means of causing a security interest to attach to collateral, possession is also a means of perfecting a security interest. Perfection by possession is more likely to occur than attachment by possession. Therefore, a more detailed discussion of the requirements of possession is contained at section 9.5:4 below, which discusses perfection by possession.

§ 9.4:6 Control

Control under chapter 9, as a method of attachment and perfection of a security interest, applies to investment property, deposit accounts, electronic chattel paper, electronic documents, and letter-of-credit rights. Tex. Bus. & Com. Code § 9.203(b)(3)(D). Control under chapter 9 does not have its common, colloquial meaning. Rather, control as used in chapter 9 has specific meanings, and specified actions must be taken to obtain control. Moreover, different actions are required to obtain control of different types of collateral. The actions to obtain control of a deposit account are set forth in section 9.104, of electronic chattel paper in section 9.105 (see also Tex. Bus. & Com. Code § 9.102(a)(31), defining “electronic chattel paper”), of investment property in sections 9.106 and 8.106, of electronic documents in section 7.106, and of letter-of-credit rights in section 9.107. Additionally, the secured party must have control of the collateral pursuant to the debtor’s security agreement. Tex. Bus. & Com. Code § 9.203(b)(3)(D). Another agreement with a third party—for example, a bank for a deposit account or a broker for a securities account—may be the agreement that establishes control of the collateral. Although attachment by control without a debtor-authenticated security agreement is possible, secured parties generally will obtain a debtor-authenticated security agreement as described in section 9.4:4 above and rely on

control for perfection of the security interest, not attachment. Perfection by control is discussed in section 9.5:5 below.

§ 9.5 Perfection of Security Interest

§ 9.5:1 Generally

An unperfected security interest is subordinate to the rights of a person who becomes a lien creditor before the security interest is perfected. Tex. Bus. & Com. Code § 9.317(a)(2). Stated another way, a perfected security interest prevails over a judgment creditor using the judicial process to obtain a judgment lien on the collateral, including a trustee in bankruptcy that has the status of a lien creditor on the commencement of a bankruptcy proceeding for the debtor. Only an attached security interest may be a perfected security interest. Tex. Bus. & Com. Code § 9.308(a).

§ 9.5:2 Methods of Perfection

There are four basic methods of perfecting an attached security interest. First, a properly completed financing statement (*see* Tex. Bus. & Com. Code § 9.102(a)(39)) may be filed in the appropriate UCC filing offices. Second, the collateral may be in the possession of the secured party. Third, the secured party may have control of the collateral. Fourth, in a few cases, attachment of a security interest automatically perfects the security interest. For a specific category of collateral, there may be only one method of perfection or several.

§ 9.5:3 Perfection by Filing

A security interest in many types of collateral may be perfected by filing a properly completed financing statement or statements in the appropriate UCC filing offices. For certain types of collateral, a properly completed financing state-

ment must be filed in the appropriate UCC filing offices to perfect a security interest in that collateral. Tex. Bus. & Com. Code § 9.310(a). Filing a properly completed financing statement is the only method of perfecting a security interest in accounts, a commercial tort claim, and general intangibles except for a security interest arising out of certain sales of accounts or payment intangibles. Filing a properly completed financing statement is an alternative method of perfecting a security interest in goods (other than goods governed by a certificate of title or another form of registration), negotiable documents, instruments, chattel paper, and investment property. If filing a financing statement is an alternative method of perfecting a security interest in collateral, then, with certain exceptions for goods, generally a secured party that perfects its security interest by another method can obtain priority over the secured party who perfects by filing.

Contents of Financing Statement: A financing statement under chapter 9 must (1) set forth the debtor's name (rules for determining a debtor's name are contained in Tex. Bus. & Com. Code § 9.503(a); see also section 9.14:2 below); (2) set forth the debtor's mailing address; (3) indicate whether the debtor is an individual or an organization; (4) if the debtor is an individual, indicate the debtor's surname; (5) indicate the name of the secured party or the secured party's representative; (6) list the mailing address of the secured party or its representative; and (7) indicate the collateral covered by the financing statement. Tex. Bus. & Com. Code §§ 9.502(a), 9.516(b)(3), (4), (5). If the collateral is timber to be cut, as-extracted collateral (defined in Tex. Bus. & Com. Code § 9.102(a)(6)), or fixtures, additional information must be included on the financing statement. Tex. Bus. & Com. Code §§ 9.502(b), (c), 9.516(b)(3)(D). A secured party may file a financing statement without the debtor's signature if the debtor authorizes the filing. Tex. Bus. & Com. Code § 9.509(a)(1). By entering into a

security agreement, a debtor automatically authorizes the filing of a financing statement covering collateral described in the security agreement. Tex. Bus. & Com. Code § 9.509(b). A secured party needs separate, express authorization from the debtor to file a financing statement before the debtor has entered into a security agreement. Even though an all-asset collateral description is insufficient in a security agreement, an indication in a financing statement that the collateral is all assets or all personal property is sufficient. Tex. Bus. & Com. Code § 9.504. A financing statement containing minor errors that are not seriously misleading may be effective. Tex. Bus. & Com. Code § 9.506(a).

Where to File in a State: Chapter 9 contains choice-of-law rules to determine the jurisdiction in which filings must be made. Those rules are discussed in section 9.6 below. Chapter 9, like the official text of Uniform Commercial Code article 9, generally requires that financing statements be filed in only one office in a jurisdiction. For Texas, that is the office of the secretary of state. Local filings are required only for as-extracted collateral (defined in section 9.102(a)(6)), timber to be cut, or fixtures. Tex. Bus. & Com. Code § 9.501(a)(1). The local filing office is the real estate recording office for a mortgage on the related real property.

What Constitutes Filing: Communication of the financing statement to the filing office and tender of the correct filing fee, the so-called tender rule, constitutes filing. Tex. Bus. & Com. Code § 9.516(a). The word *communication* (defined in Tex. Bus. & Com. Code § 9.102(a)(18)) is used to accommodate electronic filing. Chapter 9 sets forth the reasons a filing office may refuse to accept a financing statement for filing, rendering the filing ineffective. Tex. Bus. & Com. Code § 9.516(b). Under section 9.520(a) of the Texas Business and Commerce Code, a filing office may refuse to accept a financing statement or an amendment

or other record related to a financing statement only for a reason set forth in section 9.516(b). If a filing office could reject the filing, but nevertheless accepts it, the filing is effective if the financing statement contains sufficient information under sections 9.502(a) and (b). Tex. Bus. & Com. Code § 9.520(c). If a filing office refuses to accept a financing statement or other record for filing for an impermissible reason, the financing statement or record is deemed as effective as if it were filed, except against a purchaser for value of the collateral that reasonably relies on the absence of the filing. Tex. Bus. & Com. Code § 9.516(d).

How Filings Are Indexed: Filings under chapter 9 are to be indexed according to the name of the debtor so they can be located by subsequent searchers. Tex. Bus. & Com. Code § 9.519(c)(1), (f)(1). Once an initial filing is made, the filing office is required to index any amendment, assignment, or continuation statement relating to the initial filing in a way that links it to the initial filing. Tex. Bus. & Com. Code § 9.519(c)(1), (f)(2). The filing office may not delete its records pertaining to any financing statement until at least one year after the financing statement has lapsed. Tex. Bus. & Com. Code § 9.522(a).

Continuation; Lapse; Termination: Filings generally expire after five years and must be continued within six months before the end of the five-year period by the filing of a continuation statement. Tex. Bus. & Com. Code § 9.515. A filing office may reject a continuation statement that is not filed during that period. Tex. Bus. & Com. Code §§ 9.516(b)(3)(B)(ii), 9.516(b)(7). If an initial financing statement is filed in connection with a public finance transaction (defined in Tex. Bus. & Com. Code § 9.102(a)(68)) or a manufactured-home transaction (defined in Tex. Bus. & Com. Code § 9.102(a)(54)) and the financing statement indicates that fact, the financing statement is effective for thirty years. Tex. Bus. & Com.

Code § 9.515(b). If a financing statement lapses, a security interest perfected by the filing becomes unperfected (unless perfected by another method such as possession) and is deemed never to have been perfected against a purchaser for value. Tex. Bus. & Com. Code § 9.515(c). When the secured obligation has been satisfied and the secured party has no obligation to extend credit, the secured party is obligated to file, or in a commercial transaction provide to the debtor, a termination statement. Tex. Bus. & Com. Code § 9.513. A debtor may file a termination statement if the secured party is required to file or provide the termination statement and has failed to do so. Tex. Bus. & Com. Code § 9.509(d)(2). A termination statement filed by a debtor must indicate that the debtor authorized the filing of the termination statement. Tex. Bus. & Com. Code § 9.509(d)(2).

Bogus Filings: There used to be no nonjudicial means for a debtor to correct a financing statement filed against the debtor that the debtor believed was wrongful, a so-called bogus or fraudulent filing. Chapter 9 permits a debtor who believes that a filing concerning the debtor is inaccurate or was wrongfully filed to file an information statement containing the basis for the debtor's belief that the record is inaccurate or was wrongfully filed. The information statement becomes part of the filing record but does not affect the effectiveness of an initial financing statement or other filed record. Tex. Bus. & Com. Code § 9.518. Texas has adopted a non-uniform additional section in chapter 9 that permits an owner of property covered by a fraudulent filing to recover civil penalties against the filer and to sue to request release of the filing. Tex. Bus. & Com. Code § 9.5185. Certain financing statements by inmates and their representatives are presumptively fraudulent. For special restrictions on filings by such parties, see Tex. Civ. Prac. & Rem. Code §§ 12.001-.007 and Tex. Gov't Code §§ 51.901, 405.022. See also the section titled 'Fraudulent

Filings' in chapter 2 of this manual for a description of criminal and other civil actions that may be brought against a fraudulent filer.

Other Filing Provisions: Additional details concerning financing statements and the UCC filing system are contained in subchapter E of chapter 9.

§ 9.5:4 Perfection by Possession

A secured party may perfect a security interest by having possession, by itself or through a third party, of the collateral. Types of collateral that may or must be perfected by possession are summarized in the following paragraphs.

Money: The only way a secured party may perfect its security interest in money (defined in Texas Business and Commerce Code section 1.201(b)(24)) is by possession. Tex. Bus. & Com. Code § 9.312(b)(3).

Instruments: A secured party may perfect a security interest in an instrument by either filing or possession. Tex. Bus. & Com. Code §§ 9.312(a), 9.313(a). The priority of a security interest in an instrument differs depending on whether perfection is by filing or possession. There is a separate perfection rule for a sale of an instrument that is a promissory note. Such a sale is a security interest under section 1.201(b)(35) and section 9.109(a)(3). A security interest arising out of a sale of a promissory note is perfected automatically, without additional action, when it attaches. Tex. Bus. & Com. Code § 9.309(4).

Even though a secured party may perfect a security interest in an instrument by merely obtaining possession of the instrument without obtaining an endorsement of the instrument, a secured party will want to obtain an endorsement to be entitled to holder-in-due-course status under Texas UCC chapter 3. Tex. Bus. &

Com. Code §§ 3.302(a), 3.201 (defining “negotiation”).

Letter-of-Credit Rights: Under chapter 9, possession of a written letter of credit does not perfect a security interest in proceeds under the letter of credit. Instead, a security interest in a letter-of-credit right that is a supporting obligation (defined in Tex. Bus. & Com. Code § 9.102(a)(78)) is automatically perfected if the security interest in the related collateral is perfected. Tex. Bus. & Com. Code § 9.308(d). If a letter-of-credit right is original collateral, and not a supporting obligation to other collateral, a security interest therein may be perfected only by control. Tex. Bus. & Com. Code § 9.312(b)(2).

Certificated Securities: Under chapter 9, a secured party’s taking delivery of a certificated security under section 8.301 and Tex. Bus. & Com. Code § 9.313(a) perfects its security interest. Like mere possession of an instrument, a secured party’s taking delivery of a certificated security under section 8.301, without an endorsement, perfects the secured party’s security interest in the certificated security. The secured party will want to obtain an endorsement to be entitled to “protected purchaser” status under Texas UCC chapter 8 (*see* Tex. Bus. & Com. Code §§ 8.303, 8.106(b)(1)) and the priority status afforded a secured party in control of a certificated security. Tex. Bus. & Com. Code § 9.328(1), (5).

If the collateral is a certificated security in registered form, attachment of a security interest occurs when the certificated security is delivered to the secured party under Texas Business and Commerce Code section 8.301. Tex. Bus. & Com. Code §§ 9.203(b)(3)(C), 9.313(e). Delivery of a certificated security to a secured party occurs when the secured party acquires possession of the certificated security, when a third party (who is not a securities intermediary) acquires possession of the certificated security

on behalf of the secured party, or when a third party (who is not a securities intermediary) who already has possession of the certificated security acknowledges that it holds the certificated security for the secured party. Tex. Bus. & Com. Code § 8.301(a)(1), (2).

Delivery of a certificated security to a secured party for purposes of attaching and perfecting a security interest in the security certificate by possession also occurs when a securities intermediary (for example, a securities broker), acting on behalf of the secured party, acquires possession of the security certificate. The certificate must be in registered form and registered in the name of the secured party, payable to the order of the secured party, or endorsed to the secured party, not to the securities intermediary or in blank. Tex. Bus. & Com. Code § 8.301(a)(3).

Certificated securities are seldom endorsed on the back in the space provided for an endorsement by the registered owner to a purchaser, including a secured party. Rather, the general practice is for the registered owner to sign a stock power with respect to the certificated security. Frequently stock powers are signed in blank, that is, without designating the transferee of the certificate. If a secured party intends to perfect a security interest in a certificated security by possession, which occurs by delivery of the certificated security to a securities intermediary or broker that acts on behalf of the secured party, the secured party should take care to ensure that the security is in registered form and is appropriately endorsed, either on the back of the certificate or by an appropriate stock or bond power.

If a secured party intends to perfect its security interest by delivery of a certificated security to a securities intermediary, as described above, the secured party should also take steps to ensure that the securities intermediary retains possession of the certificated security. After a securi-

ties intermediary acquires a certificated security for a customer, in this case for the secured party, the securities intermediary often credits the security to a securities account held by the securities intermediary for its customer. The securities intermediary usually will not retain possession of the certificated security but rather will transfer the certificated security to the securities intermediary's clearing corporation. The records of the securities intermediary will reflect the securities credited to its customer's account. The secured party in such a situation would have to rely on "control" (see section 9.5:5 below) as the method of maintaining the perfected status of its security interest, even if the security certificate was appropriately delivered to the securities intermediary to initially perfect the secured party's security interest by possession.

Chattel Paper: A security interest in tangible chattel paper may be perfected by possession. Tex. Bus. & Com. Code § 9.313(a). A security interest in electronic chattel paper may not be perfected by possession but may be perfected by control or filing. Tex. Bus. & Com. Code §§ 9.312(a), 9.314(a).

Other Collateral: Other collateral that may be perfected by the secured party's taking possession of the collateral includes goods and tangible negotiable documents. Tex. Bus. & Com. Code § 9.313(a).

Possession by Third Parties: A secured party desiring to perfect a security interest in collateral by possession when the collateral (other than a certificated security or goods covered by a document) is in the possession of a third party must obtain an authenticated record (for example, a signed writing) from the possessor of the collateral acknowledging that it is holding the collateral for the secured party. Tex. Bus. & Com. Code § 9.313(c)(1) (compare with Tex. Bus. & Com. Code §§ 8.106(a), (b), 8.301(a)(2) for certificated securities). The third party in possession of the collateral may not be the

debtor or a lessee in the ordinary course from the debtor. Tex. Bus. & Com. Code § 9.313(c). If a secured party or a third party on behalf of the secured party has possession of collateral, possession is not relinquished if the collateral is delivered with appropriate instructions to a possible purchaser of the collateral (other than the debtor or an ordinary-course lessee of the collateral) for inspection or return. Tex. Bus. & Com. Code § 9.313(h).

§ 9.5:5 Perfection by Control

Perfection of a security interest by control applies to investment property, deposit accounts, electronic chattel paper, electronic documents, and letter-of-credit rights. Tex. Bus. & Com. Code §§ 7.106, 9.104–.107, 9.314(a).

Investment Property: A security interest in investment property may be perfected by control or filing. Tex. Bus. & Com. Code §§ 9.312(a), 9.314(a). A secured party that has control of investment property has priority over another secured party that perfects its security interest in the same property by filing a financing statement. Tex. Bus. & Com. Code § 9.328(1). Generally, chapter 9 defers to Texas UCC chapter 8 to set forth the requirements for control of investment property. Tex. Bus. & Com. Code § 9.106(a). Control of investment property includes delivery, with endorsement, of a certificated security to the secured party; an agreement by the issuer of an uncertificated security that the issuer will honor instructions from the secured party without further consent of the debtor; and an agreement by a bank, broker, or other securities intermediary holding a securities account or by a commodity intermediary that it will honor instructions from the secured party concerning the account without further consent of the debtor. Many banks, brokers, and other securities intermediaries that regularly hold securities accounts for their customers have their own form of a so-called control agreement for the latter instance. Control also includes reg-

istering a security, a securities account, or a commodity account in the name of the secured party. If a secured party is the debtor's securities intermediary or commodity intermediary, the secured party automatically has control. Tex. Bus. & Com. Code §§ 8.106, 9.106.

Deposit Accounts: A secured party may perfect a security interest in a deposit account as original collateral only by obtaining control of the deposit account. Tex. Bus. & Com. Code §§ 9.312(b)(1), 9.314(a). Filing a financing statement does not perfect a security interest in a deposit account as original collateral. Tex. Bus. & Com. Code § 9.312 cmt. 5. A secured party has control of a deposit account if it is the depository bank or if the deposit account is in the secured party's name. A secured party also has control if the depository bank agrees to comply with instructions from the secured party concerning the deposit account without further consent from the debtor. Tex. Bus. & Com. Code § 9.104(a).

Electronic Chattel Paper: A security interest in electronic chattel paper may be perfected by filing or by control. Tex. Bus. & Com. Code §§ 9.312(a), 9.314(a).

The requirements for control of electronic chattel paper are in Tex. Bus. & Com. Code § 9.105.

Letter-of-Credit Rights: A secured party may perfect its security interest in a letter-of-credit right that is not a supporting obligation for other collateral only by obtaining control of the letter-of-credit right. Tex. Bus. & Com. Code §§ 9.312(b)(2), 9.314(a). A secured party has control of a letter-of-credit right if the issuer or nominated person has consented to an assignment of proceeds of the letter of credit under Texas Business and Commerce Code section 5.114(c). Tex. Bus. & Com. Code § 9.107.

Electronic Documents: A security interest in an electronic document of title may be perfected by filing or by control. Tex. Bus. & Com. Code

§§ 9.312(a), 9.314(a). A secured party has control of an electronic document of title if a system employed for evidencing the transfer of interests in the electronic document reliably establishes the secured party as the person to which the electronic document was issued or transferred. Tex. Bus. & Com. Code § 7.106(a).

§ 9.5:6 Automatic Perfection

In some cases, a security interest is automatically perfected if it has attached; no additional action other than attachment is necessary to perfect the security interest. Tex. Bus. & Com. Code § 9.309.

Automatic Perfection: The security interests that are automatically perfected on attachment under chapter 9 are—

1. a purchase-money security interest in consumer goods;
2. a sale of payment intangibles and promissory notes;
3. an assignment of accounts that does not, alone or in conjunction with other assignments to the same assignee, transfer a significant part of the outstanding accounts of the assignor;
4. an assignment of payment intangibles that does not, alone or in conjunction with other assignments to the same assignee, transfer a significant part of the payment intangibles of the assignor;
5. a security interest arising under Texas UCC chapter 2, 2A, or 4;
6. a security interest in investment property created by a securities intermediary or commodity intermediary;
7. for a temporary period, a security interest in instruments, certificated securities, and negotiable documents;

8. an assignment of a health-care-insurance receivable to the health-care provider;
9. for a temporary period, a security interest in proceeds;
10. a sale by an individual of lottery winnings; and
11. a security interest in favor of an issuer or nominated person in documents presented to the issuer or nominated person for draw under a letter of credit.

Tex. Bus. & Com. Code §§ 9.309(1)–(8), (10), (11), (14), 9.312(e), 9.315(d). *See* Tex. Bus. & Com. Code § 5.118.

Supporting Obligation: If a security interest in an account, chattel paper, document, general intangible, instrument, or investment property is perfected, a security interest in a supporting obligation for that collateral is automatically perfected. Tex. Bus. & Com. Code §§ 9.203(f), 9.308(d). A supporting obligation is a letter-of-credit right or secondary obligation, such as a guaranty, that supports the payment or performance of an account, chattel paper, document, general intangible, instrument, or investment property. Tex. Bus. & Com. Code § 9.102(a)(78).

§ 9.5:7 Other Perfection Provisions under Chapter 9

The temporary automatic perfection periods for instruments, certificated securities, and negotiable documents is twenty days (Tex. Bus. & Com. Code § 9.312(e)), as is the temporary perfection period of a security interest in proceeds. Tex. Bus. & Com. Code § 9.315(d). A financing statement must be filed to perfect a security interest in a beneficiary's interest in a common-law trust. Tex. Bus. & Com. Code § 9.309(13). A security interest in titled-goods inventory held for sale or lease by a dealer in the business of

selling goods of that kind is perfected by filing, not by notation of the security interest on the certificate of title. A security interest in titled-goods inventory held for sale or lease by a person in the business of leasing such goods is perfected by notation on the certificate of title and not by filing. Tex. Bus. & Com. Code § 9.311(d).

§ 9.5:8 Other Means of Perfection

Federal and state statutes may provide a means of perfecting a security interest in vessels, aircraft, intellectual property, and titled goods (such as motor vehicles that are not inventory of a dealer). Compliance with these forms of perfection constitutes perfection by filing under chapter 9. Tex. Bus. & Com. Code § 9.311(a), (b).

§ 9.6 Choice of Law

§ 9.6:1 Generally

Chapter 9 contains choice-of-law provisions that determine which jurisdiction's law governs attachment of a security interest, perfection of a security interest, and priority over another interest. If a dispute occurs in a UCC jurisdiction, the choice-of-law rules in chapter 9 of the forum jurisdiction determine which jurisdiction's laws the forum jurisdiction is required to apply. The choice-of-law rules in the UCC do not address which law a non-UCC jurisdiction would apply.

§ 9.6:2 Contract Choice of Law

If a security agreement specifies a governing law, and if the transaction has a reasonable relationship with the chosen jurisdiction, the forum jurisdiction should apply the law of the jurisdiction specified in the security agreement to determine the contractual rights and obligations of the debtor and the secured party. Tex. Bus. & Com. Code § 1.301(a). Regardless of the juris-

diction chosen by the parties to govern their rights and obligations, the secured party and the debtor by their contract may not vary the mandatory choice-of-law rules in chapter 9 concerning perfection and priority of a security interest. Tex. Bus. & Com. Code § 1.301(b). *See also* Tex. Bus. & Com. Code ch. 271.

§ 9.6:3 Perfection

General Rule—Location of Debtor: Except as noted below, the law of the jurisdiction in which the debtor is located governs perfection of a security interest in collateral. Tex. Bus. & Com. Code § 9.301(1). For a debtor with multi-state operations, if a security interest in collateral is perfected by filing, the jurisdiction in which the debtor is located is the filing jurisdiction. Because of the importance of the location of the debtor to the choice-of-law rule, chapter 9 provides rules to determine a debtor's location.

Registered Organizations. A registered organization is one formed or organized in a state or the United States by the filing with, issuance of a public organic document by, or enactment of legislation by the state or the United States. Tex. Bus. & Com. Code § 9.102(a)(71) (defining "registered organization"); *see also* Tex. Bus. & Com. Code § 1.201(b)(25) (defining "organization"); Tex. Bus. & Com. Code § 9.102(a)(68–a) (defining "public organic record"); Tex. Bus. & Com. Code § 9.102(a)(77) (limiting the definition of "state" to jurisdictions in the United States and its territories and possessions). A registered organization that is organized under the law of a state is located in that state. Tex. Bus. & Com. Code § 9.307(e). For example, if a debtor is a corporation, limited liability company, or limited partnership organized under the laws of a particular state, the debtor is located in that state. *See* Tex. Bus. & Com. Code §§ 9.102 cmt. 11, 9.307 cmt. 4.

Other Debtors. If the debtor is an individual, the debtor is located at his residence. If the

debtor is an organization but is not a registered organization, the debtor is located at the debtor's place of business if the debtor has only one place of business or at the debtor's chief executive office if the debtor has more than one place of business. Tex. Bus. & Com. Code § 9.307(b).

Foreign Debtors. If the debtor is located in a jurisdiction outside the United States and that jurisdiction does not provide for a public filing system for nonpossessory security interests for a secured party to prevail over a subsequent lien creditor, the debtor is deemed to be located in the District of Columbia. Tex. Bus. & Com. Code § 9.307(c).

Possessory Security Interests: If a security interest is perfected by possession, the law of the jurisdiction in which the collateral is located governs perfection (that is, the requirements of possession) and priority of that security interest. Tex. Bus. & Com. Code § 9.301(2).

Fixtures: If a security interest in fixtures is perfected by a fixture filing, the law of the jurisdiction in which the fixtures are located governs whether perfection has occurred and the priority of conflicting security interests. Tex. Bus. & Com. Code § 9.301(3)(A).

Titled Goods: If goods are covered by a certificate of title (defined in Tex. Bus. & Com. Code § 9.102(a)(10)) issued by a particular jurisdiction, the law of the certificate-issuing jurisdiction governs whether perfection occurs. Tex. Bus. & Com. Code § 9.303(c). An exception to this rule for certificate-of-title goods applies if the goods are inventory. If titled goods are inventory, the law of the jurisdiction of the debtor's location determines whether a security interest is perfected. Tex. Bus. & Com. Code § 9.301. Under section 9.311(d), titled goods that are inventory of a person in the business of selling such goods are treated as ordinary goods for determining whether a security interest in such goods is perfected; a notation on a certificate of title for titled goods that are inventory of

such a person is not necessary or effective to perfect a security interest. *See* Tex. Bus. & Com. Code § 9.303 cmt. 5.

Agricultural Liens: The law of the jurisdiction in which the farm products are located governs whether an agricultural lien on the farm products is perfected. Tex. Bus. & Com. Code § 9.302.

Investment Property: If a security interest in investment property is perfected by filing, the law of the jurisdiction in which the debtor is located governs perfection. Tex. Bus. & Com. Code § 9.305(c)(1). If a security interest in investment property collateral is perfected by a means other than filing, (1) if the collateral is a security certificate, the law of the jurisdiction in which the security certificate is located determines whether a security interest in the certificated security is perfected (Tex. Bus. & Com. Code § 9.305(a)(1)); (2) if the collateral is an uncertificated security, the law of the jurisdiction under which the issuer of the uncertificated security is organized governs perfection of a security interest in the uncertificated security or, if permitted by the law of that jurisdiction, the law of another jurisdiction specified by the issuer (Tex. Bus. & Com. Code § 8.110(d)); (3) if the collateral is a security account or a security entitlement, the agreement of the parties to the account or entitlement determines the jurisdiction governing perfection for the security account or security entitlement; if, however, the parties do not provide for a jurisdiction, the jurisdiction is determined by sections 8.110(e) and 9.305(a)(3) of the Texas Business and Commerce Code; and (4) if the collateral is a commodity account, the agreement of the parties to the account determines the jurisdiction governing perfection for the commodity account; if, however, the parties do not provide for a jurisdiction, the jurisdiction is determined by Tex. Bus. & Com. Code § 9.305(b).

Deposit Accounts: The law of the jurisdiction of the depository bank governs perfection of a security interest in a deposit account. Tex. Bus. & Com. Code § 9.304(a). Chapter 9 contains rules for determining where a depository bank is located. Tex. Bus. & Com. Code § 9.304(b). Those rules are similar to the rules for determining the location of a securities intermediary.

Letter-of-Credit Rights: The law of the jurisdiction of the issuer or nominated person of a letter of credit generally governs perfection of a security interest in a letter-of-credit right, other than a letter-of-credit right that is a supporting obligation. The issuer's or nominated person's jurisdiction is determined under section 5.116 of the Texas Business and Commerce Code. Tex. Bus. & Com. Code § 9.306. If the issuer's or nominated person's jurisdiction is not a state (defined in Tex. Bus. & Com. Code § 9.102(a)(77)), the law of the debtor's location determines perfection of a security interest in a letter-of-credit right. *See* Tex. Bus. & Com. Code § 9.306 cmts. 2, 3.

§ 9.6:4 Effect of Perfection or Nonperfection and Priority

The jurisdiction whose law governs the effect of perfection or nonperfection and priority of a security interest is sometimes different from the jurisdiction whose law governs perfection.

Tangible Negotiable Documents, Goods, Instruments, Money, and Tangible Chattel Paper: The jurisdiction whose law governs the effect of perfection or nonperfection and priority of a nonpossessory security interest (for example, one perfected by filing) is the jurisdiction in which the collateral is located. Tex. Bus. & Com. Code § 9.301(3)(C).

Certificated Securities: The jurisdiction whose law governs the effect of perfection or nonperfection and priority of a security interest in a certificated security is the jurisdiction in

which the security certificate is located. Tex. Bus. & Com. Code § 9.305(a)(1).

Uncertificated Securities: The jurisdiction whose law governs the effect of perfection or nonperfection and priority of a security interest in an uncertificated security is the jurisdiction of the issuer of the uncertificated security. Tex. Bus. & Com. Code § 9.305(a)(2).

Security Entitlements, Security Accounts, Commodity Contracts, and Commodity Accounts: The jurisdiction whose law governs the effect of perfection or nonperfection and priority of a security interest in a security entitlement, security account, commodity contract, or commodity account is the jurisdiction of the securities intermediary or commodity intermediary. Tex. Bus. & Com. Code § 9.305(a)(3), (4).

Other Collateral: Otherwise, generally the jurisdiction whose law governs perfection of a security interest also governs the effect of perfection or nonperfection and priority of that security interest. See section 9.301(1) for accounts, commercial tort claims, and general intangibles; section 9.301(2) for possessory security interests; section 9.301(3)(A) for fixtures; section 9.301(3)(B) for timber to be cut; section 9.301(4) for as-extracted collateral; section 9.302 for farm products; section 9.303(c) for certificate-of-title goods that are not inventory; and section 9.304 for deposit accounts.

§ 9.7 Cautions

This chapter of the manual does not cover all the issues involved in complex secured transactions. Rather, this chapter provides forms and analysis to create, attach, and perfect a security interest in straightforward secured transactions.

Certain types of collateral are subject to statutes that require other steps for perfecting the security interest and are beyond the scope of this

manual. See Tex. Bus. & Com. Code §§ 9.109(c), (d), 9.311(a). The following are examples.

Titled Vehicles. If the title to the collateral is created by a certificate of title, such as for a car, boat, or trailer, proper perfection is by registering the lien on the title.

Patents, Copyrights, and Trademarks. The federal patent office registers liens on patent, copyright, and trademark rights.

Ships and Aircraft. Federal statutes govern perfection requirements for large ships and aircraft.

Additionally, issues not applicable to other types of collateral arise if the collateral consists of fixtures or farm products.

§ 9.7:1 Fixtures

Goods are fixtures if they become so related to particular real estate that an interest in them arises under the real property law of the state in which the real property is situated. Tex. Bus. & Com. Code § 9.102(a)(41). Texas cases have generally held that personalty becomes a fixture if it is affixed to realty in such a manner that it cannot be removed without damage to the realty. The intent of the “annexing party” is a major factor in the determination. Building materials incorporated into realty are not fixtures. Tex. Bus. & Com. Code § 9.334(a).

If the secured party has a deed-of-trust lien on real property, the secured party does not need a separate security interest in the fixtures on that real property or a separate financing statement filed in the real property records. A recorded deed of trust creates and perfects a lien on the fixtures as an interest in real property if the deed of trust contains certain information. Tex. Bus. & Com. Code § 9.502(c). The deed of trust as a security agreement and financing statement is discussed at section 8.9 in this manual.

Fixtures have characteristics of both real and personal property. This dual nature accounts for the special treatment of fixtures in the security agreement and the financing statement. In the security agreement, forms 9-1 through 9-4 in this chapter, the debtor warrants that the collateral is not a fixture except as provided in the agreement. The debtor also covenants to give the secured party certain rights if the collateral becomes a fixture.

In priority conflicts involving fixtures, the parties competing with the secured party are those with real estate interests, such as a lien on the real property to which the goods are affixed. *See* Tex. Bus. & Com. Code § 9.334 cmt. 4. If fixtures were treated like other personalty and if the financing statements were filed with the secretary of state, parties with real estate interests would not learn of the security interest by a title search. Thus, a security agreement and financing statement covering fixtures must describe the real estate, and the financing statement must be filed in the real property records. Tex. Bus. & Com. Code § 9.502(b).

If there is any doubt about whether collateral is or may become a fixture, the secured party should file a Uniform Commercial Code fixture filing. Sections 9.5:3 above and 9.14:5 below discuss additional rules for filing.

§ 9.7:2 Farm Products and Agricultural Liens

Creating and perfecting a security interest in farm products collateral requires action under two separate and distinct systems. Creating and perfecting a security interest against competing creditors is governed by Texas Business and Commerce Code chapter 9. Perfection of that same security interest in farm products against buyers in the ordinary course of business requires compliance with the federal Food Security Act of 1985. 7 U.S.C. § 1631.

Perfection under chapter 9 is normally accomplished by the execution of a security agreement and the filing of an appropriate financing statement. In Texas, perfection against buyers in the ordinary course of business under 7 U.S.C. § 1631 (so-called "superperfection") requires the creditor to deliver notice of the security interest to the purchaser of the farm product at any time within one year before the sale occurs. To determine which potential buyers must receive this notice, the secured party may require the debtor to list likely purchasers of the farm products collateral (see form 9-7 in this chapter). Texas has no central filing system for farm products liens under the Food Security Act. To be effective, the superperfection prenotification notice must be delivered to the farm products buyer before the sale of the farm products. The notice remains effective for only one year after it is delivered. Secured creditors should exercise diligence to determine that their prenotification notices are timely delivered and remain effective. Farm products are not infrequently sold under forward contracts. The date of a sale under a forward contract may be ambiguous. Additionally, farm products are often warehoused after harvest for an extended period. A notice may expire during the period that farm products are warehoused. A new notice, with its new one-year effectiveness, may have to be delivered to the farm products buyer of warehoused farm products.

The required contents of a prenotification notice are unique to the Food Security Act and are much more extensive than the information contained in a financing statement. See the prenotification statement at form 9-6 for the contents of the notice.

In addition, the perfection and priority of agricultural liens may be subject to rules outside of chapter 9 of the Texas Uniform Commercial Code. For example, notwithstanding the provisions of chapter 9, an agricultural lien granted under subchapter E of Texas Property Code

chapter 70 has priority over certain prior liens if certain conditions are met. *See* Tex. Prop. Code § 70.4045. Similarly, the statutory trust created upon acceptance of commodities to which the Perishable Agricultural Commodities Act applies may also have priority over certain previously filed UCC liens. *See* 7 U.S.C. §§ 499a–499s; *see, e.g. Bocchi Americas Associates, Inc. v. Commerce Fresh Marketing, Inc.*, 515 F.3d 383 (5th Cir. 2008).

§ 9.7:3 Federal Tax Liens

A federal tax lien notice covering all personal property of a debtor may be filed in an office that is different from the office in which a financing statement against the debtor is filed. All personal property of a taxpayer that is a corporation or partnership is deemed located where the principal place of the business is located; for other taxpayers, at the taxpayer's residence; and for a taxpayer located outside of the United States, in the District of Columbia. 26 U.S.C. § 6323(f)(2)(B). Under section 14.002 of the Texas Property Code, a notice of a federal tax lien should be filed in the office of the secretary of state for a corporation or partnership whose principal executive office is in Texas and, in all other cases, in the office of the county clerk in the county in which the person against whom the lien applies resides when the notice is filed. Tex. Prop. Code § 14.002.

As referenced in Texas Property Code section 14.002, 'corporation' may refer to any entity taxed as a corporation for federal income tax purposes, and 'partnership' may refer to any entity treated as a partnership for federal income tax purposes. A single-member limited liability company that does not elect to be taxed as a corporation for federal income tax purposes and is disregarded for federal income tax purposes may also be disregarded for purposes of federal tax lien notice filings. A notice of a federal tax lien filing may be made against such a limited liability company under the name of its single-

member owner, and the federal tax lien may attach to the otherwise (for state law purposes) separate property of the limited liability company. Searches for outstanding liens against a debtor should also be made in the offices in which a federal tax lien notice may have been filed.

§ 9.8 Deed of Trust as Security Agreement and Financing Statement

In addition to creating a lien on the real property conveyed, the deed of trust can be modified to create a security interest in other collateral. *See* form 8-1 in this manual. *See* also section 8.11, which describes the use of a deed of trust as security agreement and financing statement.

§ 9.9 Instructions for Completing Security Agreement Forms

In the following instructions for completing the security agreement, forms 9-1 through 9-4 in this chapter, different classifications of collateral are considered separately if appropriate; otherwise, the remarks apply to all classifications of collateral. Form 9-1 is designed for use if the collateral is consumer goods or documents with respect to goods, equipment, or inventory. If addendum form 9-5 is attached, form 9-1 may also be used if the collateral is farm products. Form 9-2 is designed for use if the collateral is accounts, chattel paper, general intangibles, or a commercial tort claim. Form 9-3 is designed for use if the collateral is instruments, including a promissory note, or investment property. Form 9-4 is designed for use if the collateral is a debtor's interest as a partner in a general or limited partnership or as a member in a limited liability company.

Parties and Name of Debtor: For general information about designation of parties and the name of the debtor, *see* sections 9.5:3 and 9.14:2 and chapter 3 in this manual.

Classification of Collateral: The secured party should list all classifications of the collateral subject to the security agreement. If the debtor and the secured party agree that the collateral is or may become a fixture, that fact should be noted in the classification, with language such as "equipment to become a fixture," and the security agreement should include a legal description of the real property. See section 9.3:3 above for a list of the classifications.

Collateral: Any description of personal property or real estate is sufficient, whether it is specific or not, if it reasonably identifies what is described. Tex. Bus. & Com. Code § 9.108. In a consumer transaction, however, a description by collateral type alone is not sufficient if the collateral is consumer goods, a security entitlement, a security account, or a commodity account. Tex. Bus. & Com. Code § 9.108(e). A description by type alone is also not sufficient for a commercial tort claim. Tex. Bus. & Com. Code § 9.108(e). Several examples of alternate clauses are included in the security agreement forms, but the attorney may use any description that meets the requirements of section 9.108. See Tex. Bus. & Com. Code § 9.108 cmt. 2.

Debtor's Representations Concerning Debtor and Locations: The security agreement forms have the debtor representing the location of the collateral, the location of the debtor's records concerning the collateral, and the location of the debtor. If a secured party has to enforce its security interest, the secured party will need to know where the collateral and records pertaining to the collateral are located. The debtor's location is important because under chapter 9 the filing jurisdiction generally depends on the location of the debtor. See Tex. Bus. & Com. Code § 9.301(1) and section 9.6:3 above. The filing jurisdiction under chapter 9 may be different from the jurisdiction in which the collateral is located. The security agreement may show the location where the debtor intends to keep the collateral and records concerning the collateral;

the location of the debtor's place of business or chief executive office if the debtor has more than one place of business; if the debtor is an individual, the location of the debtor's place of business or chief executive office if the debtor has more than one place of business and the location of the debtor's residence; and, if the debtor is a registered organization, the jurisdiction in which the debtor is organized. For most purposes, a street address or other unambiguous location should be sufficient.

The remaining representations concerning the debtor deal with information needed to complete the financing statement form.

If the collateral is or will become timber to be cut, this part of the agreement should describe the land where the collateral is or will be located. Tex. Bus. & Com. Code § 9.203(b)(3)(A). The secured party should file a financing statement in the real property records to perfect its security interest in timber to be cut, as-extracted collateral, or fixtures. Tex. Bus. & Com. Code § 9.501(a)(1). Financing statements for these types of collateral require a description of the real property. Tex. Bus. & Com. Code § 9.502(b)(3). For general information about property descriptions, see section 3.7 in this manual.

Security agreement form 9-1 is drafted for consumer goods, equipment, or inventory. With addendum form 9-5, form 9-1 can also provide coverage for farm products. By appropriately wording paragraph H.14., the parties may incorporate the addendum into the agreement. Use of the addendum for farm products to security agreement form 9-1 together with additional forms for listing of potential buyers, commission merchants, and selling agents (form 9-7) and the prenotification statement (form 9-6) allows compliance with the federal Food Security Act (7 U.S.C. § 1631).

There are two methods for documenting a security interest in a note secured by real property.

One method, use of the security agreement, is discussed in the following paragraphs. The other method, use of the collateral transfer of note and lien, is discussed in section 9.18 below.

Use of security agreement form 9-3, with appropriate alternate clauses, will create a security interest in the note. Chapter 9 provides that it governs a security interest in a secured obligation (such as a note secured by real property) notwithstanding that the underlying collateral (for example, the real property) is not governed by chapter 9. Tex. Bus. & Com. Code § 9.109(b). Furthermore, if a security interest attaches under chapter 9 to a secured obligation, the security interest automatically attaches to the security interest, mortgage, or other lien that secures the secured obligation. Tex. Bus. & Com. Code § 9.203(g). Additionally, perfection of the security interest in the secured obligation automatically perfects a security interest in the security interest, mortgage, or other lien that secures the secured obligation. Tex. Bus. & Com. Code § 9.308(e). If the note is secured by real property, a properly completed transfer-of-lien form should be filed in the real property records of the county clerk in the county in which the real property is located. See form 9-1. The transfer of lien provides notice to anyone searching the real property records of the secured party's interest in the real property. If the note is secured by personal property, a properly completed UCC3 financing statement amendment (form 9-14) should be filed in the appropriate place for the type of collateral covered. The assignment provides notice to anyone searching the personal property records of the secured party's interest in the personal property. See section 9.12 below for further discussion.

A secured party may perfect its security interest in a note by either filing a financing statement or obtaining possession of the note. Tex. Bus. & Com. Code §§ 9.312(a), 9.313(a). A secured party that has possession of an instrument may have priority over a secured party that perfects

its security interest in the instrument by filing. Tex. Bus. & Com. Code § 9.330(d). For the secured party to become a holder or a holder in due course of the note, with all the benefits that entails under chapter 3 of the Texas Business and Commerce Code, the payee or, if different, the current holder of the note must endorse the note to the secured party. Among the advantages of a secured party becoming a holder in due course of the note is that the secured party also becomes the person entitled to enforce the note. Tex. Bus. & Com. Code § 3.301. The note transferred may be endorsed as follows:

[Date of transfer]

Pay to the order of [**name of secured party**] as collateral in accordance with the security agreement dated [**date**].

[Name of payee/holder]

Additionally, notice of the security interest may be given to the maker of the note to prevent a prepayment of the note to the payee.

§ 9.10 Additional Clauses

§ 9.10:1 After-Acquired Property

The Texas Business and Commerce Code authorizes and validates a security interest in after-acquired property if the security agreement so provides. See Tex. Bus. & Com. Code § 9.204(a). The secured party may include the parenthetical language *whether now owned and all after-acquired collateral of the same classification* on forms 9-1 through 9-4 in this chapter, under the heading "Collateral," to include after-acquired property. No security interest attaches to after-acquired consumer goods (other than accessions) if they are given as additional security, unless the debtor acquires rights in the goods within ten days after the secured party gives value. Tex. Bus. & Com. Code § 9.204(b). Additionally, a security interest in a commercial

tort claim attaches only to such a claim that exists when the security agreement is entered into and not to an after-acquired claim. Tex. Bus. & Com. Code § 9.204(b).

§ 9.10:2 Other Debt/Future Advances

The Texas Business and Commerce Code provides that a security interest secures future advances to the debtor if the security agreement so provides. *See* Tex. Bus. & Com. Code § 9.204(c). To secure future advances, include the appropriate optional language under the heading "Obligation" in forms 9-1 through 9-4 in this chapter or use a modified form of the all-indebtedness or other-indebtedness clauses in form 8-6 in this manual.

§ 9.10:3 Purchase-Money Security Interest

If the secured obligation is advanced as purchase money for the collateral, the security agreement should contain the appropriate clause from form 8-3 in this manual acknowledging the purchase-money security interest. Sections 9.317 and 9.324 contain special priority rules for purchase-money security interests. *See* Tex. Bus. & Com. Code §§ 9.317, 9.324. Section 9.103 contains rules for determining when a security interest is a purchase-money security interest. Tex. Bus. & Com. Code § 9.103.

§ 9.10:4 Attorney's Fee Provision

The attorney's fee provision in forms 9-1, 9-2, 9-3, and 9-4 in this chapter is in paragraph D.2. If the loan transaction to which the security agreement relates is governed by Texas Finance Code chapter 342, then section 502 of that chapter limits attorney's fees that may be charged and assessed to those assessed by a court. Tex. Fin. Code § 342.502(b)(2). A loan is governed by chapter 342 if it is made by a lender engaged in the business of making, arranging, or negoti-

ating loans governed by that chapter; the interest rate exceeds 10 percent per year; the loan proceeds will be used for personal, family, or household use; and either the loan is not secured by a lien on real property or the loan is a secondary mortgage loan. Tex. Fin. Code § 342.005. See also the commentary on promissory notes at section 6.2:7 in this manual. If the related loan is governed by chapter 342, the attorney's fee clause should be modified as indicated.

§ 9.11 Additional Documents

For almost all transactions involving a security agreement, at least two other documents are necessary. The promissory note is described in chapter 6 in this manual, and the UCC1 financing statement, form 9-11, is described in section 9.13 below.

If a security agreement, like form 9-4, covers a debtor's interest as a partner in a general or limited partnership or as a member in a limited liability company, the secured party may need the consent of other partners, managers, or members, as applicable, to be able to create, attach, perfect, enforce, and foreclose its security interest. For entities formed under Texas law, a limited partnership agreement may restrict assignability of a partner's partnership interest in the limited partnership (*see* Tex. Bus. Orgs. Code § 153.251); a general partnership does not have to give effect to a transfer or assignment of a partner's partnership interest that is prohibited by its partnership agreement (*see* Tex. Bus. Orgs. Code § 152.405); and the regulations of a limited liability company may restrict assignability of a member's membership interest in the limited liability company (*see* Tex. Bus. Orgs. Code § 101.108(a)).

Partnership agreements and regulations of limited liability companies frequently contain provisions prohibiting any assignment, including a grant of a security interest, of a partner's or member's interest in the applicable entity and

stating that any such purported assignment or grant of a security interest is void. Sometimes assignment of an interest is permitted after obtaining consent. The requirements for consent may vary widely. The attorney for the secured party should review the applicable partnership agreement, limited liability company regulations, or comparable document for an entity formed under the laws of another jurisdiction to determine the assignability of the debtor's interest in the entity and what consents may be required. Restrictions on assignability of personal property as security for an obligation are disfavored under chapter 9.

Generally, the interest of a partner in a general or limited partnership or of a member in a limited liability company is a general intangible under chapter 9 and not a security, certificated or uncertificated, under chapter 8. *See* Tex. Bus. & Com. Code § 8.103(c). Under chapter 9, a term in an agreement relating to a general intangible that prohibits, restricts, or requires consent to the assignment or transfer of, or creation, attachment, or perfection of a security interest in, the general intangible is ineffective to impair the creation, attachment, or perfection of a security interest or to render such creation, attachment, or perfection a default or breach of the agreement. Tex. Bus. & Com. Code § 9.408(a). Section 9.408 does not, however, apply to an interest in a partnership or a limited liability company. Tex. Bus. & Com. Code § 9.408(e). Thus, restrictions on assignability in a partnership agreement, in regulations of a limited liability company, or in comparable documents for partnership or limited liability companies formed under laws of other states are effective to prevent the creation, attachment, or perfection of a security interest in a partner's or member's interest in the entity and to render such creation, attachment, or perfection a default under the partnership agreement, limited liability company agreement, or other comparable document if so provided in the entity's documents.

Moreover, even if a security interest is created, attached, and perfected in a person's interest in such an entity and there are anti-assignment provisions in the entity's organizational documents, neither the entity nor its partners or members owe any duty to the secured party and the secured party may not enforce its security interest. Tex. Bus. & Com. Code § 9.408(d). Depending on the bargaining position of the parties and more likely depending on the relative ownership interest of the debtor in the entity, the secured party may be able to obtain the consent by the entity or other owners of the entity to the creation, attachment, perfection, and enforcement of its security interest. The required consent should come from the persons whose consent is required under the organizational documents of the entity to an outright assignment of an owner's interest in the entity. In paragraph C.5. of security agreement form 9-4, the debtor represents that it has obtained the consent of all persons necessary to authorize the secured party to exercise its rights under the security agreement. This provision should be modified if such a consent is required under the organizational documents of the entity in which the debtor has an interest but is not obtained. A form of a consent is at form 9-10.

§ 9.12 Assignment of Security Interest

The secured party may assign the security interest created by the security agreement either before or after the interest is perfected, in accordance with section 9.514 of the Texas Business and Commerce Code.

If the financing statement is not filed before assignment of the security interest, the financing statement may show the assignment by giving the assignee's name and address. Tex. Bus. & Com. Code § 9.514. One way to show the assignment is to prepare a form UCC1Ad financing statement addendum (form 9-12 in this chapter) to the UCC1 financing statement

(form 9-11) to reflect the assignee of the secured party. The financing statement addendum should be attached to and filed with the financing statement.

If the financing statement is filed before the assignment, the parties should prepare a form UCC3 financing statement amendment (form 9-14), including the financing statement's file number and date of filing, the assignor's name, and the assignee's name and address. The financing statement amendment should be filed in the same filing office or offices as the assigned original financing statement. *Tex. Bus. & Com. Code* § 9.514. See section 9.15:2 below for additional instructions concerning the UCC3 financing statement amendment.

The assigning secured party should endorse the note and deliver it, the original security agreement, and the filing officer's acknowledgment copy of the original financing statement to the assignee.

§ 9.13 **Financing Statement and Other UCC Forms**

§ 9.13:1 **General Considerations**

The UCC1 financing statement, form 9-11 in this chapter, perfects a security interest for most classifications of collateral if it is filed with either the secretary of state in Austin or the county clerk, depending on the classification. *Tex. Bus. & Com. Code* § 9.501(a). *See also* *Tex. Bus. & Com. Code* § 9.310(a). The security agreement establishes the secured party's rights against the debtor, but perfection of the security interest by filing a financing statement, obtaining possession of the collateral, or obtaining control of the collateral establishes the rights of the secured party against competing parties, such as other secured creditors. *Tex. Bus. & Com. Code* § 9.201(a). *See Tex. Bus. & Com. Code* § 9.308 cmt. 2.

Filing a financing statement will not perfect a security interest in certain classifications of collateral. See section 9.5 above for an explanation of the different methods of perfecting a security interest and the type of collateral that may be perfected under each method.

Another exception to the financing statement requirement is a purchase-money security interest in consumer goods, which is perfected automatically. Even though this automatic perfection protects the retailer's rights against the consumer, retailers selling expensive merchandise often file a financing statement to protect themselves in case a debtor sells to another consumer. Without a financing statement on file, the subsequent sale would destroy the retailer's interest in the collateral. *Tex. Bus. & Com. Code* §§ 9.309, 9.320(b).

See section 9.5:3 above for a discussion of the contents of a financing statement. The financing statement is not intended to describe the full agreement of the parties but rather to give public notice of the security interest. *See Tex. Bus. & Com. Code* § 9.502 cmt. 2.

§ 9.13:2 **Cautions**

A financing statement is constructive notice to all parties of a secured party's rights in collateral. To give constructive notice of a security interest, the financing statement must be filed in the proper office. If there is doubt about the proper filing place, the attorney should file the financing statement in every place that might be appropriate. *See Tex. Bus. & Com. Code* § 9.501(a).

Certain types of collateral, such as motor vehicles and manufactured housing, are covered by other statutes and may require additional documentation, such as certificates of title. Other examples of such collateral include patents, trademarks, rolling stock, ships, and aircraft. *See Tex. Bus. & Com. Code* § 9.311(b).

§ 9.14 Instructions for Completing Form UCC1

§ 9.14:1 General Considerations

Nonstandard forms of financing statements should not be used in Texas. Texas filing offices may reject tendered written filings that are not on a standard form adopted by rule by the Texas secretary of state. Tex. Bus. & Com. Code § 9.5211.

See section 9.19 below for how to obtain a UCC1 and other financing statement forms. The attorney should review section 9.310(b) for a listing of collateral for which a financing statement is either unnecessary or ineffective in perfecting a security interest. See also section 9.5 above for a discussion of perfection of a security interest.

§ 9.14:2 Blocks 1, 2, and 3: Names of Debtor and Secured Party

For general information about designation of parties, see chapter 3 in this manual.

The debtor's correct name is crucial to the validity of the financing statement because records are indexed on that basis. The names of the debtor and of the secured party should appear on this form exactly as they appear on the security agreement. If the debtor is a registered organization, the debtor's name is the name stated to be the registered organization's name on the public organic record most recently filed with, issued by, or enacted by the debtor's jurisdiction of organization that states, amends, or restates the debtor's name. Tex. Bus. & Com. Code § 9.503(a)(1). For a Texas filing entity (as defined in Tex. Bus. Orgs. Code § 1.002(22)), this means that the debtor's name is the name stated to be the name of the filing entity on its certificate of formation or a restated certificate of formation and all amendments to an original or restated certificate of formation. Special rules

apply for an entity that is a trust or a decedent's estate. Tex. Bus. & Com. Code § 9.503(a)(1), (2), (3), (f), (h). If the debtor is an individual, the financing statement must use the name of the debtor as shown on the most recently issued unexpired Texas driver's license or most recently issued unexpired Texas Department of Public Safety-issued identification certificate and indicate the debtor's surname. Tex. Bus. & Com. Code §§ 9.503(a)(4), (g), 9.516(b)(3). If the debtor does not have a driver's license or identification certificate, the financing statement must provide the individual name of the debtor or the surname and first personal name of the debtor. Tex. Bus. & Com. Code § 9.503(a)(5). A trade name is not a sufficient name of a debtor. Tex. Bus. & Com. Code § 9.503(c). Any name used for a debtor other than the correct name renders the financing statement insufficient and seriously misleading unless the name used is so similar to the debtor's correct name that a search under the debtor's correct name, using the filing office's standard search logic, would disclose the filing with the incorrect name. Tex. Bus. & Com. Code § 9.506(c).

If the debtor's name changes and the change renders the original form seriously misleading, the secured party must file a UCC3 financing statement amendment (form 9-14 in this chapter) with the correct name within four months of the change to continue the security interest. Tex. Bus. & Com. Code § 9.507(c). A filing is seriously misleading if a search under the changed, now correct name, using the filing office's standard search logic, would not disclose the filing under the former, now incorrect, name. Tex. Bus. & Com. Code § 9.506(c).

§ 9.14:3 Block 4: Classification and Description of Collateral

For a general discussion of the significance of classification of collateral, see section 9.3:3 above.

The Texas Business and Commerce Code specifies that the description of collateral in the financing statement is sufficient if it “indicates the collateral covered by the financing statement. Tex. Bus. & Com. Code § 9.502(a)(3). A financing statement indicates the collateral covered if it contains a description of the collateral under section 9.108 or indicates that it covers all assets or all personal property. Tex. Bus. & Com. Code § 9.504.

A financing statement that correctly describes the original collateral continues perfection in after-acquired property, proceeds, and future advances without specific reference to these interests in the financing statement. If a financing statement is recorded and the general description in the financing statement shows that a security interest exists, any affected creditor should contact the secured party to determine if the security interest extends to such after-acquired property, proceeds, or future advances.

If the collateral is timber to be cut, fixtures, or as-extracted collateral, the description in the financing statement must include a description of both the collateral and the real property where it is located. Tex. Bus. & Com. Code § 9.502(b). The real property description must be “sufficient to give constructive notice of a mortgage under the law of this state if the description were contained in a mortgage. Tex. Bus. & Com. Code § 9.502(b)(3). For a general discussion of property descriptions, see section 3.7 in this manual.

§ 9.14:4 Concluding the Form

Block 3 of the form designates the secured party or its assignee. If the financing statement has been filed before assignment of the interest, the assignor should prepare a written assignment and also complete a form UCC3 financing statement amendment (form 9-14 in this chapter) for each UCC1 on file. Tex. Bus. & Com. Code

§ 9.514(b). See section 9.12 above for further suggestions.

A financing statement may be filed without the debtor’s signature on it if the debtor authorizes the filing. *See* Tex. Bus. & Com. Code § 9.509(a)(1). By entering into a security agreement a debtor automatically authorizes the filing of a financing statement covering the collateral described in the security agreement. Tex. Bus. & Com. Code § 9.509(b). If a secured party wants to file a financing statement before the debtor has entered into a security agreement, the secured party needs separate express authorization from the debtor. One way to evidence the debtor’s authorization is to have the debtor sign the financing statement. However, the UCC1 financing statement standard form does not provide a space for the debtor’s signature. Another way to evidence the debtor’s authorization is to have the debtor sign a statement, to which a copy of the completed form UCC1 is attached, authorizing the filing of the form.

§ 9.14:5 Filing

If Texas is the correct state in which to file a financing statement and no other statutory perfection rules apply, the proper office in which to file is determined by the classification of the collateral. Generally, the secretary of state’s office in Austin is the proper place to file a financing statement.

Exceptions to this general rule involve collateral significantly related to real property. For timber to be cut or as-extracted collateral, or if the financing statement is filed as a fixture filing, the proper place to file is in the real property records of the county clerk in the county in which the related real property is located. However, if the secured party has a deed-of-trust lien on the real property and a security interest in the timber to be cut, as-extracted collateral, or fixtures, the secured party does not need to file a separate financing statement in the real property

records, assuming that the deed of trust otherwise meets the requirements of a financing statement. Tex. Bus. & Com. Code § 9.502(b), (c).

The secretary of state accepts electronic filing of UCC financing statements through its website, www.sos.state.tx.us/ucc/uccforms.shtml.

A party in doubt about the proper place to file should file the statement in every possible place.

These rules apply only to Texas transactions. Filings may be required in other jurisdictions. See the discussion of perfection at section 9.6:3 above.

§ 9.15 Additional Documents

A typical security interest transaction requires a note, discussed in chapter 6 in this manual; a security agreement, forms 9-1 through 9-4 in this chapter; and a financing statement. Other documents that may be necessary include a form UCC1Ad financing statement addendum (form 9-12), a form UCC3 financing statement amendment (form 9-14), a form UCC3Ad financing statement amendment addendum (form 9-15), and a form UCC11 information request (form 9-16).

§ 9.15:1 Financing Statement Addendum

The form UCC1Ad financing statement addendum, form 9-12 in this chapter, serves several purposes.

The financing statement addendum may be used to identify an additional debtor, if there are more than two (the first two may be identified on the form UCC1 financing statement) (see item 11 of the form UCC1Ad); identify an additional secured party (see item 12 of the form); and reflect an assignment by the initial secured party to an assignee (see item 12 of the form). The

form may also be used to indicate if the financing statement covers timber to be cut, as-extracted collateral, or fixtures (see item 13 of the form); if so the form provides space to include a description of the real estate (see item 14 of the form) and the name of the record owner (if the debtor does not have a record interest) (see item 15 of the form). The form also provides space for an expanded description of the collateral (see item 16 of the form). The form may be used to indicate whether the debtor is a trust, a trustee for property held in trust, a decedent's estate (see item 17 of the form), or a transmitting utility (see item 18 of the form) or to indicate whether the filing is for a manufactured housing transaction or a public finance transaction (see item 18 of the form).

The name of the first debtor, identified in item 1 on the form UCC1 financing statement, should be inserted in item 9 of the related financing statement addendum to relate the financing statement addendum to the financing statement. The remaining items of the form should be completed only if appropriate.

The form UCC1Ad financing statement addendum should be attached to and filed with its related form UCC1 financing statement and not filed separately.

§ 9.15:2 Financing Statement Amendment

The form UCC3 financing statement amendment, form 9-14 in this chapter, serves several purposes, some of which are discussed in sections 9.9, 9.12, 9.14:2, and 9.14:4 above, in relation to the security agreement and financing statement.

The form provides for continuation of a security interest beyond the five-year duration of the original filing (Tex. Bus. & Com. Code § 9.515); assignment of a security interest if the assignment is made after the original financing

statement is filed (Tex. Bus. & Com. Code § 9.514(b)); termination of a security interest, which is a required procedure for the secured party if “there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value” (Tex. Bus. & Com. Code § 9.513(a)(1), (c)(1)); partial release of collateral; and amendment of the financing statement.

A separate form UCC3 should be used for each form UCC1 already filed, and each form UCC3 should relate to a particular financing statement by giving the financing statement’s file number and, because the Texas secretary of state does not use a unique number system that distinguishes among filings made in different years, the date of filing. The form UCC3 does not provide a separate block for the filing date of the related initial financing statement. The date of filing should be inserted in block 1a after the initial financing statement file number. The form UCC3 financing statement amendment should be filed in the same filing office or offices as the original financing statement to which it relates.

If, after a financing statement is filed in the correct state, the jurisdiction of the location of the debtor changes (for example, for a registered organization, the debtor changes its jurisdiction of organization; or for an organization that is not a registered organization, the debtor changes the state in which its place of business is located or, if the debtor has more than one place of business, the state in which its chief executive office is located; or for an individual debtor, the debtor changes his state of residence), the original filing is effective for only four months after the move. Tex. Bus. & Com. Code § 9.316(a)(2). The financing statement becomes ineffective to continue a perfected security interest unless the secured party files a form UCC3 in the state in which the debtor has relocated within the four-month period. Tex. Bus. & Com. Code § 9.316(a), (b). A mere change of an address

within a state of the location of the collateral, the location of a debtor’s place of business or chief executive office, or the location of an individual’s residence does not render an original filing ineffective.

If, after a financing statement is filed using the debtor’s then-correct name, the debtor’s name changes and the change renders the original filed financing statement seriously misleading, a UCC3 financing statement amendment with the changed, now correct name of the debtor must be filed within four months of the name change to continue the perfection by filing of the security interest. Tex. Bus. & Com. Code § 9.507(c). An original filing becomes seriously misleading if a search under the changed, now correct name, using the filing office’s standard search logic, would not disclose the filing under the former, now incorrect name. Tex. Bus. & Com. Code § 9.506(c).

§ 9.15:3 Financing Statement Amendment Addendum

The form UCC3Ad financing statement amendment addendum, form 9-15 in this chapter, is used to indicate additional information that cannot be included in the spaces provided in the form UCC3 financing statement amendment, form 9-14. It should be attached to and filed with the related form UCC3 financing statement amendment and not filed separately.

§ 9.15:4 Financing Statement Search

The form UCC11 information request, form 9-18 in this chapter, is the device commonly used to search for records of other secured interests in the property that may have priority over the interest being created. *See* Tex. Bus. & Com. Code § 9.523(c). To expedite this process, the attorney may use a private service that can complete a search quickly or an online service that can immediately verify the existence of a financing statement.

Like form UCC1, form UCC11 provides adequate instructions on its reverse side for completing the form.

§ 9.16 Extension and Termination

Most financing statements are effective for five years, after which they automatically expire. Tex. Bus. & Com. Code § 9.515(a). A financing statement filed in connection with a manufactured-home transaction or a public-finance transaction that indicates that fact is effective for thirty years from the date it is filed. Tex. Bus. & Com. Code § 9.515(b). The secured party may file a form UCC3 financing statement amendment (form 9-14 in this chapter) as a continuation statement not earlier than six months before the termination date. See sections 9.15:2 and 9.15:3 above. Once a financing statement has expired, the previous priority position is gone and a refile of the financing statement will be effective on the date of refile. Tex. Bus. & Com. Code § 9.515(c). The secretary of state accepts electronic filing of continuation and termination financing statements through its website, www.sos.state.tx.us/ucc/uccforms.shtml.

If after a financing statement is filed there is no longer an obligation secured by the collateral covered by the financing statement and there is no commitment to make an advance, incur an obligation, or otherwise give value, a termination statement on form UCC3 should be filed. Tex. Bus. & Com. Code § 9.513(a), (c). When a termination statement is filed the related financing statement ceases to be effective. Tex. Bus. & Com. Code § 9.513(d).

§ 9.17 Prefiling Financing Statement

A financing statement may be filed at any time, even before the security agreement is made. Tex. Bus. & Com. Code § 9.502(d). To fully protect the secured party, a financing statement

can be filed, and then, after the filing office confirms that the secured party has the desired priority position, the funds can be advanced. The debtor must authorize the secured party to file a financing statement before a security agreement is made. See sections 9.5:3 and 9.14:4 above.

§ 9.18 Collateral Transfer of Note and Lien

§ 9.18:1 General Considerations

In most secured transactions, the collateral (for example, the equipment) is the source of the security. However, in a transaction involving the pledge of a note secured by real property, the note itself may not be the primary source of security; the underlying real property may be the actual collateral. Therefore, the secured party and the attorney must carefully review the underlying transaction to understand the value of the collateral. The title policy, deed of trust, survey, financial reports, engineering reports, appraisals, and environmental reports may contain critical information.

§ 9.18:2 Instructions for Completing Collateral Transfer of Note and Lien

Parties: For general information about designation of parties, see chapter 3 in this manual.

Collateral Note: The collateral transfer of note and lien, form 9-8 in this chapter, contains a sample description of the note being pledged to the secured party. The description must be drafted to cover the actual note.

Current Balance: The current balance is that of the underlying collateral note. It is part of the debtor's representations in the agreement.

Collateral Note Security: The form contains a sample description of the deed of trust on the underlying collateral note. The description must

be drafted to cover the actual deed of trust and other collateral documents.

Property Description: For general information on property descriptions, see chapter 3.

Obligation: The agreement should identify the note that the collateral secures.

The subheading 'Other obligation' is appropriate if the form secures an obligation other than a note, such as the performance of a guaranty or indemnity or performance under a lease agreement.

Collateral Note Payments: Two alternate example clauses are shown on the agreement.

§ 9.18:3 Perfection

The security interest may be perfected by possession or by filing a financing statement covering the collateral note. A secured party that perfects its security interest in a collateral note by possession has priority over a secured party that perfects its security interest in the collateral note by filing a financing statement.

§ 9.18:4 Recording

It is recommended that the secured party record the collateral transfer of note and lien as soon as possible in the real property records, to put all parties dealing with the real property on notice of the secured party's interest in the collateral note and the real property securing the collateral note. Merely recording the collateral transfer of note and lien in the real property records does not perfect the secured party's security interest if the secured party (or a third party on its behalf) does not obtain possession of the collateral note or file a financing statement covering the note.

§ 9.18:5 Endorsement

To obtain the rights of a holder and of a holder in due course under Texas Business and Commerce Code chapter 3, the secured party must secure the payee's (or, if different, the current holder's) endorsement on the collateral note. Among the advantages of a secured party becoming a holder in due course of the collateral note is that the secured party also becomes the person entitled to enforce the collateral note. Tex. Bus. & Com. Code § 3.301. The endorsement may read as follows:

Pay to the order of [**name of secured party**] as collateral in accordance with collateral transfer of note and lien dated [**date**].

After the debt is repaid, the secured party should return the collateral note to the debtor. Additionally, either the secured party should endorse the collateral note to the debtor, or the debtor, on reacquiring the collateral note, may cancel its endorsement to the secured party. Tex. Bus. & Com. Code § 3.207. If the collateral transfer of note and lien has been recorded, the secured party should sign a release of collateral transfer of note and lien (see form 10-21 in this manual), and that document should be recorded.

§ 9.18:6 Collateral Note Maker's Estoppel Certificate

As additional security for the loan, the secured party should consider requiring the collateral note maker to sign the certificate set forth as form 9-9 in this chapter.

§ 9.19 Obtaining UCC Forms

The UCC forms in this manual are available in a fill-in-the-blank format over the Internet from the Texas secretary of state at www.sos.state.tx.us/ucc/uccforms.shtml.

[Reserved]

Form 9-1

Security Agreement

[Goods, Including Documents Covering Goods, Equipment, Inventory, Consumer Goods, and Farm Products]

Basic Information

Date:

Debtor:

Debtor's Mailing Address:

Secured Party:

Secured Party's Mailing Address:

Classification of Collateral: [select one or more of the following: Documents covering goods/ Equipment/Equipment to become a fixture/Inventory/Consumer goods/Farm products]

Collateral (including all accessions):

All of Debtor's interest in the following personal property and all proceeds [include if a purchase-money security interest in inventory is involved: , including chattel paper or instruments constituting proceeds of the inventory and in proceeds of such chattel paper and instruments,] of such property, including [describe the specific collateral or select one or more of the following: documents, including documents of title, warehouse receipts, and bills of lading, covering equipment and/or inventory; equipment; inventory; consumer goods consisting of [describe goods]; and farm products [, wherever located]] [include if applicable: , and [all after-acquired collateral of the same classification/all products, increase, and offspring of the collateral]].

Obligation

Note

Date:

Original principal amount:

Borrower (Obligor):

Include either or both of the following if applicable.

Other debt/Future advances: The security interest also secures all other present and future debts and liabilities of Debtor and/or Obligor to Secured Party, including future advances.

Other obligation[s]:

Continue with the following.

A. Debtor's Representations Concerning Debtor and Locations

A.1. The collateral is located solely at [address, city, state].

Include one or more of the following paragraphs as applicable and modify paragraph numbers as appropriate.

A.2. [Debtor's place of business/Debtor's chief executive office] is located at [address, city, state].

Include the following if the debtor is an individual.

A.3. Debtor's residence is located at [address, city, state].

Include the following if the debtor is a corporation, limited partnership, or limited liability company.

A.3. Debtor's state of organization is [Texas/[state]], and Debtor's name, as shown in its public organic record, as amended, is exactly as set forth above.

Continue with the following.

A.4. Debtor's records concerning the Collateral are located at [address, city, state].

B. Granting Clause

Debtor grants to Secured Party a security interest in the Collateral and all its proceeds to secure the Obligation and all renewals, modifications, and extensions of the Obligation. Debtor authorizes Secured Party to file a financing statement describing the Collateral.

C. Debtor Represents the Following:

C.1. No financing statement covering the Collateral is filed in any public office [include if the secured party has prefiled a financing statement or otherwise has a financing statement on file: except any financing statement in favor of Secured Party].

C.2. Debtor owns the Collateral and has the authority to grant this security interest, free from any setoff, claim, restriction, security interest, or encumbrance except liens for taxes not yet due.

C.3. None of the Collateral is an accession to any goods, is commingled with other goods, is or will become an accession or part of a product or mass with other goods, or is or will become covered by a document except as provided in this agreement.

C.4. All information about Debtor's financial condition is or will be accurate when provided to Secured Party.

C.5. None of the Collateral is affixed to real estate.

Include the following if applicable if the debtor is an individual.

C.6. The Obligation was not incurred primarily for personal, family, or household purposes.

And/Or

C.7. The collateral was not acquired and will not be held primarily for personal, family, or household purposes.

Continue with the following.

D. Debtor Agrees to—

D.1. Defend the Collateral against all claims adverse to Secured Party's interest; pay all taxes imposed on the Collateral or its use; keep the Collateral free from liens, except for liens in favor of Secured Party or for taxes not yet due; keep the Collateral in Debtor's possession and ownership except as otherwise provided in this agreement; maintain the Collateral in good condition; and protect the Collateral against waste, except for ordinary wear and tear.

D.2. Pay all Secured Party's expenses, including reasonable attorney's fees and legal expenses [**include for a loan transaction subject to Texas Finance Code section 342.502:** assessed by a court], incurred to (a) obtain, preserve, perfect, defend, or enforce this agreement; (b) retake, hold, prepare for disposition, dispose, collect, or enforce the Collateral; or (c) collect or enforce the Obligation. These expenses will bear interest from the date of advance at the rate stated in the Note for matured, unpaid amounts and are payable on demand at the place where the Obligation is payable. These expenses and interest are part of the Obligation and are secured by this agreement.

D.3. Sign and deliver to Secured Party any documents or instruments that Secured Party considers necessary to obtain, maintain, and perfect this security interest in the Collateral. This includes a certificate of title for any Collateral covered by a certificate of title so that Secured Party may have the certificate of title reissued with its lien noted thereon.

D.4. Notify Secured Party immediately of any event of default and of any material change (a) in the Collateral, (b) in Debtor's Mailing Address, (c) in the location of any Collateral, (d) in any other representation in this agreement, or (e) that may affect this security interest, or of any change (f) in Debtor's name or (g) of any location set forth above to another state.

D.5. Use the Collateral primarily according to the stated classification.

D.6. Maintain accurate records of the Collateral at the address set forth above, furnish Secured Party any requested information related to the Collateral, and permit Secured Party to inspect and copy all records relating to the Collateral.

D.7. Permit Secured Party to inspect the Collateral.

Include the following if the collateral includes inventory and the security interest is a purchase-money security interest.

D.8. Deliver to Secured Party on receipt all chattel paper or instruments constituting proceeds of the inventory and, at Secured Party's request, deposit all checks, items, and other cash proceeds of the inventory in a special bank account designated by Secured Party, who alone will have power of withdrawal.

Continue with the following.

E. Debtor Agrees Not to—

E.1. Sell, transfer, or encumber any of the Collateral, except in the ordinary course of Debtor's business.

E.2. Except as permitted in this agreement, permit the Collateral to be affixed to any real estate, to become an accession to any goods, to be commingled with other goods, to become a fixture, accession, or part of a product or mass with other goods, or to be covered by a document, except a document in the possession of Secured Party.

Select one of the following.

Include the following if the debtor is a corporation, limited partnership, or limited liability company.

E.3. Change its name or jurisdiction of organization, merge or consolidate with any person, or convert to a different entity without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Or

Include the following if the debtor is an entity other than a corporation, limited partnership, or limited liability company.

E.3. Change the state in which Debtor's place of business (or chief executive office if Debtor has more than one place of business) is located, change its name, or convert to a different entity without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Or

Include the following if the debtor is an individual.

E.3. Change Debtor's name or state of residence without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Continue with the following.

Include the following if the collateral includes inventory and the security interest is a purchase-money security interest.

E.4. Deliver any item of inventory to a buyer before the buyer delivers to Debtor a check, another item, money, an instrument, or chattel paper in full payment therefor or commingle any check, item, money, or other cash proceeds from the sale or lease of an item of inventory with any of Debtor's other funds or property.

Continue with the following.

F. Insurance and Risk of Loss

F.1. Debtor will insure the Collateral in accordance with Secured Party's reasonable requirements regarding choice of carrier, risks insured against, and amount of coverage. Policies must be written in favor of Debtor, be endorsed to name Secured Party as an additional insured or as otherwise directed in writing by Secured Party, and provide that Secured Party will receive at least ten days' notice before cancellation. Debtor must provide copies of the policies or evidence of insurance to Secured Party.

F.2. **COLLATERAL PROTECTION INSURANCE NOTICE**

In accordance with the provisions of section 307.052(a) of the Texas Finance Code, the Secured Party hereby notifies the Debtor as follows:

(A) the Debtor is required to:

- (i) keep the collateral insured against damage in the amount the Secured Party specifies;**
- (ii) purchase the insurance from an insurer that is authorized to do business in the state of Texas or an eligible surplus lines insurer;
and**
- (iii) name the Secured Party as the person to be paid under the policy in the event of a loss;**

(B) the Debtor must, if required by the Secured Party, deliver to the Secured Party a copy of the policy and proof of the payment of premiums; and

(C) if the Debtor fails to meet any requirement listed in Paragraph (A) or (B), the Secured Party may obtain collateral protection insurance on behalf of the Debtor at the Debtor's expense.

F.3. Debtor assumes all risk of loss to the Collateral.

F.4. Debtor appoints Secured Party as attorney-in-fact to collect any returned unearned premiums and proceeds of any insurance on the Collateral and to endorse and deliver to Secured Party any payment from such insurance made payable to Debtor. Debtor's appointment of Secured Party as Debtor's agent is coupled with an interest and if Debtor is an individual will survive any disability of Debtor.

G. Default and Remedies

G.1. A default exists if—

- a. Debtor, Obligor, or any secondary obligor fails to timely pay or perform any obligation or covenant in any written agreement between Secured Party and any of Debtor, Obligor, or secondary obligor;
- b. any representation in this agreement or in any other written agreement between Secured Party and any of Debtor, Obligor, or secondary obligor is materially false when made;
- c. a receiver is appointed for Debtor, Obligor, any secondary obligor, or any Collateral;
- d. any Collateral is assigned for the benefit of creditors;
- e. a bankruptcy or insolvency proceeding is commenced by Debtor, a partnership in which Debtor is a general partner, Obligor, or any secondary obligor;

- f. a bankruptcy or insolvency proceeding is commenced against Debtor, a partnership in which Debtor is a general partner, Obligor, or any secondary obligor, and the proceeding continues without dismissal for sixty days, the party against whom the proceeding is commenced admits the material allegations of the petition against it, or an order for relief is entered;
- g. any of the following parties is terminated, begins to wind up its affairs, is authorized to terminate or wind up its affairs by its governing body or persons, or any event occurs or condition exists that permits the termination or winding up of the affairs of any of the following parties: Debtor; a partnership of which Debtor is a general partner; Obligor; or any secondary obligor; or
- h. any Collateral is impaired by loss, theft, damage, levy and execution, issuance of an official writ or order of seizure, or destruction, unless it is promptly replaced with collateral of like kind and quality or restored to its former condition.

G.2. If a default exists, Secured Party may—

- a. demand, collect, convert, redeem, settle, compromise, receipt for, realize on, sue for, and adjust the Collateral either in Secured Party's or Debtor's name, as Secured Party desires, or take control of any proceeds of the Collateral and apply the proceeds against the Obligation;
- b. take possession of any Collateral not already in Secured Party's possession, without demand or legal process, and for that purpose Debtor grants Secured Party the right to enter any premises where the Collateral may be located;

- c. without taking possession, sell, lease, or otherwise dispose of the Collateral at any public or private sale in accordance with law; or
- d. exercise any rights and remedies granted by law or this agreement.

G.3. Foreclosure of this security interest by suit does not limit Secured Party's remedies, including the right to sell the Collateral under the terms of this agreement. Secured Party may exercise all remedies at the same or different times, and no remedy is a defense to any other. Secured Party's rights and remedies include all those granted by law and those specified in this agreement.

G.4. Secured Party's delay in exercising, partial exercise of, or failure to exercise any of its remedies or rights does not waive Secured Party's rights to subsequently exercise those remedies or rights. Secured Party's waiver of any default does not waive any other default by Debtor. Secured Party's waiver of any right in this agreement or of any default is binding only if it is in writing. Secured Party may remedy any default without waiving it.

G.5. Secured Party has no obligation to clean or otherwise prepare the Collateral for sale.

G.6. Secured Party has no obligation to satisfy the Obligation by attempting to collect the Obligation from any other person liable for it. Secured Party may release, modify, or waive any collateral provided by any other person to secure any of the Obligation. If Secured Party attempts to collect the Obligation from any other person liable for it or releases, modifies, or waives any collateral provided by any other person, that will not affect Secured Party's rights against Debtor. Debtor waives any right Debtor may have to require Secured Party to pursue any third person for any of the Obligation.

G.7. If Secured Party must comply with any applicable state or federal law requirements in connection with a disposition of the Collateral, such compliance will not be considered to adversely affect the commercial reasonableness of a sale of the Collateral.

G.8. Secured Party may sell the Collateral without giving any warranties as to the Collateral. Secured Party may specifically disclaim any warranties of title or the like. This procedure will not be considered to adversely affect the commercial reasonableness of a sale of the Collateral.

G.9. If Secured Party sells any of the Collateral on credit, Debtor will be credited only with payments actually made by the purchaser and received by Secured Party for application to the indebtedness of the purchaser. If the purchaser fails to pay for the Collateral, Secured Party may resell the Collateral and Debtor will be credited with the proceeds of the sale.

G.10. If Secured Party purchases any of the Collateral being sold, Secured Party may pay for the Collateral by crediting the purchase price against the Obligation.

G.11. Secured Party has no obligation to marshal any assets in favor of Debtor or against or in payment of the Note, any of the Other Obligation[s], or any other obligation owed to Secured Party by Debtor or any other person.

G.12. If the Collateral is sold after default, recitals in the bill of sale or transfer will be prima facie evidence of their truth and all prerequisites to the sale specified by this agreement and by law will be presumed satisfied.

H. General

H.1. Secured Party may at any time—

- a. take control of proceeds of insurance on the Collateral and reduce any part of the Obligation accordingly or permit Debtor to use the funds to repair or replace the Collateral and
- b. purchase single-interest insurance coverage that will protect only Secured Party if Debtor fails to maintain insurance, and premiums for the insurance will become part of the Obligation.

H.2. Notice is reasonable if it is mailed, postage prepaid, to Debtor at Debtor's Mailing Address at least ten days before any public sale or ten days before the time when the Collateral may be otherwise disposed of without further notice to Debtor.

H.3. This security interest will attach to after-acquired consumer goods only to the extent permitted by law.

H.4. This security interest will neither affect nor be affected by any other security for any of the Obligation. Neither extensions of any of the Obligation nor releases of any of the Collateral will affect the priority or validity of this security interest.

H.5. This agreement binds, benefits, and may be enforced by the successors in interest of Secured Party and will bind all persons who become bound as debtors to this agreement. Assignment of any part of the Obligation and Secured Party's delivery of any part of the Collateral will fully discharge Secured Party from responsibility for that part of the Collateral. If such an assignment is made, Debtor will render performance under this agreement to the assignee. Debtor waives and will not assert against any assignee any claims, defenses, or setoffs that Debtor could assert against Secured Party except defenses that cannot be waived. All representations and obligations are joint and several as to each Debtor.

H.6. This agreement may be amended only by an instrument in writing signed by Secured Party and Debtor.

H.7. The unenforceability of any provision of this agreement will not affect the enforceability or validity of any other provision.

H.8. This agreement will be construed according to Texas law, without regard to choice-of-law rules of any jurisdiction. This agreement is to be performed in [include if applicable in a consumer transaction: , and has been signed by Debtor in,] the county of Secured Party's Mailing Address.

H.9. Interest on the Obligation secured by this agreement will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the Obligation or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the Obligation or, if the principal of the Obligation has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the Obligation.

H.10. In no event may this agreement secure payment of any debt that may not lawfully be secured by a lien on real estate or create a lien otherwise prohibited by law.

H.11. When the context requires, singular nouns and pronouns include the plural.

H.12. Any term defined in sections 1.101 to 9.709 of the Texas Business and Commerce Code and not defined in this agreement has the meaning given to the term in the Code.

H.13. Except for inventory collateral, if the Obligation includes purchase money for the Collateral, Debtor's repayment of the Obligation will be applied on a first-in-first-out basis with the effect that the portion of the Obligation used to purchase a particular item of Collateral will be paid in the chronological order in which Debtor purchased the Collateral.

Include the following if the collateral is farm products.

H.14. The farm products addendum is attached to this agreement and incorporated into it for all purposes. **[Attach form 9-5 in this chapter.]**

Include the following if the collateral is equipment or inventory on which ad valorem taxes are assessed.

H.15. **Debtor waives and surrenders to Secured Party (a) Debtor's power to authorize anyone (other than Secured Party or Debtor) to pay ad valorem taxes on the Collateral and (b) Debtor's power to authorize a taxing entity to transfer its tax lien on the Collateral to anyone other than Secured Party. Debtor agrees and declares that any authorization from Debtor to another (other than Secured Party) to pay the taxes and transfer a tax lien on the Collateral is void.**

Continue with the following.

[Name of debtor]

Form 9-2

Security Agreement

[Accounts, Chattel Paper, General Intangibles, Commercial Tort Claims]

Basic Information

Date:

Debtor:

Debtor's Mailing Address:

Secured Party:

Secured Party's Mailing Address:

Classification of Collateral: [**select one or more of the following:** [Accounts/Chattel paper/
General intangibles/Commercial tort claim]]

Collateral:

All of Debtor's interest in the following personal property and all supporting obligations and proceeds of such property [**describe the specific collateral or select one or more of the following:** accounts; chattel paper; general intangibles; commercial tort claims arising out of Debtor's claim against [**name**] and other persons; and all rights to payment arising out of a judgment or settlement of such commercial tort claim, including under any instrument, chattel paper, or settlement agreement] [**include if applicable:** and all after-acquired collateral of the same classification].

Obligation

Note

Date:

Original principal amount:

Borrower (Obligor):

Include either or both of the following if applicable.

Other debt/Future advances: The security interest also secures all other present and future debts and liabilities of Debtor and/or Obligor to Secured Party, including future advances.

Other obligation[s]:

Continue with the following.

A. Debtor's Representations Concerning Debtor and Locations

A.1. The chattel paper collateral is located solely at [address, city, state].

Include one or more of the following paragraphs as applicable and modify paragraph numbers as appropriate.

A.2. [Debtor's place of business/Debtor's chief executive office] is located at [address, city, state].

Include the following if the debtor is an individual.

A.3. Debtor's residence is located at [address, city, state].

Include the following if the debtor is a corporation, limited partnership, or limited liability company.

A.3. Debtor's state of organization is [Texas/[state]], and Debtor's name, as shown in its public organic record, as amended, is exactly as set forth above.

Continue with the following.

A.4. Debtor's records concerning the Collateral are located at [address, city, state].

B. Granting Clause

Debtor grants to Secured Party a security interest in the Collateral and all its proceeds to secure the Obligation and all renewals, modifications, and extensions of the Obligation. Debtor authorizes Secured Party to file a financing statement describing the Collateral.

C. Debtor Represents the Following:

C.1. No financing statement covering the Collateral is filed in any public office [include if the secured party has prefiled a financing statement or otherwise has a financing statement on file: except any financing statement in favor of Secured Party].

C.2. Debtor owns the Collateral and has the authority to grant this security interest, free from any setoff, claim, restriction, security interest, or encumbrance except liens for taxes not yet due.

C.3. All information about Debtor's financial condition is or will be accurate when provided to Secured Party.

C.4. Each account and chattel paper in the Collateral is and will be the valid, legally enforceable obligation of a third-party account debtor or obligor.

C.5. If any Collateral or proceeds include obligations of third parties to Debtor, the transactions creating those obligations conform and will conform in all respects to applicable state and federal consumer credit law.

C.6. The chattel paper Collateral is in tangible, not electronic, form and has only one original counterpart. No person, other than Debtor or Secured Party, has actual or constructive possession of any chattel paper Collateral.

D. Debtor Agrees to—

D.1. Defend the Collateral against all claims adverse to Secured Party's interest; pay all taxes imposed on the Collateral; keep the Collateral free from liens, except for liens in favor of Secured Party or for taxes not yet due; and keep the Collateral in Debtor's possession and ownership except as otherwise provided in this agreement.

D.2. Pay all Secured Party's expenses, including reasonable attorney's fees and legal expenses [**include for a loan transaction subject to Texas Finance Code section 342.502:** assessed by a court], incurred to (a) obtain, preserve, perfect, defend, or enforce this agreement; (b) retake, hold, prepare for disposition, dispose, collect, or enforce the Collateral; or (c) collect or enforce the Obligation. These expenses will bear interest from the date of advance at the rate stated in the Note for matured, unpaid amounts and are payable on demand at the place where the Obligation is payable. These expenses and interest are part of the Obligation and are secured by this agreement.

D.3. Sign and deliver to Secured Party any documents or instruments that Secured Party considers necessary to obtain, maintain, and perfect this security interest in the Collateral.

D.4. Notify Secured Party immediately of any event of default and of any material change (a) in the Collateral, (b) in Debtor's Mailing Address, (c) in the location of any Collateral, (d) in any other representation or warranty in this agreement, or (e) that may affect this security interest, or of any change (f) in Debtor's name or (g) of any location set forth above to another state.

D.5. Use the Collateral primarily according to the stated classification.

D.6. Maintain accurate records of the Collateral at the address set forth above; furnish Secured Party any requested information related to the Collateral; and permit Secured Party to inspect and copy all records relating to the Collateral.

D.7. Preserve the liability of all obligors on the Collateral and preserve the priority of all security for the Collateral.

D.8. On Secured Party's demand, hold payments, including instruments, items, and money received as proceeds of the Collateral, separate and in an express trust for Secured Party and deposit all such payments received as proceeds of the Collateral in a special bank account designated by Secured Party, who alone will have power of withdrawal.

D.9. Inform Secured Party immediately of the rejection of property, a delay in delivery or performance, or a claim made in regard to any Collateral.

D.10. As trustee for Secured Party, keep returned property segregated from Debtor's other property until Secured Party has been paid the amount loaned against the related account and deliver the property on demand to Secured Party.

D.11. Pay Secured Party the unpaid amount of an account in the Collateral under any of the following conditions: if the account is not paid when due; if a purchaser rejects the property or services covered by the account; or if Secured Party rejects the account as unsatisfactory. Secured Party may retain the account in the Collateral and may charge any deposit account of Debtor with the unpaid amount.

D.12. Cause each chattel paper in the Collateral to have only one original counterpart and, at the request of Secured Party, (a) immediately deliver to Secured Party all current and after-acquired chattel paper Collateral in Debtor's possession and either endorse it to Secured Party's order or give Secured Party appropriate executed powers, (b) obtain the acknowledgment of any other person in possession of chattel paper Collateral of Secured Party's security

interest in the Collateral, or (c) mark each chattel paper in the Collateral with a legend indicating that it is subject to a security interest under this agreement.

E. Debtor Agrees Not to—

E.1. Sell, transfer, or encumber any of the Collateral, except in the ordinary course of Debtor's business.

Select one of the following.

Include the following if the debtor is a corporation, limited partnership, or limited liability company.

E.2. Change its name or jurisdiction of organization, merge or consolidate with any person, or convert to a different entity without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Or

Include the following if the debtor is an entity other than a corporation, limited partnership, or limited liability company.

E.2. Change the state in which Debtor's place of business (or chief executive office if Debtor has more than one place of business) is located, change its name, or convert to a different entity without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Or

Include the following if the debtor is an individual.

E.2. Change Debtor's name or state of residence without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Continue with the following.

E.3. Modify any agreement related to the Collateral.

E.4. Commingle the Collateral or any proceeds with any of Debtor's other funds or property.

F. Insurance and Risk of Loss

F.1. Debtor will insure the Collateral in accordance with Secured Party's reasonable requirements regarding choice of carrier, risks insured against, and amount of coverage. Policies must be written in favor of Debtor, be endorsed to name Secured Party as an additional insured or as otherwise directed in writing by Secured Party, and provide that Secured Party will receive at least ten days' notice before cancellation. Debtor must provide copies of the policies or evidence of insurance to Secured Party.

***F.2.* COLLATERAL PROTECTION INSURANCE NOTICE**

In accordance with the provisions of section 307.052(a) of the Texas Finance Code, the Secured Party hereby notifies the Debtor as follows:

(A) the Debtor is required to:

(i) keep the collateral insured against damage in the amount the Secured Party specifies;

**(ii) purchase the insurance from an insurer that is authorized to do business in the state of Texas or an eligible surplus lines insurer;
and**

(iii) name the Secured Party as the person to be paid under the policy in the event of a loss;

(B) the Debtor must, if required by the Secured Party, deliver to the Secured Party a copy of the policy and proof of the payment of premiums; and

(C) if the Debtor fails to meet any requirement listed in Paragraph (A) or (B), the Secured Party may obtain collateral protection insurance on behalf of the Debtor at the Debtor's expense.

F.3. Debtor assumes all risk of loss to the Collateral.

F.4. Debtor appoints Secured Party as attorney-in-fact to collect any returned unearned premiums and proceeds of any insurance on the Collateral and to endorse and deliver to Secured Party any payment from such insurance made payable to Debtor. Debtor's appointment of Secured Party as Debtor's agent is coupled with an interest and if Debtor is an individual will survive any disability of Debtor.

G. Default and Remedies

G.1. A default exists if—

- a. Debtor, Obligor, or any secondary obligor fails to timely pay or perform any obligation or covenant in any written agreement between Secured Party and any of Debtor, Obligor, or secondary obligor;
- b. any representation in this agreement or in any other written agreement between Secured Party and any of Debtor, Obligor, or secondary obligor is materially false when made;
- c. a receiver is appointed for Debtor, Obligor, any secondary obligor, or any Collateral;
- d. any Collateral is assigned for the benefit of creditors;

- e. a bankruptcy or insolvency proceeding is commenced by Debtor, a partnership in which Debtor is a general partner, Obligor, or any secondary obligor;
- f. a bankruptcy or insolvency proceeding is commenced against Debtor, a partnership in which Debtor is a general partner, Obligor, or any secondary obligor, and the proceeding continues without dismissal for sixty days, the party against whom the proceeding is commenced admits the material allegations of the petition against it, or an order for relief is entered;
- g. any of the following parties is terminated, begins to wind up its affairs, is authorized to terminate or wind up its affairs by its governing body or persons, or any event occurs or condition exists that permits the termination or winding up of the affairs of any of the following parties: Debtor; a partnership of which Debtor is a general partner; Obligor; or any secondary obligor; or
- h. any Collateral is impaired by loss, theft, damage, levy and execution, issuance of an official writ or order of seizure, or destruction, unless it is promptly replaced with collateral of like kind and quality or restored to its former condition.

G.2. If a default exists, Secured Party may—

- a. demand, collect, convert, redeem, settle, compromise, receipt for, realize on, sue for, and adjust the Collateral either in Secured Party's or Debtor's name, as Secured Party desires, or take control of any proceeds of the Collateral and apply the proceeds against the Obligation;

- b. take possession of any Collateral not already in Secured Party's possession, without demand or legal process, and for that purpose Debtor grants Secured Party the right to enter any premises where the Collateral may be located;
- c. without taking possession, sell, lease, or otherwise dispose of the Collateral at any public or private sale in accordance with law;
- d. exercise any rights and remedies granted by law or this agreement;
- e. notify obligors on the Collateral to pay Secured Party directly and enforce Debtor's rights against such obligors; or
- f. as Debtor's agent, make any endorsements in Debtor's name and on Debtor's behalf.

G.3. Foreclosure of this security interest by suit does not limit Secured Party's remedies, including the right to sell the Collateral under the terms of this agreement. Secured Party may exercise all remedies at the same or different times, and no remedy is a defense to any other. Secured Party's rights and remedies include all those granted by law and those specified in this agreement.

G.4. Secured Party's delay in exercising, partial exercise of, or failure to exercise any of its remedies or rights does not waive Secured Party's rights to subsequently exercise those remedies or rights. Secured Party's waiver of any default does not waive any other default by Debtor. Secured Party's waiver of any right in this agreement or of any default is binding only if it is in writing. Secured Party may remedy any default without waiving it.

G.5. Secured Party has no obligation to clean or otherwise prepare the Collateral for sale.

G.6. At any time Secured Party may contact obligors on the Collateral directly to verify information furnished by Debtor.

G.7. Secured Party has no obligation to collect any of the Collateral and is not liable for failure to collect any of the Collateral, for failure to preserve any rights pertaining to the Collateral, or for any act or omission on the part of Secured Party or Secured Party's officers, agents, or employees, except willful misconduct.

G.8. Secured Party has no obligation to satisfy the Obligation by attempting to collect the Obligation from any other person liable for it. Secured Party may release, modify, or waive any collateral provided by any other person to secure any of the Obligation. If Secured Party attempts to collect the Obligation from any other person liable for it or releases, modifies, or waives any collateral provided by any other person, that will not affect Secured Party's rights against Debtor. Debtor waives any right Debtor may have to require Secured Party to pursue any third person for any of the Obligation.

G.9. If Secured Party must comply with any applicable state or federal law requirements in connection with a disposition of the Collateral, such compliance will not be considered to adversely affect the commercial reasonableness of a sale of the Collateral.

G.10. Secured Party may sell the Collateral without giving any warranties as to the Collateral. Secured Party may specifically disclaim any warranties of title or the like. This procedure will not be considered to adversely affect the commercial reasonableness of a sale of the Collateral.

G.11. If Secured Party sells any of the Collateral on credit, Debtor will be credited only with payments actually made by the purchaser and received by Secured Party for application to the indebtedness of the purchaser. If the purchaser fails to pay for the Collateral, Secured Party may resell the Collateral and Debtor will be credited with the proceeds of the sale.

G.12. If Secured Party purchases any of the Collateral being sold, Secured Party may pay for the Collateral by crediting the purchase price against the Obligation.

G.13. Secured Party has no obligation to marshal any assets in favor of Debtor or against or in payment of the Note, any of the Other Obligation[s], or any other obligation owed to Secured Party by Debtor or any other person.

G.14. If the Collateral is sold after default, recitals in the bill of sale or transfer will be prima facie evidence of their truth and all prerequisites to the sale specified by this agreement and by law will be presumed satisfied.

H. General

H.1. Secured Party may at any time—

- a. take control of proceeds of insurance on the Collateral and reduce any part of the Obligation accordingly or permit Debtor to use the funds to repair or replace the Collateral and
- b. purchase single-interest insurance coverage that will protect only Secured Party if Debtor fails to maintain insurance, and premiums for the insurance will become part of the Obligation.

H.2. Notice is reasonable if it is mailed, postage prepaid, to Debtor at Debtor's Mailing Address at least ten days before any public sale or ten days before the time when the Collateral may be otherwise disposed of without further notice to Debtor.

H.3. This security interest will attach to an after-acquired commercial tort claim only to the extent permitted by law.

H.4. This security interest will neither affect nor be affected by any other security for any of the Obligation. Neither extensions of any of the Obligation nor releases of any of the Collateral will affect the priority or validity of this security interest.

H.5. This agreement binds, benefits, and may be enforced by the successors in interest of Secured Party and will bind all persons who become bound as debtors to this agreement. Assignment of any part of the Obligation and Secured Party's delivery of any part of the Collateral will fully discharge Secured Party from responsibility for that part of the Collateral. If such an assignment is made, Debtor will render performance under this agreement to the assignee. Debtor waives and will not assert against any assignee any claims, defenses, or setoffs that Debtor could assert against Secured Party except defenses that cannot be waived. All representations and obligations are joint and several as to each Debtor.

H.6. This agreement may be amended only by an instrument in writing signed by Secured Party and Debtor.

H.7. The unenforceability of any provision of this agreement will not affect the enforceability or validity of any other provision.

H.8. This agreement will be construed according to Texas law, without regard to choice-of-law rules of any jurisdiction. This agreement is to be performed in [**include if applicable in a consumer transaction:** , and has been signed by Debtor in,] the county of Secured Party's Mailing Address.

H.9. Interest on the Obligation secured by this agreement will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the Obligation or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the Obligation or, if the

principal of the Obligation has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the Obligation.

H.10. In no event may this agreement secure payment of any debt that may not lawfully be secured by a lien on real estate or create a lien otherwise prohibited by law.

H.11. When the context requires, singular nouns and pronouns include the plural.

H.12. Any term defined in sections 1.101 to 9.709 of the Texas Business and Commerce Code and not defined in this agreement has the meaning given to the term in the Code.

[Name of debtor]

Form 9-3

Security Agreement
[Instruments, Investment Property]

Basic Information

Date:

Debtor:

Debtor's Mailing Address:

Secured Party:

Secured Party's Mailing Address:

Classification of Collateral: **[select one or both of the following:** [Instruments [and]/Investment property]]

Collateral:

All of Debtor's interest in the following personal property and all supporting obligations and proceeds of such property: **[describe the specific collateral as follows:** that certain **[[title of instrument]/note]**, dated **[date]**, in the original face amount of **[\$[amount]]**, issued by **[name]** as maker and payable to **[name]** as payee/all instruments or notes acquired by or payable to Debtor arising out of Debtor's sale of lots in the **[name]** subdivision otherwise known as **[insert legal description]/[number]** shares of **[describe class or series of preferred or common]** stock of **[name of corporation]** represented by certificate number[s] **[number[s]]**, brokerage account number **[number]**, maintained in the name of Debtor with **[name of broker or securities intermediary]/**

instruments, including promissory notes/investment property, including securities]
[include if applicable: and all after-acquired collateral of the same classification].

Obligation

Note

Date:

Original principal amount:

Borrower (Obligor):

Include either or both of the following if applicable.

Other debt/Future advances: The security interest also secures all other present and future debts and liabilities of Debtor and/or Obligor to Secured Party, including future advances.

Other obligation[s]:

Continue with the following.

A. Debtor's Representations Concerning Debtor and Locations

Include one or more of the following paragraphs as applicable and modify paragraph numbers as appropriate.

A.1. [Debtor's place of business/Debtor's chief executive office] is located at [address, city, state].

Include the following if the debtor is an individual.

A.2. Debtor's residence is located at [address, city, state].

Include the following if the debtor is a corporation, limited partnership, or limited liability company.

A.2. Debtor's state of organization is [Texas/[state]], and Debtor's name, as shown in its public organic record, as amended, is exactly as set forth above.

A.3. Debtor's records concerning the Collateral are located at [address, city, state].

B. Granting Clause

Debtor grants to Secured Party a security interest in the Collateral and all its proceeds to secure the Obligation and all renewals, modifications, and extensions of the Obligation. Debtor authorizes Secured Party to file a financing statement describing the Collateral.

C. Debtor Represents the Following:

C.1. No financing statement covering the Collateral is filed in any public office [include if the secured party has prefiled a financing statement or otherwise has a financing statement on file: except any financing statement in favor of Secured Party].

C.2. Debtor owns the Collateral and has the authority to grant this security interest, free from any setoff, claim, restriction, security interest, or encumbrance except liens for taxes not yet due.

C.3. All information about Debtor's financial condition is or will be accurate when provided to Secured Party.

C.4. Each instrument and security, certificated or uncertificated, in the Collateral is and will represent the valid, legally enforceable obligation of the issuer thereof.

C.5. The transaction under which each instrument and security, certificated or uncertificated, in the Collateral was issued and transferred to Debtor conforms and will conform in all respects to applicable state and federal law, including securities law and consumer credit law.

D. Debtor Agrees to—

D.1. Defend the Collateral against all claims adverse to Secured Party's interest; pay all taxes imposed on the Collateral; keep the Collateral free from liens, except for liens in favor of Secured Party or for taxes not yet due; keep the Collateral in Debtor's possession and ownership except as otherwise provided in this agreement; maintain the Collateral in good condition; and protect the Collateral against waste, except for ordinary wear and tear.

D.2. Pay all Secured Party's expenses, including reasonable attorney's fees and legal expenses [**include for a loan transaction subject to Texas Finance Code section 342.502:** assessed by a court], incurred to (a) obtain, preserve, perfect, defend, or enforce this agreement; (b) retake, hold, prepare for disposition, dispose, collect, or enforce the Collateral; and (c) collect or enforce the Obligation. These expenses will bear interest from the date of advance at the rate stated in the Note for matured, unpaid amounts and are payable on demand at the place where the Obligation is payable. These expenses and interest are part of the Obligation and are secured by this agreement.

D.3. Sign and deliver to Secured Party any documents or instruments that Secured Party considers necessary to obtain, maintain, and perfect this security interest in the Collateral and take any action requested by Secured Party for Secured Party to obtain control of investment property in the Collateral.

D.4. Notify Secured Party immediately of any event of default and of any material change (a) in the Collateral, (b) in Debtor's Mailing Address, (c) in the location of any Collateral, (d) in any other representation or warranty in this agreement, or (e) that may affect this security interest, or of any change (f) in Debtor's name or (g) of any location set forth above to another state.

D.5. Use the Collateral primarily according to the stated classification.

D.6. Maintain accurate records of the Collateral at the address set forth above; furnish Secured Party any requested information related to the Collateral; and permit Secured Party to inspect and copy all records relating to the Collateral.

D.7. If the Collateral is not in the possession or control of Secured Party, permit Secured Party to inspect the Collateral.

D.8. Immediately deliver to Secured Party, with an assignment or endorsement, current and after-acquired instruments and certificated securities in the Collateral.

D.9. Preserve the liability of all obligors on the Collateral and preserve the priority of all security for the Collateral.

D.10. On Secured Party's demand, deposit all payments received as proceeds of the Collateral in a special bank account designated by Secured Party, who alone will have power of withdrawal.

D.11. Cause all obligors on the Collateral to pay and perform all their obligations and inform Secured Party immediately of the default in the payment or performance of any Collateral.

E. Debtor Agrees Not to—

E.1. Sell, transfer, or encumber any of the Collateral [**include if applicable:** except in the ordinary course of Debtor's business].

Select one of the following.

Include the following if the debtor is a corporation, limited partnership, or limited liability company.

E.2. Change its name or jurisdiction of organization, merge or consolidate with any person, or convert to a different entity without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Or

Include the following if the debtor is an entity other than a corporation, limited partnership, or limited liability company.

E.2. Change the state in which Debtor's place of business (or chief executive office if Debtor has more than one place of business) is located, change its name, or convert to a different entity without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Or

Include the following if the debtor is an individual.

E.2. Change Debtor's name or state of residence without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Continue with the following.

E.3. Modify any term of any instrument or security in the Collateral.

E.4. Commingle any payment on the Collateral with any of Debtor's other funds or property.

F. Default and Remedies

F.1. A default exists if—

- a. Debtor, Obligor, or any secondary obligor fails to timely pay or perform any obligation or covenant in any written agreement between Secured Party and any of Debtor, Obligor, or secondary obligor;
- b. any representation in this agreement or in any other written agreement between Secured Party and any of Debtor, Obligor, or secondary obligor is materially false when made;
- c. a receiver is appointed for Debtor, Obligor, any secondary obligor, or any Collateral;
- d. any Collateral is assigned for the benefit of creditors;
- e. a bankruptcy or insolvency proceeding is commenced by Debtor, a partnership in which Debtor is a general partner, Obligor, or any secondary obligor;
- f. a bankruptcy or insolvency proceeding is commenced against Debtor, a partnership in which Debtor is a general partner, Obligor, or any secondary obligor, and the proceeding continues without dismissal for sixty days, the party against whom the proceeding is commenced admits the material allegations of the petition against it, or an order for relief is entered;
- g. any of the following parties is terminated, begins to wind up its affairs, is authorized to terminate or wind up its affairs by its governing body or persons, or any event occurs or condition exists that permits the termination or winding up of the affairs of any of the following parties: Debtor; a partnership of which Debtor is a general partner; Obligor; or any secondary obligor; or

- h. any Collateral is impaired by loss, theft, damage, levy and execution, issuance of an official writ or order of seizure, or destruction, unless it is promptly replaced with collateral of like kind and quality or restored to its former condition.

F.2. If a default exists, Secured Party may—

- a. demand, collect, convert, redeem, settle, compromise, receipt for, realize on, sue for, and adjust the Collateral either in Secured Party's or Debtor's name, as Secured Party desires, or take control of any proceeds of the Collateral and apply the proceeds against the Obligation;
- b. take possession of any Collateral not already in Secured Party's possession, without demand or legal process, and for that purpose Debtor grants Secured Party the right to enter any premises where the Collateral may be located;
- c. without taking possession, sell, lease, or otherwise dispose of the Collateral at any public or private sale in accordance with law;
- d. exercise any rights and remedies granted by law or this agreement;
- e. notify obligors on the Collateral to pay Secured Party directly;
- f. as Debtor's agent, make any endorsements in Debtor's name and on Debtor's behalf of any instruments in the Collateral and to any proceeds of the Collateral;
- g. exercise and enforce all rights, including voting rights, available to an owner of the Collateral; and
- h. transfer record ownership of any Collateral to Secured Party.

F.3. Foreclosure of this security interest by suit does not limit Secured Party's remedies, including the right to sell the Collateral under the terms of this agreement. Secured Party may exercise all remedies at the same or different times, and no remedy is a defense to any other. Secured Party's rights and remedies include all those granted by law and those specified in this agreement.

F.4. Secured Party's delay in exercising, partial exercise of, or failure to exercise any of its remedies or rights does not waive Secured Party's rights to subsequently exercise those remedies or rights. Secured Party's waiver of any default does not waive any other default by Debtor. Secured Party's waiver of any right in this agreement or of any default is binding only if it is in writing. Secured Party may remedy any default without waiving it.

F.5. Secured Party has no obligation to clean or otherwise prepare the Collateral for sale.

F.6. Other than exercising reasonable care to assure safe custody of the Collateral in its possession, Secured Party has no responsibility for the Collateral. Secured Party has no obligation to collect any of the Collateral and is not liable for failure to collect any of the Collateral, for failure to preserve any right pertaining to the Collateral, or for any act or omission on the part of Secured Party or Secured Party's officers, agents, or employees, except willful misconduct.

F.7. Secured Party has no obligation to satisfy the Obligation by attempting to collect the Obligation from any other person liable for it. Secured Party may release, modify, or waive any collateral provided by any other person to secure any of the Obligation. If Secured Party attempts to collect the Obligation from any other person liable for it or releases, modifies, or waives any collateral provided by any other person, that will not affect Secured Party's rights against Debtor. Debtor waives any right Debtor may have to require Secured Party to pursue any third person for any of the Obligation.

F.8. If Secured Party must comply with any applicable state or federal law requirements in connection with a disposition of the Collateral, such compliance will not be considered to adversely affect the commercial reasonableness of a sale of the Collateral.

F.9. Secured Party may sell the Collateral without giving any warranties as to the Collateral. Secured Party may specifically disclaim any warranties of title or the like. This procedure will not be considered to adversely affect the commercial reasonableness of a sale of the Collateral.

F.10. If Secured Party sells any of the Collateral on credit, Debtor will be credited only with payments actually made by the purchaser and received by Secured Party for application to the indebtedness of the purchaser. If the purchaser fails to pay for the Collateral, Secured Party may resell the Collateral and Debtor will be credited with the proceeds of the sale.

F.11. If Secured Party purchases any of the Collateral being sold, Secured Party may pay for the Collateral by crediting the purchase price against the Obligation.

F.12. Secured Party has no obligation to marshal any assets in favor of Debtor or against or in payment of the Note, any of the Other Obligation[s], or any other obligation owed to Secured Party by Debtor or any other person.

F.13. If the Collateral is sold after default, recitals in the bill of sale or transfer will be prima facie evidence of their truth and all prerequisites to the sale specified by this agreement and by law will be presumed satisfied.

G. General

G.1. Notice is reasonable if it is mailed, postage prepaid, to Debtor at Debtor's Mailing Address at least ten days before any public sale or ten days before the time when the Collateral may be otherwise disposed of without further notice to Debtor.

G.2. This security interest will neither affect nor be affected by any other security for any of the Obligation. Neither extensions of any of the Obligation nor releases of any of the Collateral will affect the priority or validity of this security interest.

G.3. This agreement binds, benefits, and may be enforced by the successors in interest of Secured Party and will bind all persons who become bound as debtors to this agreement. Assignment of any part of the Obligation and Secured Party's delivery of any part of the Collateral will fully discharge Secured Party from responsibility for that part of the Collateral. If such an assignment is made, Debtor will render performance under this agreement to the assignee. Debtor waives and will not assert against any assignee any claims, defenses, or setoffs that Debtor could assert against Secured Party except defenses that cannot be waived. All representations and obligations are joint and several as to each Debtor.

G.4. This agreement may be amended only by an instrument in writing signed by Secured Party and Debtor.

G.5. The unenforceability of any provision of this agreement will not affect the enforceability or validity of any other provision.

G.6. This agreement will be construed according to Texas law, without regard to choice-of-law rules of any jurisdiction. This agreement is to be performed in [**include if applicable in a consumer transaction:** , and has been signed by Debtor in,] the county of Secured Party's Mailing Address.

G.7. Interest on the Obligation secured by this agreement will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the Obligation or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the Obligation or, if the

principal of the Obligation has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the Obligation.

G.8. In no event may this agreement secure payment of any debt that may not lawfully be secured by a lien on real estate or create a lien otherwise prohibited by law.

G.9. When the context requires, singular nouns and pronouns include the plural.

G.10. Any term defined in sections 1.101 to 9.709 of the Texas Business and Commerce Code and not defined in this agreement has the meaning given to the term in the Code.

[Name of debtor]

Form 9-4

Security Agreement
[Interest in Noncorporate Entity]

Basic Information

Date:

Debtor:

Debtor's Mailing Address:

Secured Party:

Secured Party's Mailing Address:

Classification of Collateral: General intangibles

Collateral:

All of Debtor's interest in the following personal property and all proceeds of that property [**describe the specific collateral as in the following example**]:

- a. Debtor's undivided interest as a [general partner/limited partner/member] in and to that certain [general partnership/limited partnership/limited liability company] named [**name of company**] (the "Company"), described in the [[limited/general] partnership agreement/limited liability company [agreement/regulations]] of the Company dated [**date**], by and between Debtor and other [partners/members] of the Company, as amended or modified and in effect (the "Company Agreement"), together with all of Debtor's other rights, title, and interest of every kind and character whatever in and to the Company and under the Company Agreement; and

- b. all of Debtor's share of profits, distributions, income, and surplus from the Company and Debtor's interest in specific properties of the Company on dissolution or otherwise.

Obligation

Note

Date:

Original principal amount:

Borrower (Obligor):

Include either or both of the following if applicable.

Other debt/Future advances: The security interest also secures all other present and future debts and liabilities of Debtor and/or Obligor to Secured Party, including future advances.

Other obligation[s]:

Continue with the following.

A. Debtor's Representations Concerning Debtor and Locations

Include one or more of the following paragraphs as applicable and modify paragraph numbers as appropriate.

A.1. [Debtor's place of business/Debtor's chief executive office] is located at [address, city, state].

Include the following if the debtor is an individual.

A.2. Debtor's residence is located at [address, city, state].

Include the following if the debtor is a corporation, limited partnership, or limited liability company.

A.2. Debtor's state of organization is [Texas/[state]], and Debtor's name, as shown in its public organic record, as amended, is exactly as set forth above.

Continue with the following.

A.3. The Company's state of organization is [Texas/[state]], and the Company's name, as shown in its organizational documents, as amended, is exactly as set forth above.

A.4. Debtor's records concerning the Collateral are located at [address, city, state].

B. Granting Clause

Debtor grants to Secured Party a security interest in the Collateral and all its proceeds to secure the Obligation and all renewals, modifications, and extensions of the Obligation. Debtor authorizes Secured Party to file a financing statement describing the Collateral.

C. Debtor Represents the Following:

C.1. No financing statement covering the Collateral is filed in any public office [include if the secured party has prefiled a financing statement or otherwise has a financing statement on file: except any financing statement in favor of Secured Party].

C.2. Debtor owns the Collateral and has the authority to grant this security interest, free from any setoff, claim, restriction, security interest, or encumbrance except liens for taxes not yet due.

C.3. All information about Debtor's financial condition is or will be accurate when provided to Secured Party.

C.4. An accurate copy of the Company Agreement has been delivered to Secured Party. There are no changes to the Company Agreement not reflected in the copy delivered to Secured Party.

C.5. Debtor has obtained the written consent of all persons required under the Company Agreement or otherwise to authorize the security interest created by this agreement and Secured Party's exercise of its rights hereunder. On request of Secured Party, Debtor will deliver to Secured Party an executed original of that consent.

D. Debtor Agrees to—

D.1. Defend the Collateral against all claims adverse to Secured Party's interest; pay all taxes imposed on the Collateral; keep the Collateral free from liens, except for liens in favor of Secured Party or for taxes not yet due; keep the Collateral in Debtor's possession and ownership except as otherwise provided in this agreement; maintain the Collateral in good condition; and protect the Collateral against waste, except for ordinary wear and tear.

D.2. Pay all Secured Party's expenses, including reasonable attorney's fees and legal expenses [**include for a loan transaction subject to Texas Finance Code section 342.502:** assessed by a court], incurred to (a) obtain, preserve, perfect, defend, or enforce this agreement; (b) retake, hold, prepare for disposition, dispose, collect, or enforce the Collateral; or (c) collect or enforce the Obligation. These expenses will bear interest from the date of advance at the rate stated in the Note for matured, unpaid amounts and are payable on demand at the place where the Obligation is payable. These expenses and interest are part of the Obligation and are secured by this agreement.

D.3. Sign and deliver to Secured Party any documents or instruments that Secured Party considers necessary to obtain, maintain, and perfect this security interest in the Collateral.

D.4. Notify Secured Party immediately of any event of default and of any material change (a) in the Collateral, (b) in Debtor's Mailing Address, (c) in the location of any Collateral, (d) in any other representation or warranty in this agreement, or (e) that may affect this security interest, or of any change (f) in Debtor's name or (g) of any location set forth above to another state.

D.5. Use the Collateral primarily according to the stated classification.

D.6. Maintain accurate records of the Collateral at the address set forth above; furnish Secured Party any requested information related to the Collateral; and permit Secured Party to inspect and copy all records relating to the Collateral.

D.7. Perform all obligations to be performed by Debtor under the Company Agreement.

D.8. Notify Secured Party of any default known to Debtor of any other person under the Company Agreement and of any notice of default given under the Company Agreement.

D.9. Enforce the obligations of other persons under the Company Agreement and at Secured Party's request, at Debtor's expense, take action requested by Secured Party to enforce the obligations of other persons and exercise the rights of Debtor under the Company Agreement.

E. Debtor Agrees Not to—

E.1. Sell, transfer, or encumber any of the Collateral [**include if applicable:** , except in the ordinary course of Debtor's business].

Select one of the following.

Include the following if the debtor is a corporation, limited partnership, or limited liability company.

E.2. Change its name or jurisdiction of organization, merge or consolidate with any person, or convert to a different entity without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Or

Include the following if the debtor is an entity other than a corporation, limited partnership, or limited liability company.

E.2. Change the state in which Debtor's place of business (or chief executive office if Debtor has more than one place of business) is located, change its name, or convert to a different entity without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Or

Include the following if the debtor is an individual.

E.2. Change Debtor's name or state of residence without notifying Secured Party in advance and taking action to continue the perfected status of the security interest in the Collateral.

Continue with the following.

E.3. Consent to or approve any modification of the Company Agreement.

E.4. Compromise or reduce any payment or distribution to be made to Debtor on the Collateral.

F. Secured Party Not Liable

Debtor remains liable under the Company Agreement for all its obligations thereunder. Secured Party has no liability thereunder because of this agreement. Secured Party is not liable, because of this agreement, for any obligation of Debtor under the Company Agreement.

G. Default and Remedies

G.1. A default exists if—

- a. Debtor, Obligor, or any secondary obligor fails to timely pay or perform any obligation or covenant in any written agreement between Secured Party and any of Debtor, Obligor, or secondary obligor;
- b. any representation in this agreement or in any other written agreement between Secured Party and any of Debtor, Obligor, or secondary obligor is materially false when made;
- c. a receiver is appointed for Debtor, Obligor, any secondary obligor, or any Collateral;
- d. any Collateral is assigned for the benefit of creditors;
- e. a bankruptcy or insolvency proceeding is commenced by Debtor, the Company, a partnership in which Debtor is a general partner, Obligor, or any secondary obligor;
- f. a bankruptcy or insolvency proceeding is commenced against Debtor, the Company, a partnership in which Debtor is a general partner, Obligor, or any secondary obligor, and the proceeding continues without dismissal for sixty days, the party against whom the proceeding is commenced admits the material allegations of the petition against it, or an order for relief is entered;
- g. any of the following parties is terminated, begins to wind up its affairs, is authorized to terminate or wind up its affairs by its governing body or persons, or any event occurs or condition exists that permits the termination or

winding up of the affairs of any of the following parties: Debtor; the Company; a partnership of which Debtor is a general partner; Obligor; or any secondary obligor; or

- h. any Collateral is impaired by loss, theft, damage, levy and execution, issuance of an official writ or order of seizure, or destruction, unless it is promptly replaced with collateral of like kind and quality or restored to its former condition.

G.2. If a default exists, Secured Party may—

- a. demand, collect, convert, redeem, settle, compromise, receipt for, realize on, sue for, and adjust the Collateral either in Secured Party's or Debtor's name, as Secured Party desires, or take control of any proceeds of the Collateral and apply the proceeds against the Obligation;
- b. take possession of any Collateral not already in Secured Party's possession, without demand or legal process, and for that purpose Debtor grants Secured Party the right to enter any premises where the Collateral may be located;
- c. without taking possession, sell, lease, or otherwise dispose of the Collateral at any public or private sale in accordance with law;
- d. exercise any rights and remedies granted by law or this agreement;
- e. notify obligors on the Collateral to pay Secured Party directly;
- f. as Debtor's agent, make any endorsements in Debtor's name and on Debtor's behalf of any proceeds of the Collateral; or

- g. exercise and enforce all rights, including voting rights, available to an owner of the Collateral.

G.3. Foreclosure of this security interest by suit does not limit Secured Party's remedies, including the right to sell the Collateral under the terms of this agreement. Secured Party may exercise all remedies at the same or different times, and no remedy is a defense to any other. Secured Party's rights and remedies include all those granted by law and those specified in this agreement.

G.4. Secured Party's delay in exercising, partial exercise of, or failure to exercise any of its remedies or rights does not waive Secured Party's rights to subsequently exercise those remedies or rights. Secured Party's waiver of any default does not waive any other default by Debtor. Secured Party's waiver of any right in this agreement or of any default is binding only if it is in writing. Secured Party may remedy any default without waiving it.

G.5. Secured Party has no obligation to clean or otherwise prepare the Collateral for sale.

G.6. Secured Party has no obligation to collect any of the Collateral and is not liable for failure to collect any of the Collateral, for failure to preserve any right pertaining to the Collateral, or for any act or omission on the part of Secured Party or Secured Party's officers, agents, or employees, except willful misconduct.

G.7. Secured Party has no obligation to satisfy the Obligation by attempting to collect the Obligation from any other person liable for it. Secured Party may release, modify, or waive any collateral provided by any other person to secure any of the Obligation. If Secured Party attempts to collect the Obligation from any other person liable for it or releases, modifies, or waives any collateral provided by any other person, that will not affect Secured Party's rights against Debtor. Debtor waives any right Debtor may have to require Secured Party to pursue any third person for any of the Obligation.

G.8. If Secured Party must comply with any applicable state or federal law requirements in connection with a disposition of the Collateral, such compliance will not be considered to adversely affect the commercial reasonableness of a sale of the Collateral.

G.9. Secured Party may sell the Collateral without giving any warranties as to the Collateral. Secured Party may specifically disclaim any warranties of title or the like. This procedure will not be considered to adversely affect the commercial reasonableness of a sale of the Collateral.

G.10. If Secured Party sells any of the Collateral on credit, Debtor will be credited only with payments actually made by the purchaser and received by Secured Party for application to the indebtedness of the purchaser. If the purchaser fails to pay for the Collateral, Secured Party may resell the Collateral and Debtor will be credited with the proceeds of the sale.

G.11. If Secured Party purchases any of the Collateral being sold, Secured Party may pay for the Collateral by crediting the purchase price against the Obligation.

G.12. Secured Party has no obligation to marshal any assets in favor of Debtor or against or in payment of the Note, any of the Other Obligation[s], or any other obligation owed to Secured Party by Debtor or any other person.

G.13. If the Collateral is sold after default, recitals in the bill of sale or transfer will be prima facie evidence of their truth and all prerequisites to the sale specified by this agreement and by law will be presumed satisfied.

H. General

H.1. Notice is reasonable if it is mailed, postage prepaid, to Debtor at Debtor's Mailing Address at least ten days before any public sale or ten days before the time when the Collateral may be otherwise disposed of without further notice to Debtor.

H.2. This security interest will neither affect nor be affected by any other security for any of the Obligation. Neither extensions of any of the Obligation nor releases of any of the Collateral will affect the priority or validity of this security interest.

H.3. This agreement binds, benefits, and may be enforced by the successors in interest of Secured Party and will bind all persons who become bound as debtors to this agreement. Assignment of any part of the Obligation and Secured Party's delivery of any part of the Collateral will fully discharge Secured Party from responsibility for that part of the Collateral. If such an assignment is made, Debtor will render performance under this agreement to the assignee. Debtor waives and will not assert against any assignee any claims, defenses, or setoffs that Debtor could assert against Secured Party except defenses that cannot be waived. All representations and obligations are joint and several as to each Debtor.

H.4. This agreement may be amended only by an instrument in writing signed by Secured Party and Debtor.

H.5. The unenforceability of any provision of this agreement will not affect the enforceability or validity of any other provision.

H.6. This agreement will be construed according to Texas law, without regard to choice-of-law rules of any jurisdiction. This agreement is to be performed in [**include if applicable in a consumer transaction**: , and has been signed by Debtor in,] the county of Secured Party's Mailing Address.

H.7. Interest on the Obligation secured by this agreement will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the Obligation or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the Obligation or, if the

principal of the Obligation has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the Obligation.

H.8. In no event may this agreement secure payment of any debt that may not lawfully be secured by a lien on real estate or create a lien otherwise prohibited by law.

H.9. When the context requires, singular nouns and pronouns include the plural.

H.10. Any term defined in sections 1.101 to 9.709 of the Texas Business and Commerce Code and not defined in this agreement has the meaning given to the term in the Code.

[Name of debtor]

Form 9-5

Addendum to Security Agreement
[Farm Products]

Basic Information

Date:

Debtor:

Secured Party:

Date of Security Agreement:

This addendum applies to and is incorporated in the security agreement.

A. Supplemental Description of Farm Products Collateral

A.1. Type and description of farm products collateral: **[describe collateral and specify farm products collateral type according to USDA classification system at 9 C.F.R. § 205.206(a)].**

A.2. Amount of farm products collateral:

A.3. Crop year of farm products collateral:

A.4. [County/Counties] where farm products collateral located:

A.5. Real property where farm products collateral located:

A.6. Additional collateral:

The Collateral includes, with respect to both the Collateral and all products, increase, or offspring of the Collateral, the following: all seed, seed plants, and propagative materials of crops or plants; all sale or other proceeds; all insurance proceeds for loss, damage, or theft; all claims or causes of action relating to use, sale, lease, damage, or loss; all contracts, warehouse

receipts, bills of lading, assignments, receipts, claims, drafts, checks, or causes of action relating to or representing any sale of the Collateral; all fees, charges, or things of value earned by livestock for reproductive services or uses of any kind; all copyrights and patents in any way relating to or arising out of the Collateral; all future-acquired property of Debtor of the same type or kind as the Collateral; and all additions to or replacement of the Collateral.

B. Debtor Agrees:

B.1. Conditions for Sale of Collateral. This security interest may not be waived or released unless the sale or other disposition is approved in advance in writing by Secured Party for the full value of the Collateral and the consideration from the sale or other disposition is actually delivered to Secured Party and finally paid. Debtor may not transfer or encumber the Collateral or engage in any transaction involving the Collateral with any buyer, commission merchant, or selling agent without seven days' prior written notice to Secured Party and without securing the prior written consent of Secured Party. Debtor may make no sale or other disposition of any of the Collateral unless the proceeds are paid by an instrument jointly payable to Debtor and Secured Party and delivered to Secured Party. Debtor will immediately remit to Secured Party all proceeds of the sale or other disposition or as much of the proceeds as necessary to fully discharge the Obligation.

B.2. Conditions for Collateral Storage. The Collateral may not be placed in storage at any storage facility issuing warehouse receipts for the Collateral without seven days' prior written notice to Secured Party. Any warehouse receipts issued for the Collateral must be nonnegotiable warehouse receipts naming Secured Party as the person entitled to possession of the Collateral. Debtor must immediately deliver all such receipts to Secured Party. Before placing any of the Collateral in storage, Debtor must advise the storage facility of the security interest of Secured Party in the Collateral.

B.3. Compliance with Federal Food Security Act. Debtor agrees to furnish Secured Party a list of the names and addresses of every buyer, commission merchant, and selling

agent to or through whom Debtor may make any sale or other disposition of the Collateral. "Commission merchant" and "selling agent" have those meanings set out in 7 U.S.C. section 1631. Debtor agrees to notify Secured Party in writing of the identity of any buyer, selling agent, or commission merchant for any of the Collateral at least seven days before the sale or other disposition of any part of the Collateral as may be authorized by the security agreement. If Debtor makes an unauthorized sale or transfer of the Collateral, Debtor must account to Secured Party for the proceeds of the sale or other disposition within ten days.

NOTICE: VIOLATION OF THE FOREGOING MAY CONSTITUTE A CRIMINAL ACT UNDER THE PROVISIONS OF 7 U.S.C. SECTION 1631.

B.4. Additional Defaults. In addition to the defaults listed in the security agreement, a default exists if—

- a. the Collateral is not maintained, preserved, or protected according to the standards of the industry or good agricultural husbandry; or
- b. Debtor makes any sale or other disposition of any of the Collateral without complying with the provisions of this addendum.

B.5. Additional Remedies on Default. If a default exists, Secured Party, in addition to the remedies provided in the security agreement, may—

- a. complete any and all growing, grazing, fattening, or other farming or ranching operations in connection with the Collateral reasonable to its sale or other disposition; or
- b. incur reasonable expenses on behalf of Debtor in connection with the retaking, holding, storing, growing, nurturing, fattening, or grazing of the Collateral and in preparation of the Collateral for sale or other disposition.

[Reserved]

Form 9-6

Prenotification Statement
[Notice of Security Interest]

Basic Information

To: [name of buyer, commission merchant, or selling agent]

Date:

Debtor:

Debtor's Mailing Address:

Debtor's Social Security No. or Federal Tax ID No.

Secured Party:

Secured Party's Mailing Address:

Collateral:

1. Type and description of farm products collateral: [**describe collateral and specify farm products collateral type according to USDA classification system at 9 C.F.R. § 205.206(a)**].
2. Amount of farm products collateral:
3. Crop year of farm products collateral:
4. [County/Counties] where farm products collateral located:
5. Real property where farm products collateral located:
6. Additional collateral:

The Collateral includes, with respect to both the Collateral and all products, increase, or offspring of the Collateral, the following: all seed, seed plants, and propagative materials of crops or plants; all sale or other proceeds; all insurance proceeds for loss, damage, or theft; all claims or causes of action relating to use, sale, lease, damage, or loss; all contracts, warehouse receipts, bills of lading, assignments, receipts, claims, drafts, checks, or causes of action relating to or representing any sale of the Collateral; all fees, charges, or things of value earned by livestock for reproductive services or uses of any kind; all copyrights and patents in any way relating to or arising out of the Collateral; all future-acquired property of Debtor of the same type or kind as the Collateral; and all additions to or replacement of the Collateral.

Conditions for Waiver or Release of Security Interest

The security interest may not be waived or released unless the sale or other disposition is approved in advance in writing by Secured Party for the full value of the Collateral to be sold (as that value may be determined by Secured Party) and the consideration from the sale or other disposition is actually delivered to Secured Party and finally paid. Debtor may not transfer or encumber the Collateral or engage in any transaction involving the Collateral with any buyer, commission merchant, or selling agent without seven days' prior written notice to Secured Party and without securing the prior written consent of Secured Party. Any contract or agreement for the sale or other disposition of any of the Collateral must provide that the sales proceeds will be paid by an instrument jointly payable to Debtor and Secured Party and delivered to Secured Party. Debtor will immediately remit to Secured Party all proceeds of the sale or other disposition or as much of the proceeds as necessary to fully discharge the obligation.

Notice of Security Interest

Debtor or Secured Party has identified you as a potential buyer, commission merchant, or selling agent of the Collateral. You are hereby given notice pursuant to the Food Security

Act of 1985 that Debtor has given a security interest in the Collateral to Secured Party. This security interest covers the Collateral wherever located.

You will be subject to the security interest in the Collateral unless the Conditions for Waiver or Release of Security Interest are satisfied.

Satisfaction of the Conditions for Waiver or Release of Security Interest will not affect the security interest of the Secured Party in any proceeds from the sale or other disposition of the Collateral.

[Name of secured party]

[Reserved]

Form 9-7

Listing of Potential Buyers, Commission Merchants, and Selling Agents

Basic Information

Date:

Debtor:

Debtor's Mailing Address:

Debtor's Social Security No. or Federal Tax ID No.

Secured Party:

Secured Party's Mailing Address:

Collateral:

1. Type and description of farm products collateral: [**describe collateral and specify farm products collateral type according to USDA classification system at 9 C.F.R. § 205.206(a)**].
2. Amount of farm products collateral:
3. Crop year of farm products collateral:
4. [County/Countries] where farm products collateral located:
5. Real property where farm products collateral located:
6. Additional collateral:

The Collateral includes, with respect to both the Collateral and all products, increase, or offspring of the Collateral, the following: all seed, seed plants, and propagative materials of crops or plants; all sale or other proceeds; all insurance proceeds for loss, damage, or theft; all

claims or causes of action relating to use, sale, lease, damage, or loss; all contracts, warehouse receipts, bills of lading, assignments, receipts, claims, drafts, checks, or causes of action relating to or representing any sale of the Collateral; all fees, charges, or things of value earned by livestock for reproductive services or uses of any kind; all copyrights and patents in any way relating to or arising out of the Collateral; all future-acquired property of Debtor of the same type or kind as the Collateral; and all additions to or replacement of the Collateral.

Debtor Agrees

Debtor is giving to Secured Party this list of potential buyers, commission merchants, and selling agents to or through whom Debtor may make a sale or other disposition of the Collateral. "Selling agent" and "commission merchant" have those meanings set out in 7 U.S.C. section 1631. Debtor is aware that any sale or other disposition of the Collateral to or through anyone not on this list is illegal unless Debtor notifies Secured Party in writing of the identity of the buyer, commission merchant, or selling agent at least seven days before the sale or other disposition or Debtor accounts to Secured Party for the proceeds of the sale within ten days after the sale or other disposition. Debtor agrees to keep this list current and to promptly notify Secured Party of any changes to this list. Debtor and Secured Party intend that the terms of this listing of potential buyers, commission merchants, and selling agents become part of the security agreement between the parties.

Debtor agrees that the Collateral may not be sold or otherwise disposed of free of the security interest of Secured Party unless the conditions for waiver or release of the security interest are satisfied.

List

List of Potential Buyers, Commission Merchants, and Selling Agents: **[list, including names, addresses, and telephone numbers]**.

[Name of debtor]

Form 9-8

Collateral Transfer of Note and Lien

Basic Information

Date:

Debtor:

Debtor's Mailing Address:

Secured Party:

Secured Party's Mailing Address:

Classification of Collateral: Instrument

Collateral (including all accessions): All of Debtor's interest in the Collateral Note and the Collateral Note Security.

Collateral Note: \$[amount] Note executed by [maker] and payable to the order of [payee] dated [date].

Current balance:

Collateral Note Security: Deed of Trust dated [date], recorded in [recording data].

Property description:

Obligation

Note in the amount of \$[amount] executed by [maker] and payable to the order of [payee] dated [date].

Include either or both of the following if applicable.

Other debt/Future advances: The security interest also secures all other present and future debts and liabilities of Debtor to Secured Party, including future advances.

Other obligation:

Continue with the following.

Collateral Note Payments: All payments on the Collateral Note are to be made directly [to Secured Party/to Debtor until after the occurrence of an event of default, at which time Secured Party may notify the Collateral Note maker to make all future payments to Secured Party].

A. Granting Clause

Debtor grants to Secured Party a security interest in the Collateral and all its proceeds to secure Debtor's Obligation and all renewals of any of the Obligation.

B. Deliveries

Simultaneously with Debtor's execution and delivery to Secured Party of this agreement, Debtor has endorsed and delivered to Secured Party the original Collateral Note, thereby making Secured Party the person entitled to enforce the Collateral Note.

C. Debtor Represents the Following:

C.1. Debtor [**include if applicable:** owns the Collateral and] has the authority to grant this security interest, free from any setoff, claim, restriction, security interest, or encumbrance except liens for taxes not yet due.

C.2. All information about Debtor's financial condition is or will be accurate when provided to Secured Party.

C.3. The current balance of the Collateral Note is correct.

C.4. The Collateral Note has not been modified and is not in default.

C.5. There are no defenses or offsets to the Collateral Note.

C.6. The lien of the Collateral Note Security is a first lien.

C.7. The Collateral represents the valid, legally enforceable obligation of the Collateral Note maker.

C.8. Debtor will keep the records of payments on the Collateral Note at Debtor's Mailing Address.

D. Debtor Agrees to—

D.1. Defend the Collateral against all claims adverse to Secured Party's interest and keep the Collateral free from liens.

D.2. Pay all of Secured Party's expenses incurred, including reasonable attorney's fees and legal expenses [include the following for a loan subject to Texas Finance Code section 342.502: assessed by a court], to (a) obtain, preserve, perfect, defend, or enforce this agreement; (b) dispose of, collect, or enforce the Collateral; or (c) collect or enforce the Obligation. These expenses will bear interest from the date of advance at the highest rate allowed by law and are payable on demand at the place where the Obligation is payable. These expenses and interest will become part of the Obligation and will be secured by this agreement.

D.3. Sign any documents that Secured Party considers necessary to obtain, maintain, and perfect this security interest.

D.4. Notify Secured Party immediately of any material change in the Collateral; change in Debtor's name, address, or location; change in any representation in this agreement; change that may affect this security interest; or any default.

D.5. Maintain accurate records of the Collateral; furnish Secured Party any requested information related to the Collateral; and allow Secured Party to inspect and copy all records relating to the Collateral.

D.6. Perform all obligations required under the Collateral Note Security.

D.7. Preserve the liability of all obligors on the Collateral and preserve the priority of all security for the Collateral.

D.8. On Secured Party's demand, deposit all payments received as proceeds of the Collateral in a special bank account designated by Secured Party, who alone will have power of withdrawal.

D.9. Cause the Collateral Note maker to pay and perform all obligations under the Collateral Note and the Collateral Note Security and inform Secured Party immediately of default in the payment or performance of the Collateral Note.

E. Debtor Agrees Not to—

E.1. Renew, extend, or modify the Collateral Note or grant releases of any part of the property securing the Collateral Note.

E.2. Modify any terms in the Collateral Note Security.

E.3. Commingle any payments on the Collateral with any of Debtor's other funds or property.

F. Default and Remedies

F.1. A default exists if—

- a. Debtor fails to timely pay or perform any Obligation, covenant, or liability in any written agreement between Debtor and Secured Party;
- b. any representation in this agreement is materially false when made;
- c. a receiver is appointed for Debtor or any of the Collateral;
- d. the Collateral is assigned for the benefit of creditors;
- e. to the extent permitted by law, a bankruptcy or insolvency proceeding is commenced against or by any of the following parties: Debtor; the Collateral Note maker; any partnership of which Debtor is a general partner; or any maker, drawer, acceptor, endorser, guarantor, surety, accommodation party, or other person liable on or for any part of the Obligation;
- f. any of the following parties is terminated: Debtor; the Collateral Note maker; any partnership of which Debtor is a general partner; or any maker, drawer, acceptor, endorser, guarantor, surety, accommodation party, or other person liable on or for any part of the Obligation; or
- g. default exists under the Collateral Note or the Collateral Note Security.

F.2. Secured Party may at any time—

- a. take control of any proceeds of the Collateral;
- b. release any Collateral in Secured Party's possession to any debtor, temporarily or otherwise;

- c. take control of proceeds of insurance on the Collateral Note Security and reduce any part of the Obligation accordingly or permit Debtor to use such funds to repair or replace damaged or destroyed Collateral covered by insurance;
- d. demand, collect, convert, redeem, settle, compromise, receipt for, realize on, sue for, and adjust the Collateral either in Secured Party's or Debtor's name, as Secured Party desires; or
- e. exercise all other rights available to an owner of such Collateral.

F.3. If a default exists, Secured Party may—

- a. declare the unpaid principal and earned interest of the Obligation immediately due in whole or part;
- b. enforce the Obligation; and
- c. exercise any rights and remedies granted by law or this agreement.

F.4. Foreclosure of this security interest by suit does not limit Secured Party's remedies, including the right to sell the Collateral under the terms of this agreement. Secured Party may exercise all remedies at the same or different times, and no remedy is a defense to any other. Secured Party's rights and remedies include all those granted by law or otherwise, in addition to those specified in this agreement.

F.5. If the Collateral is sold after default, recitals in the bill of sale or transfer will be prima facie evidence of their truth and all prerequisites to the sale specified by this agreement and by law will be presumed satisfied.

G. Collateral Note/Enforcement of Power of Sale

G.1. Debtor has endorsed and delivered the Collateral Note to Secured Party.

Secured Party is the holder of the Collateral Note, the person entitled to enforce the Collateral Note, and the sole party with power to appoint a substitute trustee or request the trustee to act. Any foreclosure action requested by Debtor is void.

G.2. Any foreclosure sale under the Collateral Note Security will be at such time and on such terms as Secured Party may, in its discretion, approve. If Secured Party approves a bid from Debtor without payment in full of the Collateral Note, Debtor must provide a mortgagee's title insurance policy with only such exceptions as Secured Party approves and execute such additional security documents as Secured Party may require.

G.3. Debtor assigns, transfers, and conveys to Secured Party all amounts due on the Collateral Note. Collateral Note maker is directed to make payments on the Collateral Note in accordance with the Collateral Note payments provision above.

G.4. Debtor indemnifies Secured Party from all claims made against or incurred by Secured Party from any action in connection with the Collateral Note or the Collateral Note Security documents.

H. General

H.1. Notice is reasonable if it is mailed, postage prepaid, to Debtor at Debtor's Mailing Address at least ten days before any public sale or ten days before the time when the Collateral may be otherwise disposed of without further notice to Debtor.

H.2. This security interest will neither affect nor be affected by any other security for any of the Obligation. Neither extensions of any of the Obligation nor releases of any of the Collateral will affect the priority or validity of this security interest as to any third person.

H.3. This agreement binds, benefits, and may be enforced by the successors in interest of the parties, except as otherwise provided. Assignment of any part of the Obligation and Secured Party's delivery of any part of the Collateral will fully discharge Secured Party from responsibility for that part of the Collateral. All representations and obligations are joint and several as to each Debtor.

H.4. Secured Party's delay in exercising, partial exercise of, or failure to exercise any of its remedies or rights does not waive Secured Party's rights to subsequently exercise those remedies or rights. Secured Party's waiver of any default does not waive any further default by Debtor. Secured Party's waiver of any right in this agreement or of any default is binding only if it is in writing. Secured Party may remedy any default without waiving it.

H.5. This agreement may be amended only by an instrument in writing signed by Secured Party and Debtor.

H.6. The unenforceability of any provision of this agreement will not affect the enforceability or validity of any other provision.

H.7. This agreement will be construed according to Texas law. This agreement is to be performed in the county of Secured Party's Mailing Address.

H.8. Interest on the Obligation secured by this agreement will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the Obligation or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the Obligation or, if the principal of the Obligation has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the Obligation.

H.9. In no event may this agreement secure payment of any debt that may not lawfully be secured by a lien on real estate or create a lien otherwise prohibited by law.

H.10. When the context requires, singular nouns and pronouns include the plural.

[Name of debtor]

[Reserved]

Form 9-9

Collateral Note Maker's Estoppel Certificate

Basic Information

Date:

Debtor:

Debtor's Mailing Address:

Secured Party:

Secured Party's Mailing Address:

Collateral Note: Note dated [**date**], in the original principal amount of \$[**amount**], executed by
Collateral Note Maker and payable to Debtor as therein provided.

Collateral Note Maker:

Collateral Note Maker's Mailing Address:

Deed of Trust: Deed of trust securing Collateral Note, recorded in [**recording data**] of the real
property records of [**county**] County, Texas.

Real Property:

A. Reason for and Reliance on Certificate

Debtor has requested that Secured Party make a loan to be secured by the Collateral
Note, and Secured Party has agreed to do so. As a condition for this loan, Secured Party
requires Collateral Note Maker to verify the following information concerning the Collateral

Note. Collateral Note Maker understands that Secured Party is relying on this information in connection with the closing of the loan.

B. Representations

Collateral Note Maker represents to Secured Party that—

B.1. True and complete copies of the Collateral Note and Deed of Trust are attached as Exhibits [**exhibit numbers/letters**].

B.2. The Collateral Note and Deed of Trust have not been modified.

B.3. The present unpaid balance of the Collateral Note is \$[**amount**].

B.4. The amount of accrued unpaid interest on the Collateral Note is \$[**amount**].

B.5. Collateral Note Maker has no claims, setoffs, or defenses to payment of the Collateral Note or against Debtor.

B.6. No default presently exists under the terms of the Collateral Note or Deed of Trust or any other loan documents.

Select one of the following.

B.7. No amount is being held in escrow by Debtor.

Or

B.7. The amount of \$[**amount**] is presently being held in escrow by Debtor for the payment of taxes, insurance, or both, under the terms of the Collateral Note and Deed of Trust.

Continue with the following.

C. Agreement

Collateral Note Maker agrees with Secured Party that—

C.1. The Collateral Note and Deed of Trust will not be modified without Secured Party's prior written consent.

C.2. Collateral Note Maker has been furnished with a copy of the collateral transfer of note and lien dated [date] executed by Debtor to Secured Party and agrees to abide by its terms.

C.3. Secured Party is the current holder of the Collateral Note and is the only party entitled to receive payments on the Collateral Note.

Select one of the following.

C.4. Collateral Note Maker will make regularly scheduled monthly payments on the Collateral Note only to Debtor. On written request of Secured Party, Collateral Note Maker will make all payments on the Collateral Note directly to Secured Party.

Or

C.4. Collateral Note Maker will make all payments on the Collateral Note directly to Secured Party.

Continue with the following.

D. Debtor's Consent

Debtor joins in this agreement to evidence its consent to Collateral Note Maker's obligations hereunder.

[Name of collateral note maker]

[Name of debtor]

Include acknowledgments and attach exhibits.

Form 9-10

Consent and Agreement

Basic Information

Date:

Secured Party:

Secured Party's Mailing Address:

Debtor:

Company:

Company's Mailing Address:

Company is a [[general/limited] partnership/limited liability company] organized under the laws of the state of [Texas/[state]].

A. Background

Debtor and Secured Party are entering into a security agreement covering Debtor's interest in the Company.

The [partnership agreement/regulations/limited liability company agreement] of the Company (the "Company Agreement") contains terms restricting assignment of interests in the Company by its [partners/members] and conditioning effectiveness of any such assignment on the consent of the [general partner/managing general partner/general partner and a majority in interest of the limited partners/partners/manager/managing member/majority in interest of the members/members] of the Company. The undersigned and the Company are the persons whose consent must be obtained under the terms of the Company Agreement.

B. Agreement

The Company and the undersigned severally agree for the benefit of Secured Party as follows:

B.1. The Company and each of the undersigned consent to the creation, attachment, and perfection of a security interest in Debtor's interest in the Company and other collateral under Debtor's security agreement with Secured Party.

B.2. The Company agrees that if Secured Party delivers to the Company a notice stating that a default exists under Debtor's security agreement with Secured Party and directing the Company to deliver to Secured Party any profits, income, distributions (whether in money, specific property of the Company, or other assets), withdrawal, liquidation, and redemption proceeds, and any other proceeds payable to Debtor from time to time in respect of Debtor's interest in the Company, the Company will comply with that directive. The Company is not required to inquire as to or determine the validity of the factual matters in any such notice or the genuineness of any such notice. The undersigned consent to the Company's compliance with any such notice.

B.3. The undersigned consent to Secured Party's exercise of any of its rights and remedies under Debtor's security agreement with Secured Party, including the right to exercise any voting, consensual, or other management rights of Debtor and the right to sell or otherwise dispose of any of the collateral granted by Debtor under Debtor's security agreement with Secured Party. The undersigned agree that on Secured Party's exercise of any of its rights and remedies under Debtor's security agreement with Secured Party, any acquirer (whether by foreclosure or otherwise) of the [partnership/membership] interest of Debtor will become, without further consent by any of the undersigned, a substitute [partner/member] of the Company under the Company Agreement and the Company's other organizational documents,

entitled to exercise any of the rights and remedies of Debtor thereunder; provided that such acquirer will not be liable for obligations of Debtor to contribute capital to the Company that arose before the acquirer's acquisition of Debtor's [partnership/membership] interest.

COMPANY

[Name of company]

By: _____

[Name and capacity]

[Name and capacity]

[Reserved]

Form 9-11

UCC1 Financing Statement



UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS

A. NAME & PHONE OF CONTACT AT FILER (optional)
B. E-MAIL CONTACT AT FILER (optional)
C. SEND ACKNOWLEDGMENT TO: (Name and Address)

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S NAME: Provide only one Debtor name (1a or 1b) (unless not, full name; do not omit, modify, abbreviate any part of the Debtor name). If any part of the Individual Debtor name will not fit in line 1b, leave all of item 1 blank, check here and provide the Individual Debtor information in item 10 of the Filing Statement Addendum (Form UCC1Ad)

1a. ORGANIZATION'S NAME			
OR 1b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX
1c. MAILING ADDRESS	CITY	STATE	POSTAL CODE COUNTRY

2. DEBTOR'S NAME: Provide only one Debtor name (2a or 2b) (unless not, full name; do not omit, modify, abbreviate any part of the Debtor name). If any part of the Individual Debtor name will not fit in line 2b, leave all of item 2 blank, check here and provide the Individual Debtor information in item 10 of the Filing Statement Addendum (Form UCC1Ad)

2a. ORGANIZATION'S NAME			
OR 2b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX
2c. MAILING ADDRESS	CITY	STATE	POSTAL CODE COUNTRY

3. SECURED PARTY'S NAME (or NAME of ASSIGNEE of ASSIGNOR SECURED PARTY): Provide only one Secured Party name (3a or 3b)

3a. ORGANIZATION'S NAME			
OR 3b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX
3c. MAILING ADDRESS	CITY	STATE	POSTAL CODE COUNTRY

4. COLLATERAL: This financing statement covers the following collateral:

5. Check only if applicable and check only one box: Collateral is held in a Trust (see UCC1Ad, Item 17 and Instructions) being administered by a Debtor's Personal Representative.

6a. Check only if applicable and check only one box: Public-Financed Transaction Manufactured-Home Transaction A Debtor is a Transmitting Utility Agricultural Lien Non-UCC Filing

7. ALTERNATIVE DESIGNATION (if applicable): Lender/Lessor Co-signer/Co-signee Seller/Buyer Bailor/Bailee Licensor/Licensee

8. OPTIONAL FILER REFERENCE DATA:

FILING OFFICE COPY — UCC FINANCING STATEMENT (Form UCC1) (Rev. 04/20/11)

International Association of Commercial Administrators (IACA)

Instructions for UCC Financing Statement (Form UCC1)

Please type or laser-print this form. Be sure it is completely legible. Read and follow all Instructions, especially Instruction 1; use of the correct name for the Debtor is crucial.

Fill in form very carefully; mistakes may have important legal consequences. If you have questions, consult your attorney. The filing office cannot give legal advice.

Send completed form and any attachments to the filing office, with the required fee.

ITEM INSTRUCTIONS

A and B. To assist filing offices that might wish to communicate with filer, filer may provide information in item A and item B. These items are optional.
C. Complete item C if filer desires an acknowledgment sent to them. If filing in a filing office that returns an acknowledgment copy furnished by filer, present simultaneously with this form the Acknowledgment Copy or a carbon or other copy of this form for use as an acknowledgment copy.

1. **Debtor's name.** Carefully review applicable statutory guidance about providing the debtor's name. Enter only one Debtor name in item 1 — either an organization's name (1a) or an individual's name (1b). If any part of the Individual Debtor's name will not fit in line 1b, check the box in item 1, leave all of item 1 blank, check the box in item 9 of the Financing Statement Addendum (Form UCC1Ad) and enter the Individual Debtor name in item 10 of the Financing Statement Addendum (Form UCC1Ad). Enter Debtor's correct name. Do not abbreviate words that are not already abbreviated in the Debtor's name. If a portion of the Debtor's name consists of only an initial or an abbreviation rather than a full word, enter only the abbreviation or the initial. If the collateral is held in a trust and the Debtor name is the name of the trust, enter trust name in the Organization's Name box in item 1a.

1a. **Organization Debtor Name.** "Organization Name" means the name of an entity that is not a natural person. A sole proprietorship is **not** an organization, even if the individual proprietor does business under a trade name. If Debtor is a registered organization (e.g., corporation, limited partnership, limited liability company), it is advisable to examine Debtor's current filed public organic records to determine Debtor's correct name. Trade name is insufficient. If a corporate ending (e.g., corporation, limited partnership, limited liability company) is part of the Debtor's name, it must be included. Do not use words that are not part of the Debtor's name.

1b. **Individual Debtor Name.** "Individual Name" means the name of a natural person; this includes the name of an individual doing business as a sole proprietorship, whether or not operating under a trade name. The term includes the name of a decedent where collateral is being administered by a personal representative of the decedent. The term does not include the name of an entity, even if it contains, as part of the entity's name, the name of an individual. Prefixes (e.g., Mr., Mrs., Ms.) and titles (e.g., M.D.) are generally not part of an individual name. Indications of lineage (e.g., Jr., Sr., III) generally are not part of the individual's name, but may be entered in the Suffix box. Enter individual Debtor's surname (family name) in Individual's Surname box, first personal name in First Personal Name box, and all additional names in Additional Name(s)/initial(s) box.

If a Debtor's name consists of only a single word, enter that word in Individual's Surname box and leave other boxes blank.

For both organization and individual Debtors. Do not use Debtor's trade name, DBA, AKA, FKA, division name, etc. in place of or combined with Debtor's correct name; filer may add such other names as additional Debtors if desired (but this is neither required nor recommended).

1c. Enter a mailing address for the Debtor named in item 1a or 1b.

2. **Additional Debtor's name.** If an additional Debtor is included, complete item 2, determined and formatted per Instruction 1. For additional Debtors, attach either Addendum (Form UCC1Ad) or Additional Party (Form UCC1AP) and follow Instruction 1 for determining and formatting additional names.

3. **Secured Party's name.** Enter name and mailing address for Secured Party or Assignee who will be the Secured Party of record. For additional Secured Parties, attach either Addendum (Form UCC1Ad) or Additional Party (Form UCC1AP). If there has been a full assignment of the initial Secured Party's right to be Secured Party of record before filing this form, either (1) enter Assignor Secured Party's name and mailing address in item 3 of this form and file an Amendment (Form UCC3) [see item 5 of that form]; or (2) enter Assignee's name and mailing address in item 3 of this form and, if desired, also attach Addendum (Form UCC1Ad) giving Assignor Secured Party's name and mailing address in item 11.

4. **Collateral.** Use item 4 to indicate the collateral covered by this financing statement. If space in item 4 is insufficient, continue the collateral description in item 12 of the Addendum (Form UCC1Ad) or attach additional page(s) and incorporate by reference in item 12 (e.g., See Exhibit A). Do not include social security numbers or other personally identifiable information.

Note: If this financing statement covers timber to be cut, covers as-extracted collateral, and/or is filed as a fixture filing, attach Addendum (Form UCC1Ad) and complete the required information in items 13, 14, 15, and 16.

5. If collateral is held in a trust or being administered by a decedent's personal representative, check the appropriate box in item 5. If more than one Debtor has an interest in the described collateral and the check box does not apply to the interest of all Debtors, the filer should consider filing a separate Financing Statement (Form UCC1) for each Debtor.

6a. If this financing statement relates to a Public-Finance Transaction, Manufactured-Home Transaction, or a Debtor is a Transmitting Utility, check the appropriate box in item 6a. If a Debtor is a Transmitting Utility and the initial financing statement is filed in connection with a Public-Finance Transaction or Manufactured-Home Transaction, check only that a Debtor is a Transmitting Utility.

6b. If this is an Agricultural Lien (as defined in applicable state's enactment of the Uniform Commercial Code) or if this is not a UCC security interest filing (e.g., a tax lien, judgment lien, etc.), check the appropriate box in item 6b and attach any other items required under other law.

7. **Alternative Designation.** If filer desires (at filer's option) to use the designations lessee and lessor, consignee and consignor, seller and buyer (such as in the case of the sale of a payment intangible, promissory note, account or chattel paper), bailee and bailor, or licensee and licensor instead of Debtor and Secured Party, check the appropriate box in item 7.

8. **Optional Filer Reference Data.** This item is optional and is for filer's use only. For filer's convenience of reference, filer may enter in item 8 any identifying information that filer may find useful. Do not include social security numbers or other personally identifiable information.

Form 9-12

UCC1Ad
Financing Statement Addendum

UCC FINANCING STATEMENT ADDENDUM

FOLLOW INSTRUCTIONS

9. NAME OF FIRST DEBTOR: Same as in Section 11 of the Financing Statement; if line 1b was left blank, do not omit, modify, abbreviate, or enter the mailing address in line 10c.

9a. ORGANIZATION'S NAME

OR

9b. INDIVIDUAL'S SURNAME

FIRST PERSONAL NAME

ADDITIONAL NAME(S)/INITIAL(S) SUFFIX

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

10. DEBTOR'S NAME: Provide (10a or 10b) only one additional Debtor name for Debtor name that did not fit in line 9b or 2b of the Financing Statement (Form UCC1) (do not omit, modify, abbreviate any part of the Debtor's name) and enter the mailing address in line 10c.

10a. ORGANIZATION'S NAME

OR

10b. INDIVIDUAL'S SURNAME

INDIVIDUAL'S FIRST PERSONAL NAME

INDIVIDUAL'S ADDITIONAL NAME(S)/INITIAL(S) SUFFIX

10c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY

11. ADDITIONAL SECURED PARTY'S NAME or ASSIGNOR SECURED PARTY'S NAME: Provide only one name (11a or 11b)

11a. ORGANIZATION'S NAME

OR

11b. INDIVIDUAL'S SURNAME FIRST PERSONAL NAME ADDITIONAL NAME(S)/INITIAL(S) SUFFIX

11c. MAILING ADDRESS CITY STATE POSTAL CODE COUNTRY

12. ADDITIONAL SPACE FOR ITEM 4 (Collateral):

13. This FINANCING STATEMENT is to be filed (for record) or recorded in the REAL ESTATE RECORDS (if applicable)

14. This FINANCING STATEMENT: covers timber to be cut covers non-extracted collateral is filed as a fixture filing

15. Name and address of a RECORD OWNER of real estate described in item 16 (if Debtor does not have interest):

16. Description of real estate:

17. MISCELLANEOUS:

Instructions for UCC Financing Statement Addendum (Form UCC1Ad)

Please type or laser-print this form. Be sure it is completely legible. Read and follow all Instructions; use of the correct name for the Debtor is crucial. Fill in form very carefully; mistakes may have important legal consequences. If you have questions, consult your attorney. The filing office cannot give legal advice.

ITEM INSTRUCTIONS

9. **Name of first Debtor.** Enter name of first Debtor exactly as shown in item 1 of Financing Statement (Form UCC1) to which this Addendum relates. The name will not be indexed as a separate debtor. The Debtor name in this section is intended to cross-reference this Addendum with the related Financing Statement (Form UCC1).

If the box in item 1 of the Financing Statement (Form UCC1) was checked because Individual Debtor name did not fit, the box in item 9 of this Addendum should be checked.
10. **Additional Debtor's name.** If this Addendum adds an additional Debtor, complete item 10 in accordance with Instruction 1 of Financing Statement (Form UCC1). For additional Debtors, attach either an additional Addendum or Additional Party (Form UCC1AP) and follow Instruction 1 of Financing Statement (Form UCC1) for determining and formatting additional names.
11. **Additional Secured Party's name or Assignor Secured Party's name.** If this Addendum adds an additional Secured Party, complete item 11 in accordance with Instruction 3 of Financing Statement (Form UCC1). For additional Secured Parties, attach either an additional Addendum or Additional Party (Form UCC1AP) and complete applicable items in accordance with Instruction 3 of Financing Statement (Form UCC1). In the case of a full assignment of the Secured Party's interest before the filing of this financing statement, if filer has provided the name and mailing address of the Assignee in item 3 of Financing Statement (Form UCC1), filer may enter Assignor Secured Party's name and mailing address in item 11.
12. **Additional Collateral Description.** If space in item 4 of Financing Statement (Form UCC1) is insufficient or additional information must be provided, enter additional information in item 12 or attach additional page(s) and incorporate by reference in item 12 (e.g., See Exhibit A). Do not include social security numbers or other personally identifiable information.
- 13-16. **Real Estate Record Information.** If this Financing Statement is to be filed in the real estate records and covers timber to be cut, covers as-extracted collateral, and/or is filed as a fixture filing, complete items 1-4 of the Financing Statement (Form UCC1), check the box in item 13, check the appropriate box in item 14, and complete the required information in items 15 and 16. If the Debtor does not have an interest of record, enter the name and address of the record owner in item 15. Provide a sufficient description of real estate in accordance with the applicable law of the jurisdiction where the real estate is located in item 16. If space in items 15 or 16 is insufficient, attach additional page(s) and incorporate by reference in items 15 or 16 (e.g., See Exhibit A), and continue the real estate record information. Do not include social security numbers or other personally identifiable information.
17. **Miscellaneous.** Under certain circumstances, additional information not provided on the Financing Statement (Form UCC1) may be required. Also, some states have non-uniform requirements. Use this space or attach additional page(s) and incorporate by reference in item 17 (e.g., See Exhibit A) to provide such additional information or to comply with such requirements; otherwise, leave blank. Do not include social security numbers or other personally identifiable information.

Form 9-13

**UCC1AP
Financing Statement Additional Party**

UCC FINANCING STATEMENT ADDITIONAL PARTY

FOLLOW INSTRUCTIONS

18. NAME OF FIRST DEBTOR: Same as line 1a or 1b of Financing Statement; if line 1b was left blank because Individual Debtor name did not fit, check here

18a. ORGANIZATION'S NAME	
OR	
18b. INDIVIDUAL'S SURNAME	
FIRST PERSONAL NAME	
ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY.

19. ADDITIONAL DEBTOR'S NAME: Provide only one Debtor name (19a or 19b) (use correct, full name; do not omit, modify, abbreviate any part of the Debtor name)

19a. ORGANIZATION'S NAME			
OR			
19b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX
19c. MAILING ADDRESS	CITY	STATE	POSTAL CODE COUNTRY

20. ADDITIONAL DEBTOR'S NAME: Provide only one Debtor name (20a or 20b) (use correct, full name; do not omit, modify, abbreviate any part of the Debtor name)

20a. ORGANIZATION'S NAME			
OR			
20b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX
20c. MAILING ADDRESS	CITY	STATE	POSTAL CODE COUNTRY

21. ADDITIONAL DEBTOR'S NAME: Provide only one Debtor name (21a or 21b) (use correct, full name; do not omit, modify, abbreviate any part of the Debtor name)

21a. ORGANIZATION'S NAME			
OR			
21b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX
21c. MAILING ADDRESS	CITY	STATE	POSTAL CODE COUNTRY

22. ADDITIONAL SECURED PARTY'S NAME or ASSIGNOR SECURED PARTY'S NAME: Provide only one name (22a or 22b)

22a. ORGANIZATION'S NAME			
OR			
22b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX
22c. MAILING ADDRESS	CITY	STATE	POSTAL CODE COUNTRY

23. ADDITIONAL SECURED PARTY'S NAME or ASSIGNOR SECURED PARTY'S NAME: Provide only one name (23a or 23b)

23a. ORGANIZATION'S NAME			
OR			
23b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX
23c. MAILING ADDRESS	CITY	STATE	POSTAL CODE COUNTRY

24. MISCELLANEOUS:

Instructions for UCC Financing Statement Additional Party (Form UCC1AP)

Please type or laser-print this form. Be sure it is completely legible. Read and follow all Instructions; use of the correct name for the Debtor is crucial. Fill in form very carefully; mistakes may have important legal consequences. If you have questions, consult your attorney. The filing office cannot give legal advice.

Use this form (multiple copies if needed) to continue adding additional Debtor or Secured Party names as needed when filing a UCC Financing Statement (Form UCC1).

ITEM INSTRUCTIONS

18. **Name of first Debtor.** Enter name of first Debtor exactly as shown in item 1 of Financing Statement (Form UCC1) to which this Additional Party relates. The name will not be indexed as a separate Debtor. If line 1b of the Financing Statement (Form UCC1) was left blank because the Individual Debtor name did not fit, check the box in item 18 and enter as much of the Individual Debtor name from item 10 that will fit. The Debtor name in this section is intended to cross-reference this Additional Party with the related Financing Statement (Form UCC1).
- 19-21. **Additional Debtor's name.** If this Additional Party adds additional Debtors, complete items 19, 20, and 21 in accordance with Instruction 1 of Financing Statement (Form UCC1).
- 22-23. **Additional Secured Party's name or Assignor Secured Party's name.** If this Additional Party form adds additional Secured Parties, complete items 22 and 23 in accordance with Instruction 3 of Financing Statement (Form UCC1). In the case of a full assignment of the Secured Party's interest before the filing of this financing statement, if filer has provided the name and mailing address of the Assignee in item 3 of Financing Statement (Form UCC1), filer may enter Assignor Secured Party's name and mailing address in items 22 and 23.
24. **Miscellaneous.** Under certain circumstances, additional information not provided on the Financing Statement (Form UCC1) may be required. Also, some states have non-uniform requirements. Use this space or attach additional page(s) and incorporate by reference in item 24 (e.g., See Exhibit A) to provide such additional information or to comply with such requirements; otherwise, leave blank. Do not include social security numbers or other personally identifiable information.

Form 9-14

UCC3 Financing Statement Amendment



UCC FINANCING STATEMENT AMENDMENT

FOLLOW INSTRUCTIONS

A. NAME & PHONE OF CONTACT AT FILER (optional)
B. E-MAIL CONTACT AT FILER (optional)
C. SEND ACKNOWLEDGMENT TO: (Name and Address)

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1a. INITIAL FINANCING STATEMENT FILE NUMBER

1b. This FINANCING STATEMENT AMENDMENT is to be filed (for recording) in the REAL ESTATE RECORDS. File: attach Amendment Addendum (Form UCC3Ad) and provide Debtor's name in item 13

2. TERMINATION: Effective _____ of the Financing Statement identified above is terminated with respect to the priority interest(s) of Secured Party authorizing this Termination Statement

3. ASSIGNMENT (full or partial): Provide name of Assignee in item 7a or 7b, and address of Assignee in item 7c and name of Assignor in item 9. For partial assignment, complete items 7 and 9 and also indicate affected collateral in item 8

4. CONTINUATION: Effective _____ of the Financing Statement identified above with respect to the priority interest(s) of Secured Party authorizing this Continuation Statement is authorized for the additional period provided by applicable law

5. PARTY INFORMATION CHANGE:
 Check one of the following: Debtor or Secured Party of record. AND Check one of the following boxes to: CHANGE name and/or address. Complete item 6a or 6b; and item 7a or 7b and item 7c. ADD name. Complete item 7a or 7b, and item 7c. DELETE name. Give record name to be deleted in item 6a or 6b

6. CURRENT RECORD INFORMATION: Complete for Party Information Change - provide only one name (6a or 6b)

6a. ORGANIZATION'S NAME _____

OR

6b. INDIVIDUAL'S SURNAME _____	FIRST PERSONAL NAME _____	ADDITIONAL NAME(S)/INITIAL(S) _____	SUFFIX _____
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7. CHANGED OR ADDED INFORMATION: Complete for Assignment or Party Information Change - provide only one name (7a or 7b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name)

7a. ORGANIZATION'S NAME _____

OR

7b. INDIVIDUAL'S SURNAME _____

INDIVIDUAL'S FIRST PERSONAL NAME _____

INDIVIDUAL'S ADDITIONAL NAME(S)/INITIAL(S) _____

SUFFIX _____

7c. MAILING ADDRESS _____	CITY _____	STATE _____	POSTAL CODE _____	COUNTRY _____
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8. COLLATERAL CHANGE: Also check one of the following for collateral: ADD collateral DELETE collateral RESTATE collateral ASSIGN collateral. Indicate collateral: _____

9. NAME OF SECURED PARTY OF RECORD AUTHORIZING THIS AMENDMENT: Provide only one name (9a or 9b) (name of Assignee, if this is Assignment). If this Amendment authorized by a DEBTOR, check here and provide name of authorizing Debtor:

9a. ORGANIZATION'S NAME _____

OR

9b. INDIVIDUAL'S SURNAME _____	FIRST PERSONAL NAME _____	ADDITIONAL NAME(S)/INITIAL(S) _____	SUFFIX _____
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10. OPTIONAL FILER REFERENCE DATA:

Instructions for UCC Financing Statement Amendment (Form UCC3)

Please type or laser-print this form. Be sure it is completely legible. Read and follow all Instructions, especially Instruction 1a; correct file number of initial financing statement is crucial.

Fill in form very carefully; mistakes may have important legal consequences. If you have questions, consult your attorney. The filing office cannot give legal advice.

Send completed form and any attachments to the filing office, with the required fee.

ITEM INSTRUCTIONS

A and B. To assist filing offices that might wish to communicate with filer, filer may provide information in item A and item B. These items are optional.

C. Complete item C if filer desires an acknowledgment sent to them. If filing in a filing office that returns an acknowledgment copy furnished by filer, present simultaneously with this form the Acknowledgment Copy or a carbon or other copy of this form for use as an acknowledgment copy.

Always complete items 1a and 9.

- 1a. **File Number.** Enter file number of initial financing statement to which this Amendment relates. Enter only one file number. In some states, the file number is not unique; in those states, also enter in item 1a, after the file number, the date that the initial financing statement was filed.
- 1b. If this Amendment is to be filed in the real estate records or in any other filing office where the name of current Debtor is required for indexing purposes, check the box in item 1b and enter Debtor name in item 13 of Amendment Addendum (Form UCC3Ad). Complete item 13 in accordance with instructions on Amendment Addendum (Form UCC3Ad). If Debtor does not have an interest of record, enter the name and address of the record owner in item 16 of Amendment Addendum (Form UCC3Ad).

Note: Show purpose of this Amendment by checking box 2, 3, 4, 5, or 8 (in items 5 and 8 you must check additional boxes); also complete items 6, 7, and/or 8 as appropriate. Some, but not all filing offices accept multiple actions on an Amendment. Filing offices that accept multiple actions may charge an additional fee. Some filing offices that accept multiple actions may only index one of the actions requested. Consult the administrative rules of the designated filing office to determine the extent to which multiple actions will be accepted, indexed, and the applicable filing fees for multiple actions.

2. **Termination.** To terminate the effectiveness of the identified financing statement with respect to the security interest(s) of authorizing Secured Party, check box in item 2. See Instruction 9 below.
3. **Assignment.** To assign (1) some or all of Assignor's right to amend the identified financing statement, or (2) the Assignor's right to amend the identified financing statement with respect to some (but not all) of the collateral covered by the identified financing statement: Check box in item 3 and enter name of Assignee in item 7a or 7b; always enter the Assignee's mailing address in item 7c. Also enter name of Assignor in item 9. If assignment affects the right to amend the financing statement with respect to some (but not all) of the collateral covered by the identified financing statement, check the ASSIGN collateral box and indicate the particular collateral covered in item 8.
4. **Continuation.** To continue the effectiveness of the identified financing statement with respect to the security interest(s) of authorizing Secured Party, check box in item 4. See Instruction 9 below.
- 5-7. **Party Information Change.** To indicate a party information change, check this box; also check additional boxes (as applicable) and complete items 5, 6, and/or 7 as appropriate.

To change the name and/or address of a party (items 5, 6, and 7): Check box in item 5 to indicate whether this Amendment relates to a Debtor or Secured Party of record; and check the CHANGE name and/or mailing address box in item 5 and enter name of affected party (current record name) in item 6a or 6b; and repeat or enter the new name in item 7a or 7b; always enter the party's mailing address in item 7c.

To add a party (items 5 and 7): Check box in item 5 to indicate whether this Amendment relates to a Debtor or Secured Party of record; and check the ADD name box in item 5 and enter the added party's name in item 7a or 7b; always enter the party's mailing address in item 7c. For additional Debtors or Secured Parties, attach Amendment Additional Party (Form UCC3AP), using correct name format.

To delete a party (items 5 and 6): Check box in item 5 to indicate whether this Amendment relates to a Debtor or Secured Party of record; and check the DELETE name box in item 5 and enter the deleted party's name in item 6a or 6b.

8. **Collateral Change.** To indicate a collateral change, check this box; also check additional box (as applicable) and describe the change in item 8. If space in item 8 is insufficient, continue collateral description in item 14 of Amendment Addendum (Form UCC3Ad). Do not include social security numbers or other personally identifiable information.

To add collateral: Check the ADD collateral box in item 8 and indicate the additional collateral.

To delete collateral: Check the DELETE collateral box in item 8 and indicate the deleted collateral. A partial release is a DELETE collateral change.

To restate covered collateral description: Check the RESTATE covered collateral box in item 8 and indicate the restated collateral.

To assign the right to amend the financing statement with respect to part (but not all) of the collateral covered by the identified financing statement: Comply with Instruction 3 above and check the ASSIGN collateral box in item 8.

If, due to a full release of collateral, filer no longer claims a security interest under the identified financing statement, check box in item 2 (Termination) and not a box in item 8 (Collateral Change).

9. **Name of Authorizing Party.** Enter name of party of record authorizing this Amendment. In most cases, the authorizing party is the Secured Party of record. If this is an Amendment (Assignment), enter Assignor's name in item 9a or 9b. If this is an Amendment (Termination) authorized by a Debtor, check the box in item 9 and enter the name of the Debtor authorizing this Amendment in item 9a or 9b. If this Amendment (Termination) is to be filed or recorded in the real estate records, also enter, in item 12 of Amendment Addendum (Form UCC3Ad), the name of Secured Party of record. If there is more than one authorizing Secured Party or Debtor, enter additional name(s) in item 14 of Amendment Addendum (Form UCC3Ad).

10. **Optional Filer Reference Data.** This item is optional and is for filer's use only. For filer's convenience of reference, filer may enter in item 10 any identifying information that filer may find useful. Do not include social security numbers or other personally identifiable information.

Form 9-15

UCC3Ad Financing Statement Amendment Addendum

UCC FINANCING STATEMENT AMENDMENT ADDENDUM

FOLLOW INSTRUCTIONS

11. INITIAL FINANCING STATEMENT FILE NUMBER: Same as item 1a on Amendment form

12. NAME OF PARTY AUTHORIZING THIS AMENDMENT: Same as item 9c on Amendment form

12a. ORGANIZATION'S NAME

OR

12b. INDIVIDUAL'S SURNAME

FIRST PERSONAL NAME

ADDITIONAL NAME(S)/INITIAL(S) SUFFIX

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

13. Name of DEBTOR on related financing statement (Name of a Debtor of record required for indexing purposes only in some filing offices; Instructive item 13: Provide only one Debtor name (13a or 13b) (Use correct, full name, do not omit, modify, abbreviate any part of the Debtor name); Instructive item 13: If name does not fit

13a. ORGANIZATION'S NAME

OR

13b. INDIVIDUAL'S SURNAME FIRST PERSONAL NAME ADDITIONAL NAME(S)/INITIAL(S) SUFFIX

14. ADDITIONAL SPACE FOR ITEM 8 (Collateral)

15. This FINANCING STATEMENT AMENDMENT: covers timber to be cut, covers an extracted collateral, is filed as a fixture filing

16. Name and address of a RECORD OWNER of real estate described in item 17 (If Debtor does not have record interest):

17. Description of real estate

18. MISCELLANEOUS:

Instructions for UCC Financing Statement Amendment Addendum (Form UCC3Ad)

Please type or laser-print this form. Be sure it is completely legible. Read and follow all Instructions; use of the correct name for the Debtor is crucial. Fill in form very carefully; mistakes may have important legal consequences. If you have questions, consult your attorney. The filing office cannot give legal advice.

ITEM INSTRUCTIONS

11. **File Number.** Enter file number of initial financing statement as shown in item 1a of Amendment (Form UCC3) to which this Amendment Addendum relates.
12. **Name of Authorizing Party.** Enter information exactly as shown in item 9 on Amendment (Form UCC3).
13. **Name of Debtor on related Financing Statement.** If this Amendment (Form UCC3) is to be filed in the real estate records or in any other filing office where the name of a current Debtor of record is required for indexing purposes, enter Debtor name in item 13a or 13b. Item 13 is intended to cross-reference the Amendment (Form UCC3) and Amendment Addendum with the related Financing Statement (Form UCC1). If more than one current Debtor, enter additional name(s) in item 14 or on additional Amendment Addendum (Form UCC3Ad). Do not use item 13 to change, add, or delete a Debtor name.
14. **Additional Space for Item 8 (Collateral).** If space in item 8 of Amendment (Form UCC3) is insufficient or additional information must be provided, enter additional information in item 14 or attach additional page(s) and incorporate by reference in item 14 (e.g., See Exhibit A). Do not include social security numbers or other personally identifiable information.
- 15-17. **Real Estate Record Information.** If this Amendment (Form UCC3) is to be filed in the real estate records, complete the required information (items 15, 16, and 17). If this Amendment (Form UCC3) covers timber to be cut, covers as-extracted collateral, and/or is filed as a fixture filing, check appropriate box in item 15. If the Debtor does not have an interest of record, enter the name and address of the record owner in item 16. Provide a sufficient description of real estate in accordance with the applicable law of the jurisdiction where the real estate is located in item 17. If space in items 16 or 17 is insufficient, attach additional page(s) and incorporate by reference in items 16 or 17 (e.g., See Exhibit A), and continue the real estate information. Do not include social security numbers or other personally identifiable information.
18. **Miscellaneous.** Under certain circumstances, additional information not provided on the Financing Statement Amendment (Form UCC3) may be required. Also, some states have non-uniform requirements. Use this space or attach additional page(s) and incorporate by reference in item 18 (e.g., See Exhibit A) to provide such additional information or to comply with such requirements; otherwise, leave blank. Do not include social security numbers or other personally identifiable information.

Form 9-16

**UCC3AP
Financing Statement Amendment Additional Party**

UCC FINANCING STATEMENT AMENDMENT ADDITIONAL PARTY

FOLLOW INSTRUCTIONS

19. INITIAL FINANCING STATEMENT FILE NUMBER: Same as item 1a on Amendment form

20. NAME OF PARTY AUTHORIZING THIS AMENDMENT: Same as item 9 on Amendment form

20a. ORGANIZATION'S NAME

OR
20b. INDIVIDUAL'S SURNAME

FIRST PERSONAL NAME

ADDITIONAL NAME(S)/INITIAL(S)

SUFFIX

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

21. ADDITIONAL DEBTOR'S NAME: Provide only one Debtor name (21a or 21b) (unless directed, full name; do not omit, modify, abbreviate any part of the Debtor's name)

21a. ORGANIZATION'S NAME

OR
21b. INDIVIDUAL'S SURNAME

FIRST PERSONAL NAME

ADDITIONAL NAME(S)/INITIAL(S)

SUFFIX

21c. MAILING ADDRESS

CITY

STATE

POSTAL CODE

COUNTRY

22. ADDITIONAL DEBTOR'S NAME: Provide only one Debtor name (22a or 22b) (unless directed, full name; do not omit, modify, abbreviate any part of the Debtor's name)

22a. ORGANIZATION'S NAME

OR
22b. INDIVIDUAL'S SURNAME

FIRST PERSONAL NAME

ADDITIONAL NAME(S)/INITIAL(S)

SUFFIX

22c. MAILING ADDRESS

CITY

STATE

POSTAL CODE

COUNTRY

23. ADDITIONAL DEBTOR'S NAME: Provide only one Debtor name (23a or 23b) (unless directed, full name; do not omit, modify, abbreviate any part of the Debtor's name)

23a. ORGANIZATION'S NAME

OR
23b. INDIVIDUAL'S SURNAME

FIRST PERSONAL NAME

ADDITIONAL NAME(S)/INITIAL(S)

SUFFIX

23c. MAILING ADDRESS

CITY

STATE

POSTAL CODE

COUNTRY

24. ADDITIONAL SECURED PARTY'S NAME or ASSIGNOR SECURED PARTY'S NAME: Provide only one name (24a or 24b)

24a. ORGANIZATION'S NAME

OR
24b. INDIVIDUAL'S SURNAME

FIRST PERSONAL NAME

ADDITIONAL NAME(S)/INITIAL(S)

SUFFIX

24c. MAILING ADDRESS

CITY

STATE

POSTAL CODE

COUNTRY

25. ADDITIONAL SECURED PARTY'S NAME or ASSIGNOR SECURED PARTY'S NAME: Provide only one name (25a or 25b)

25a. ORGANIZATION'S NAME

OR
25b. INDIVIDUAL'S SURNAME

FIRST PERSONAL NAME

ADDITIONAL NAME(S)/INITIAL(S)

SUFFIX

25c. MAILING ADDRESS

CITY

STATE

POSTAL CODE

COUNTRY

26. MISCELLANEOUS:

FILING OFFICE COPY — UCC FINANCING STATEMENT AMENDMENT ADDITIONAL PARTY (Form UCC3AP) (Rev. 08/22/11) International Association of Commercial Administrators (IACA)

Instructions for UCC Financing Statement Amendment Additional Party (Form UCC3AP)

Please type or laser-print this form. Be sure it is completely legible. Read and follow all Instructions; use of the correct name for the Debtor is crucial. Fill in form very carefully; mistakes may have important legal consequences. If you have questions, consult your attorney. The filing office cannot give legal advice.

Use this form (multiple copies if needed) to continue adding additional Debtor or Secured Party names as needed when filing a UCC Financing Statement Amendment (Form UCC3).

ITEM INSTRUCTIONS

19. **File Number.** Enter file number of initial financing statement as shown in item 1a of Amendment (Form UCC3) to which this Amendment Addendum relates.
20. **Name of Authorizing Party.** Enter information exactly as shown in item 9 on Amendment (Form UCC3).
- 21-23. **Additional Debtor's name.** If this Amendment Additional Party adds additional Debtors, complete items 21, 22, and 23 in accordance with Instruction 1 of Financing Statement (Form UCC1).
- 24-25. **Additional Secured Party's name or Assignor Secured Party's name.** If this Amendment Additional Party adds additional Secured Parties, complete items 24 and 25 in accordance with Instruction 3 of Financing Statement (Form UCC1). In the case of an assignment of the Secured Party's interest, filer may enter Secured Party and/or Assignor Secured Party's name and mailing address information in items 24 and 25.
26. **Miscellaneous.** Under certain circumstances, additional information not provided on the Financing Statement Amendment (Form UCC3) may be required. Also, some states have non-uniform requirements. Use this space or attach additional page(s) and incorporate by reference in item 26 (e.g., See Exhibit A) to provide such additional information or to comply with such requirements; otherwise, leave blank. Do not include social security numbers or other personally identifiable information.

Form 9-17

UCC5 Information Statement



CAUTION: This is not an amendment.

INFORMATION STATEMENT

FOLLOW INSTRUCTIONS

A. NAME & PHONE OF CONTACT AT FILER (optional)
B. E-MAIL CONTACT AT FILER (optional)
C. SEND ACKNOWLEDGMENT TO: (Name and Address)

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. Identification of the RECORD to which this INFORMATION STATEMENT relates

1a. INITIAL FINANCING STATEMENT FILE NUMBER	1b. RECORD INFORMATION TO WHICH THIS INFORMATION STATEMENT RELATES
---	--

2. Check one of the options below to indicate the claim made by this INFORMATION STATEMENT

2a. RECORD IS INACCURATE. Enter in item 3 the basis for the belief by the Debtor of Record identified in item 5 that the RECORD identified in item 1 is inaccurate and indicate the manner in which the person believes the RECORD should be amended to the accuracy.

2b. RECORD WAS WRONGFULLY FILED. Enter in item 3 the basis for the belief by the Debtor of Record identified in item 5 that the RECORD identified in item 1 was wrongfully filed.

2c. RECORD FILED BY PERSON NOT ENTITLED TO DO SO. Enter in item 3 the basis for the belief by the Secured Party of Record that the person that filed the RECORD identified in item 1 was not entitled to do so under UCC Section 9-509.

3. Basis for claim of bona fide purchaser checked in item 2

4. If this INFORMATION STATEMENT relates to a RECORD filed (or recorded) in a filing office described in Section 9-501(a)(1) and this INFORMATION STATEMENT is filed in which a filing office, provide the date (and time) on which the INITIAL FINANCING STATEMENT identified in item 1a above was filed (or recorded)

4a. DATE	4b. TIME
----------	----------

5. NAME of PERSON filing this INFORMATION STATEMENT

5a. ORGANIZATION'S NAME			
OR	5b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S) SUFFIX

FILING OFFICE COPY -- INFORMATION STATEMENT (Form UCC5) (Rev. 07/19/12)

International Association of Commercial Administrators (IACA)

Instructions for Information Statement (Form UCC5)

Please type or laser-print this form. Be sure it is completely legible. Read and follow all Instructions, especially Instructions 1a and 1b; correct identification of the initial record to which this Information Statement relates is crucial.

Fill in form very carefully; mistakes may have important legal consequences. If you have questions, consult your attorney. The filing office cannot give legal advice.

Send completed form and any attachments to the filing office, with the required fee.

Note: A person may file an Information Statement with respect to a record indexed under that person's name if the person believes the record was inaccurate or wrongfully filed, or a person may file an Information Statement with respect to a record if the person is a Secured Party of Record with respect to the financing statement to which the record relates and believes that the person that filed the record was not entitled to do so.

ITEM INSTRUCTIONS

A and B. To assist filing offices that might wish to communicate with filer, filer may provide information in item A and item B. These items are optional.
C. Complete item C if filer desires an acknowledgment sent to them. If filing in a filing office that returns an acknowledgment copy furnished by filer, present simultaneously with this form the Acknowledgment Copy or a carbon or other copy of this form for use as an acknowledgment copy.

Always complete items 1 and 5 and either 2a or 2b or 2c. Always complete item 3 with the basis for the box marked in item 2. You may also be required to complete item 4.

- 1a. **File number:** Enter file number of initial financing statement to which the record that is the object of this Information Statement relates. Enter only one file number.
- 1b. Enter record information to which this Information Statement relates. Indicate the type of record to which this Information Statement relates (e.g., Financing Statement or Amendment) or you may also insert additional information that you believe will assist in identifying the record (e.g., the record file number or the filing date of the record).
- 2a. **Record is inaccurate.** If this Information Statement is filed based upon the belief of the Debtor of Record that the record identified in item 1 is inaccurate, check box in item 2a, provide the basis for that belief in item 3, and indicate the manner in which the record should be amended to cure the inaccuracy.
- 2b. **Record was wrongfully filed.** If this Information Statement is filed based upon the belief of the Debtor of Record that the record identified in item 1 was wrongfully filed, check box in item 2b and provide the basis for that belief in item 3.
- 2c. **Record filed by person not entitled to do so.** If this Information Statement is filed based upon the belief of the Secured Party of Record that the person that filed the record identified in item 1b was not entitled to do so under Section 9-509, check box in item 2c and provide the basis for that belief in item 3.
3. **Basis.** Use this item to provide the basis for the box checked in item 2.
4. **Filing office date and time.** If this Information Statement relates to a record filed [or recorded] in a filing office described in Section 9-501(a)(1) and this Information Statement is filed in such a filing office, provide the date [and time] on which the initial financing statement identified in item 1a above was filed [or recorded].
5. **Name of Authorizing Party.** Enter name of the person filing this Information Statement. This name must be the same name as a Secured Party of Record or the name under which the record is indexed.

Form 9-18

UCC11 Information Request



INFORMATION REQUEST FOLLOW INSTRUCTIONS

A. NAME & PHONE OF CONTACT AT FILER (optional)	FILING OFFICE ACCT #
B. E-MAIL CONTACT AT FILER (optional)	
C. RETURN TO: (Name and Address)	

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S NAME to be searched: Provide only one Debtor name (1a or 1b) (do not check full name; do not omit, modify or abbreviate any part of the Debtor's name)

1a. ORGANIZATION'S NAME				
OR	1b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX

2. INFORMATION OPTIONS relating to UCC filings and other notices on file in the filing office that include the Debtor name identified in item 1:

2a. LISTING RELATING TO DEBTOR AT SPECIFIED CITY AND STATE ONLY — Filing office requested to furnish a search report listing all filings, statements, related records, and other notices on file in filing office that include the Debtor's name identified in item 1 and show that Debtor's address in the city, state, and country indicated here

CITY	STATE	COUNTRY
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2b. INFORMATION REQUEST RESPONSE WITH FULL COPIES (CERTIFIED) — Filing office requested to furnish a search report listing all filings, statements, related records, and other notices, showing date and time of filing and name and address of each Secured Party named therein and also furnish a **CERTIFIED COPY** of ALL reported records (including all attachments)

2c. INFORMATION REQUEST RESPONSE WITHOUT COPIES — Filing office requested to furnish a search report (as described in 2b) listing all reported records, but to furnish NO COPIES of reported records

2d. INFORMATION REQUEST RESPONSE WITH PARTIAL COPIES (CERTIFIED) — Filing office requested to furnish a search report (as described in 2b) and also to furnish a **CERTIFIED COPY** of the FIRST PAGE ONLY of all reported records

3. SPECIFIED COPIES ONLY — Filing office requested to furnish a photocopy of each page of the filings, statements, related records, and other notices (including all attachments) that are identified below by record number. Certain filing offices require additional identifying information — please complete if required

Record Number	Date Record Filed (if required)	Type of Record and Additional Identifying Information (if required)

CERTIFIED COPY REQUEST — Filing office requested to furnish CERTIFIED copies per request indicated in this item 3

4. LISTING RELATING TO SECURED PARTY — Filing office requested to furnish a search report listing all filings, statements, related records, and other notices (regardless of Debtor name) on file in filing office that include the Secured Party's name identified in item 4a or 4b. If a specified city, state, and country are being requested (optional), show that Secured Party's address in item 4c

4a. ORGANIZATION'S NAME				
OR	4b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX
4c. CITY	STATE	COUNTRY		

5. DELIVERY INSTRUCTIONS (request will be filled by mail unless shown in item C unless otherwise instructed here):

5a. FAX Delivery — Filing office requested to fax results of this Information Request to fax number indicated here: _____

5b. Pick Up

5c. Other

Specify desired method here (if available from this office); provide delivery information (e.g., delivery service's name, addressee's account # with delivery service, addressee's phone #, etc.)

Instructions for Information Request (Form UCC11) (Texas)

Please type or laser-print this form. Be sure it is completely legible. Read and follow all Instructions, especially Instruction 1; use of the correct name for the Debtor is crucial.

Fill in form very carefully; mistakes may have important legal consequences. If you have questions, consult your attorney. The filing office cannot give legal advice.

Send completed form parts 1 and 2 (labeled Filing Office Copy (1) and (2)) to the filing office, with the required fee.

ITEM INSTRUCTIONS

A and B. To assist filing offices that might wish to communicate with filer, filer may provide information in item A and item B. These items are optional.
C. Provide name and address of requestor in item C. This item is NOT optional.

1. **Debtor's name.** Enter only one Debtor name in item 1 - either an organization's name (1a) or an individual's name (1b). Enter Debtor's correct name. Do not abbreviate words that are not already abbreviated in the Debtor's name.

1a. **Organization Debtor Name.** "Organization Name" means the name of an entity that is not a natural person. A sole proprietorship is not an organization, even if the individual proprietor does business under a trade name. If Debtor is a registered organization (e.g., corporation, limited partnership, limited liability company), it is advisable to examine Debtor's current filed public organic records to determine Debtor's correct name. Trade name is insufficient. If a corporate ending (e.g., corporation, limited partnership, limited liability company) is part of the Debtor's name, it must be included. Do not use words that are not part of the Debtor's name.

1b. **Individual Debtor Name.** "Individual Name" means the name of a natural person; this includes the name of an individual doing business as a sole proprietorship, whether or not operating under a trade name. The term includes the name of a decedent where collateral is being administered by a personal representative of the decedent. The term does not include the name of an entity, even if it contains, as part of the entity's name, the name of an individual. Prefixes (e.g., Mr., Mrs., Ms.) and titles (e.g., M.D.) are generally not part of an individual name. Indications of lineage (e.g., Jr., Sr., III) generally are not part of the individual's name, but may be entered in the Suffix box. Enter individual Debtor's surname (family name) in Individual's Surname box, first personal name in First Personal Name box, and all additional names in Additional Name(s)/Initial(s) box.

If a Debtor's name consists of only a single word, enter that word in Individual's Surname box and leave other boxes blank.

For both organization and individual Debtors. Do not use Debtor's trade name, DBA, AKA, FKA, division name, etc. in place of or combined with Debtor's correct name; filer may add such other names as additional Debtors if desired (but this is neither required nor recommended).

2. Information Options.

2a. To request a "Listing Relating to Debtor at Specified City and State Only" check box 2a and enter the city, state, and country in item 2a. This type of request will introduce a search criterion that narrows the scope of the search, which may result in an incomplete search (that fails to list all filings against a named Debtor) and requestor may fail to learn information that might be of value.

2b-2d. Check appropriate box (2b, 2c, or 2d) to specify whether search response should include all copies, no copies or partial copies.

3. **Specified Copies Only.** To request specified copies only, check the "Specified Copies Only" box and provide the record number(s) as requested. To request certified copies for record number(s) identified in item 3, also check the "Certified Copy Request" box.

4. **Listing relating to Secured Party.** To request a listing for a named Secured Party, check this box. Enter only one Secured Party name in item 4 - either an organization's name (4a) or an individual's name (4b). If a specified city, state, and country is being requested (optional), enter that Secured Party's address in item 4c.

5. **Delivery Instructions.** Unless otherwise instructed, filing office will mail information to the name and address in item C. Check appropriate box (5a, 5b, or 5c) if optional delivery method is being requested.

5a. To request information to be faxed to the requestor, check the "FAX Delivery" box and provide fax number in specified area.

5b. To request information to be picked up from the filing office, check the "Pick Up" box.

5c. For other than mail, pick up or FAX, check the "Other" box and specify the other delivery method that is being requested. If requesting delivery service, provide delivery service's name and requestor's account number to bill for delivery charge. Filing office will not deliver by delivery service unless prepaid waybill or account number for billing is provided.

If requesting information from a county clerk filing office, contact county clerk to determine what services are offered by that office.

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Chapter 10

Ancillary Loan Documents

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[Reserved]

Chapter 10

Ancillary Loan Documents

§ 10.1 **General Considerations for Transfer of Note and Lien**

The transfer of note and lien, form 10-1 in this chapter, is used to transfer ownership of a note or other obligation and the lien securing it to another party. This type of transfer is a real property transaction not subject to the Uniform Commercial Code provisions governing secured transactions. The transfer instrument must be filed in the real property records of the county in which the land is located, or, like other documents concerning the conveyance of real property, it is void as to a creditor or subsequent purchaser for valuable consideration without notice. Tex. Prop. Code § 13.001(a).

The holder of the note must endorse it in favor of the transferee and deliver both the transfer instrument and the note to the transferee. Any special terms included in the transfer instrument, such as a negation of recourse or of representations or warranties, should also be noted in the endorsement on the note.

If the note and lien are being pledged as collateral, the transaction is subject to the Texas Uniform Commercial Code. The proper procedure for effecting a security interest is outlined in chapter 9 in this manual.

§ 10.1:1 **Cautions for Transfer of Lien**

The borrower must receive actual notice of the transfer of the note and lien. If the borrower continues to make payments to the prior holder and has not received actual notice, the transferee has no recourse against the borrower. Accordingly, the transferee should either notify the borrower

of the transfer or make certain that the prior holder informs the borrower of the transfer.

§ 10.1:2 **Instructions for Completing Transfer of Lien**

Form 10-1 in this chapter is drafted with the assumption that the parties will not wish to show the actual consideration for the transfer. However, a description of the consideration could be added at any suitable place.

The note is frequently secured by two liens, such as a vendor's lien and a deed-of-trust lien. All liens should be listed, even if the attorney for the note holder making the transfer has access only to the recording information for the deed of trust. If recording information for all documents is available, it should be included, but a simple notation of a lien other than the one described by recording information is adequate.

For information about the property description, see section 3.7 in this manual.

§ 10.1:3 **Additional Clauses: Negation of Recourse and Representations and Warranties**

If the holder is being paid in full, the holder has the option to sign a release. The transferee, however, will most likely want a transfer instrument. In that case, the holder will not want to incur any liability beyond that which the holder would incur by signing a release. To do so, the holder will make the transfer without recourse. Merely making the transfer without recourse does not negate the transfer warranties of Texas Business

and Commerce Code section 3.416. *See* Tex. Bus. & Com. Code § 3.416 cmt. 3. To negate the transfer warranties, the words *without warranties* or other specific reference must be included in the transfer instrument. *See* Tex. Bus. & Com. Code § 3.416 cmt. 5. The words *without recourse against or without representation or warranty by* should be added to the endorsement of the note and a statement added to the transfer of note and lien to accomplish this purpose. There are some representations that the holder can make that will not result in liability beyond that of signing a release. First, the holder is the correct person to make the transfer, that is, the holder is the person entitled to enforce the note. Second, the payoff amount, the outstanding principal and interest, is correctly stated. Third, if true, the note is not overdue. This last representation helps the transferee obtain holder-in-due-course status. *See* Tex. Bus. & Com. Code § 3.302(a)(2)(C).

§ 10.1:4 Endorsement of Note

The note transferred should be endorsed and dated, and if the transfer is without recourse against or representation or warranty by the holder, except as stated, that fact should be noted:

[Date of transfer]

Pay to the order of [name] [without recourse against [and/or] without representation or warranty by, except as stated in a separate transfer of note and lien, [name of holder]].

[Signature of holder]

§ 10.1:5 Confidentiality Notice

Instruments, defined as deeds and deeds of trust, transferring an interest in real property to or from an individual must contain the confidentiality notice required by Tex. Prop. Code § 11.008. *See* section 3.16 in this manual.

§ 10.2 General Considerations for Release of Lien and Partial Release of Lien

Although payment of a debt extinguishes the liens that secure it even without a formal release, the lienholder has a duty to provide a written release. After paying the debt, the borrower may bring suit against a lienholder who refuses to provide a release and may recover actual damages incurred because of the refusal. *Bayless v. Strahan*, 182 S.W.2d 262 (Tex. Civ. App.—Amarillo 1944, writ ref'd w.o.m.).

The release should be filed in the real property records of the county in which the lien is recorded.

§ 10.2:1 Cautions for Partial Release

Only the portion of the property to be released from the lien should be described in the partial release, form 10-3 in this chapter.

If the lien instrument does not authorize partial releases, the lienholder is not required to grant a partial release. If the lienholder nevertheless agrees to a partial release, obtaining the written consent of any junior lienholder may be considered, although obtaining a junior lienholder's consent is not general practice.

If the note secured by the lien has makers or guarantors who are not grantors in the lien instrument, their written consent to the partial release is probably necessary unless the note or guaranty provides for their continuing liability after a partial release.

If the lien is insured by a mortgagee's title policy, an endorsement of the policy should be obtained. Title companies may require a premium for endorsement. Procedural Rule P-9.b(3), *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*.

§ 10.2:2 Instructions for Completing Release

Notes are frequently secured by more than one lien, such as a vendor's lien and deed-of-trust lien, and all of them should be included in the release. If recording information for all documents is available, it should be included under the heading "Note and Lien Are Described in the Following Documents." Even if some recording information is not available, all lien documents should be described as fully as possible.

For information about the property description, see section 3.7 in this manual.

§ 10.2:3 Instructions for Completing Partial Release

A partial release should include a description of all liens securing the note. If recording information for all documents is available, it should be included under the heading "Note and Lien Are Described in the Following Documents." Even if some recording information is not available, all lien documents should be described as fully as possible.

§ 10.2:4 Additional Clauses for Use with Partial Release

A partial release clause in a lien instrument or a prepayment clause in a note should state how any allowable prepayment will be applied. If those clauses do not adequately explain the application of a prepayment, a clause serving that purpose should be added to form 10-3 in this chapter after the sentence releasing the lien. The prepayment clauses suggested in form 6-3 in this manual may serve as appropriate models for drafting this type of clause.

§ 10.3 General Considerations for Modification and Extension Agreement

Form 10-4 in this chapter is appropriate for extending the time or manner of payment of a note secured by a deed-of-trust lien on property or for modifying the terms of the note. If instead the parties want to reinstate a note and pay it as originally written, they should use a different form. See the suggested reinstatement agreement at form 14-6 in this manual.

The legality of extensions and their effect on the statute of limitations are governed by Tex. Civ. Prac. & Rem. Code §§ 16.035-.037. The form expressly requires the obligor to assume payment of the note, even if the obligor was not the original borrower. This requirement accords with section 16.036, which provides that the extension of a note likewise extends the statute of limitations for foreclosure of a lien only if the extension is executed by the "party or parties primarily liable for a debt." Therefore a party who buys the property subject to the lien without assuming the note should not execute this extension form, for the party would become liable for payment of the note.

Many attorneys advise their clients to obtain written consent from all junior or inferior lien claimants and holders before agreeing to an extension. Numerous cases, however, have held that junior lienholders who acquire their liens while the first lien and first-lien note are intact are bound by the terms of a valid extension agreement. See *Yates v. Darby*, 131 S.W.2d 95, 101 (Tex. 1939).

§ 10.3:1 Cautions for Modification and Extension Agreement

If a loan policy covers the interest of the note holder, it should be examined carefully. Policies written before March 1, 1983, limit the policy protection to the final maturity date of the note

as originally written plus the applicable limitations period. There is also no loan policy endorsement available for increased value.

§ 10.3:2 Instructions for Completing Modification and Extension Agreement

The property description should match that on the note, if any, and the deed of trust.

The period of extension must be definite, or the extension will not be enforceable.

After being acknowledged, the form must be recorded in the county in which the land is located to provide notice to third parties.

If a party to a modification or extension agreement is an individual, the practitioner should consider including the confidentiality notice required by Tex. Prop. Code § 11.008 at the top of the first page of the agreement. See section 3.16 in this manual.

§ 10.4 Assignment of Rent

Texas has adopted an assignment of rents act. *See* Tex. Prop. Code ch. 64; Acts 2011, 82d Leg., R.S., ch. 636, § 2 (S.B. 889), eff. June 17, 2011. Under the act, an enforceable security instrument (meaning a deed of trust, mortgage, or other contract lien on an interest in real property) creates an assignment of rents arising from the real property, unless the security instrument provides otherwise or an assignment of rents is prohibited by the Texas Constitution. The assignment of rents is a security interest in all accrued and unaccrued rents, regardless of the form of the document creating the assignment of rents. The security interest is perfected upon recording the security instrument in the real property records of the county where the real property is located.

The assignee may enforce an assignment of rents by giving notice to the assignor demanding that all rents accrued but not paid and unaccrued rents be sent to the assignee when collected by the assignor. The assignee may also enforce an assignment of rents by giving notice, a form of which is included in the statute, to the tenant that all rents accrued but not paid and unaccrued rents be paid to the assignee when rent payments are due. An assignee may not enforce an assignment of rents by either of these methods if the property is a one-to-four-family residence that is the assignor's homestead when the security instrument is entered into and when enforcement is sought. After a tenant receives notice from an assignee to pay rents to the assignee, the tenant's obligation to pay rents is discharged by paying rents to the assignee. If a tenant is occupying the premises as his primary residence, the tenant's obligation to pay rents is also discharged by continuing to pay rents to the assignor/landlord. For other tenants, the obligation to pay rents is not discharged by continuing to pay rents to the assignor/landlord after receipt of the notice from the assignee.

Unless otherwise agreed, an assignee that collects rents must apply the collected rents in a stipulated order. The order of application for collected rents is different than the order of application of foreclosure proceeds under the Texas Property Code. Unless otherwise agreed, a subordinate creditor that enforces its assignment of rents and collects rents before receipt of a turnover notice from an assignee with priority is not obligated to turn over to the assignee with priority rents collected before receipt of the turnover demand. If an assignee's security interest in rents is perfected, the assignee's security interest attaches to identifiable proceeds and is perfected as to identifiable cash proceeds.

§ 10.5 Borrowing Resolutions

Form 10-6 in this chapter provides examples of resolutions authorizing an entity to guarantee a

loan or borrow funds and mortgage real property as security for the loan. These resolutions may be incorporated into one of the certificates of resolutions included in chapter 26, forms 26-9 through 26-14. The requirements for meeting and voting for for-profit corporations are found in chapter 21 of the Business Organizations Code. See Tex. Bus. Orgs. Code §§ 21.411-.416. The requirements for meeting and voting for limited liability companies are found in chapter 101 of the Business Organizations Code. See Tex. Bus. Orgs. Code §§ 101.353-.358.

§ 10.6 Collection and Payment Agreement

Form 10-7 in this chapter may be used in wrap-around loan transactions. See section 8.3 in this manual for commentary on wraparound loan transactions.

§ 10.7 Homestead Affidavits

Forms 10-8 and 10-9 in this chapter designate property as a rural homestead or urban homestead. Constitutional and statutory prohibitions against mortgaging or encumbering the homestead (except for purchase money, taxes, owelty of partition, improvements, home equity loans, or reverse mortgages) and against one spouse's selling or abandoning the homestead without the consent of the other may limit the ability to borrow against or transfer the property. The voluntary designation of homestead in the real property records may free property that is not claimed as homestead from these limitations. A purchaser or lender for value without actual knowledge is entitled to conclusively rely on an affidavit that disclaims property as homestead or designates other property as the homestead of the affiant. Tex. Const. art. XVI, § 50(d). Both spouses should join in the designation of a homestead. Form 10-8 may be used by a lender making a loan to be secured by the borrower's

nonhomestead property. See clauses 8-9-2 and 8-9-3 in this manual for homestead disclaimer and designation clauses suggested for use in a deed of trust. Form 10-9 is an example of an affidavit appropriate for loans to be secured by the borrower's homestead.

§ 10.8 Lender's Estoppel Certificate

A lender considering a loan to be secured by a subordinate lien on real property already encumbered by a prior lien often will require, as a condition to making the loan, that the borrower obtain an estoppel certificate from the prior lienholder. Form 10-10 in this chapter requires the prior lienholder to confirm important information regarding the prior lienholder's note and deed of trust. Some of the provisions of this form may have to be modified or deleted to obtain the prior lienholder's agreement to execute this form.

§ 10.9 Lienholder's Subordination to Oil, Gas, and Mineral Lease

Form 10-11 in this chapter is used if an oil, gas, and mineral lease is given on real property already encumbered by a deed-of-trust lien or other lien. This form provides that the lease will not be affected by foreclosure of the lien if the lease is maintained according to its terms.

§ 10.10 Notice from Lender's Attorney to Borrower

Form 10-12 in this chapter is an example of a written disclosure confirming that the lender's attorney does not represent the borrower. As with all forms, this letter should be modified to reflect the specific details of the loan transaction. See section 1.6:4 in this manual for commentary regarding an attorney's communications with unrepresented parties.

§ 10.11 Subordination of Lien

Form 10-13 in this chapter is used if a new deed-of-trust lien is made superior to an existing deed-of-trust lien. The new lender typically requires the subordination of existing liens to the newly created lien.

§ 10.12 Notice of Final Agreement

Loans made by banks, savings and loan associations, and credit unions in excess of \$50,000 must be in writing and be signed by the party to be bound or by that party's authorized representative. Tex. Bus. & Com. Code § 26.02(b). Written loan documents evidencing loans in excess of \$50,000 may not be varied by oral agreements if the financial institution gives the obligor, on or before execution of the loan documents, a written notice stating substantially the following:

This written loan agreement represents the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties.

The notice may be in a separate document signed by the obligor or incorporated into one or more of the loan documents and must be conspicuous. Form 10-14 in this chapter may be used by financial institutions to satisfy the requirements of section 26.02 of the Texas Business and Commerce Code.

§ 10.13 General Considerations for Guaranty

Form 10-15 in this chapter is an unconditional guaranty of payment. It allows the lender to pursue the guarantor without first pursuing the principal obligor on the default of the principal obligor. This form should be distinguished from

a guaranty of collection, which requires the lender to use reasonable diligence to compel payment by the principal obligor before pursuing the guarantor. This form may be modified to become a limited guaranty by describing the guaranteed indebtedness as limited to a specific dollar amount or a specific percentage of the borrower's debt to the lender. Although this form contains several waivers by the guarantor of various defenses to the enforcement of a guaranty, many attorneys recommend that the guarantor's written consent be obtained at the time of any modification of the guaranteed indebtedness. If the guarantor is a corporation, the lender should require a specific resolution of the corporation's board of directors authorizing the execution of the guaranty and declaring that the guaranty may reasonably be expected to benefit the corporation. *See* Tex. Bus. Orgs. Code § 2.104(c).

In Moayedi v. Interstate 35/Chisam Road, L.P., 438 S.W.3d 1, 6 (Tex. 2014), the Texas Supreme Court held that a guarantor may waive his right to offset under section 51.003 of the Texas Property Code.

§ 10.14 Home Loans

"Home loan" is defined as a loan that is made to one or more individuals for personal, family, or household purposes and secured in whole or part by either a manufactured home (as defined by Finance Code section 372.002), used or to be used as a borrower's principal residence, or real property improved by a dwelling designed for occupancy by four or fewer families and used or to be used as a borrower's principal residence. Tex. Fin. Code § 343.001(2). A lender, mortgage banker, or licensed mortgage broker must provide each applicant for a home loan with a notice of penalties for making false or misleading written statements. Tex. Fin. Code § 343.105. Form 10-19 in this chapter may be used to provide the statutorily required notice. As used in chapter 343 of the Finance Code, a

home loan excludes a reverse mortgage or an open-end account as defined by Finance Code section 343.002. Tex. Fin. Code §§ 343.002, 343.202. Two types of home loans are addressed in the statute: low-rate home loans and high-cost home loans.

§ 10.14:1 Low-Rate Home Loans

A low-rate home loan is a home loan that at its inception carries an interest rate two percentage points or more below the yield on treasury securities having comparable periods of maturity to the loan maturity, except that if the loan's interest rate is a discounted introductory rate or a rate that automatically steps up over time, the fully indexed rate or the fully stepped-up rate, as appropriate, is used instead of the rate at the loan's inception to determine if the loan is a low-rate home loan. Tex. Fin. Code § 343.101(a). A lender may not replace or consolidate a low-rate home loan directly made by a governmental or nonprofit lender before the seventh anniversary of the date of the loan unless the new or consolidated loan has a lower interest rate and requires payment of a lesser amount of points and fees than the original loan or is a restructure to avoid foreclosure. Tex. Fin. Code § 343.101(b). A restructure is defined in Finance Code chapter 343 as a change in the payment schedule or other terms of a home loan as a result of the borrower's default. Tex. Fin. Code § 343.001(3).

§ 10.14:2 High-Cost Home Loans

A high-cost home loan is a home loan that (1) has a principal amount equal to or less than one-half of the maximum conventional loan amount for first mortgages as established and adjusted by the Federal National Mortgage Association and (2) is a credit transaction described by section 226.32 of title 12 of the Code of Federal Regulations. Such a loan also includes a residential mortgage transaction, as defined by section 226.2 of title 12 of the Code of Federal Regula-

tions, if the total loan amount is \$20,000 or more and the annual percentage rate exceeds the rate indicated in section 226.32(a)(1)(i) or the total points and fees payable by the consumer at or before the loan closing will exceed the amount indicated in section 226.32(a)(1)(ii). Tex. Fin. Code § 343.201(1)(C), (E). Points and fees have the meaning assigned by section 226.32(b) of title 12 of the Code of Federal Regulations. Tex. Fin. Code § 343.201(2).

A high-cost home loan may not contain a provision for a scheduled payment that is more than twice as large as the average of earlier scheduled monthly payments unless the balloon payment becomes due not less than sixty months after the date of the loan. This prohibition does not apply if the payment schedule is adjusted to account for the seasonal or otherwise irregular income of the borrower or if the loan is a bridge loan in connection with the acquisition or construction of a dwelling intended to become the borrower's principal dwelling. Tex. Fin. Code § 343.202.

A high-cost home loan may not provide for a payment schedule with regular periodic payments that cause the principal balance to increase except for any negative amortization as a consequence of a temporary forbearance, bridge loan, or restructure sought by the borrower. Tex. Fin. Code § 343.203. A high-cost home loan also may not contain a provision for a prepayment penalty. Tex. Fin. Code § 343.205.

A bridge loan under Finance Code chapter 343 refers to temporary or short-term financing that requires payment only of interest until the entire unpaid balance is due. Tex. Fin. Code § 343.001(1).

A high-cost home loan lender may also not engage in a pattern or practice of extending consumer credit based on the consumer's collateral without regard to an obligor's repayment ability, including an obligor's current and expected income, current obligations, employment status, and other financial resources, other than an obli-

gor's equity in the dwelling that secures repayment of the loan. Tex. Fin. Code § 343.204(b). The term *obligor* as used in section 343.204(b) refers to all persons obligated to pay a high-cost home loan, including borrowers, cosigners, and guarantors. Tex. Fin. Code § 343.204(a).

§ 10.14:3 Credit Life, Disability, or Unemployment Insurance

Lenders must provide a statutory insurance disclosure to each home loan applicant, which must be made by hand delivery or mail not later than the third business day after the date the lender receives a home loan application. Tex. Fin. Code § 343.104. Form 10-16 in this chapter may be used to provide the statutorily required insurance disclosure.

§ 10.15 Certification of Trust

Effective September 1, 2007, a person other than a beneficiary is not required to inquire into the extent of the trustee's powers or the propriety of the exercise of those powers if the person deals with the trustee in good faith and obtains a certification of trust. *See* Tex. Prop. Code § 114.081(b). Instead of providing a copy of a trust instrument to a third party, the trustee may provide a certification of trust that contains, among other things, representations about the power of the trustee to take actions on behalf of the trust. Any party without actual knowledge to the contrary may rely on the representations in the certification of trust in dealing with the trustee. A person who in good faith enters into a transaction relying on a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification of trust are correct.

Form 10-20 in this chapter provides an example of a certification of trust. The statute allows a recipient of a certification of trust to require the trustee to furnish copies of the excerpts from the original trust instrument and later amendments

to the trust instrument that designate the trustee and confer on the trustee the power to act in the pending transaction. *See* Tex. Prop. Code § 114.086(e). The statute does not provide protection to parties with knowledge contrary to the contents of the certification.

A person making a demand for the trust instrument in addition to a certification of trust or excerpts as provided by the statute is liable for damages if the court determines that the person did not act in good faith in making the demand. Tex. Prop. Code § 114.086(i).

§ 10.16 Subordination, Nondisturbance, and Attornment Agreement

A subordination, nondisturbance, and attornment agreement (SNDA) deals with the issues of existing commercial tenants' and lienholders' rights as they relate to present and future financing. This agreement is an acknowledgment by a landlord, tenant, and lienholder of their respective rights and obligations, and it provides assurance to the parties that present rights and obligations will be preserved should the landlord default on its loan and the lender foreclose. The tenant agrees to continue to be a tenant of the landlord or purchaser on foreclosure, and the lienholder agrees not to foreclose the rights of the tenant on foreclosure of the lien. Form 25-13 in this manual provides an example of a simple SNDA. Language also may be incorporated in the lease agreement if the situation warrants its incorporation. When drafting an SNDA, the attorney may also need to address various other issues applicable to the different types of commercial properties.

§ 10.17 Assumption Agreement

Form 10-22 in this chapter is an example of an assumption agreement used to document a third party's assumption of an obligation to pay an indebtedness secured by a vendor's lien or deed-

of-trust lien on real property. Alternative paragraphs are included to distinguish between an assumption of debt where the original borrower is released or not released from liability to pay the assumed indebtedness. If the original borrower is not released from liability to pay the assumed indebtedness, a practitioner should review sections 8.6 and 8.7 in this manual concerning the use and effect of a deed of trust to secure assumption.

§ 10.18 Lender's Rescission and Waiver of Acceleration of an Indebtedness Secured by a Lien on Real Property

A lender may use forms 10-23 and 10-24 in this chapter to rescind and waive the acceleration of

an indebtedness secured by a lien on real property before the limitations period expires, following the requirements of section 16.038 of the Texas Civil Practice and Remedies Code, and to document the lender's compliance with the written notice requirement to the borrower.

§ 10.19 Other Loan Documents

For other forms in this manual related to loan transactions, see the following:

- mechanic's lien contract and related forms—chapter 20;
reinstatement agreement—form 14-6; and
closing instructions letters—forms 26-15 through 26-18.

[Reserved]

Form 10-1

Transfer of Note and Lien

Basic Information

Date:

Holder of Note and Lien ("Holder"):

Holder's Mailing Address:

Transferee:

Transferee's Mailing Address:

Note

Date:

Original principal amount:

Borrower:

Lender:

Unpaid principal and interest:

[Maturity date:]

Note and Lien Are Described in the Following Documents ("Lien Documents"): **[include recording information]**

Property (including any improvements):

Prior Lien(s): [include recording information]

Transfer of Note and Lien

Holder transfers the Note and the liens and security interests ("Lien") on the Property granted in the Lien Documents to Transferee.

[Include if applicable: This transfer is without recourse against [and/or] without representation or warranty by Holder, except that] Holder represents that Holder is the person entitled to enforce the Note [include if applicable: , the Note is not overdue,] and the unpaid principal and interest on the Note are correctly stated.

Holder expressly waives and releases all present and future rights to establish or enforce the liens described in this instrument as security for payment of any future or other indebtedness.

When the context requires, singular nouns and pronouns include the plural.

[Name of holder]

Include acknowledgment.

Form 10-2

Release of Lien

Basic Information

Date:

Holder of Note and Lien:

Holder's Mailing Address:

Note

Date:

Original principal amount:

Borrower:

Lender:

[Maturity date:]

Note and Lien Are Described in the Following Documents ("Lien Documents"): **[include recording information]**

Property (including any improvements): **[include legal description of real property and personal property to be released]**

Release of Lien and Security Interests

Holder is the owner and holder of the Note and Lien.

Select one of the following.

Holder releases the Property from all liens and security interests held by Holder granted in the Lien Documents and any other instruments, including other instruments recorded in the official public records of the county where the Property is located.

Or

Holder releases the Property from all liens and security interests held by Holder granted in the Lien Documents.

Continue with the following.

When the context requires, singular nouns and pronouns include the plural.

[Name of holder]

Include acknowledgment.

Form 10-3

Partial Release of Lien

Basic Information

Date:

Holder of Note and Lien:

Holder's Mailing Address:

Note

Date:

Original principal amount:

Borrower:

Lender:

[Maturity date:]

Note and Lien Are Described in the Following Documents: **[include recording information]**

Property (including any improvements) to Be Released from Lien ("Property"):

Partial Release of Lien

For value received, Holder of Note and Lien releases only the Property from the Lien and from all liens held by Holder of Note and Lien, without regard to how they were created or evidenced.

When the context requires, singular nouns and pronouns include the plural.

[Name of holder]

Include acknowledgment.

Form 10-4

Modification and Extension Agreement

Basic Information

Date:

Holder of Note and Lien:

Holder's Mailing Address:

Obligor:

Obligor's Mailing Address:

Note:

Date:

Original principal amount:

Borrower:

Lender:

[Maturity date:]

Unpaid Principal and Interest on Note:

Lien Documents: [include recording information]

Property (including any improvements):

Extended Maturity Date of Note:

Modified Terms:

Obligor's Covenants and Warranties

The Note is secured by liens against the Property. Whether Obligor is primarily liable on the Note or not, Obligor nevertheless agrees to pay the Note and comply with the obligations expressed in the Lien Documents.

For value received, Obligor renews the Note and promises to pay to the order of Holder of Note and Lien, according to the Modified Terms, the Unpaid Principal and Interest on Note. All unpaid amounts are due by the Extended Maturity Date of Note. Obligor also extends the liens described in the Lien Documents.

The Note and the Lien Documents continue as written, except as provided in this agreement.

Obligor warrants to Holder of Note and Lien that the Note and the Lien Documents, as modified, are valid and enforceable and represents that they are not subject to rights of offset, rescission, or other claims.

When the context requires, singular nouns and pronouns include the plural.

[Name of obligor]

[Name of holder]

Include acknowledgments.

Form 10-5

Assignment of Rent

Basic Information

Date:

Assignor:

Assignor's Mailing Address:

Assignee:

Assignee's Mailing Address:

Note

Date:

Original principal amount:

Borrower:

Lender:

Deed of Trust

Date:

Borrower:

Lender:

Trustee:

Property:

Current Leases: [include recording information if available]

Clauses and Covenants

For value received, as a supplement to the Deed of Trust, Assignor collaterally assigns to Assignee all current and future rent from the Property. Leases are not assigned.

A. Assignor's Representations:

Assignor represents the following:

- A.1. This assignment is valid and enforceable.
- A.2. The Current Leases are valid, have not been modified or amended except as stated, have not been previously assigned, and are subject to no security interests.
- A.3. Without the prior written consent of Assignee, Assignor will not modify any material term in any lease covering the Property, exercise or forfeit any option in a lease, or accept payment of rent more than one month before its regular monthly payment date.
- A.4. Assignor will perform all the obligations of the lessor in all leases covering the Property.
- A.5. Assignor will promptly inform Assignee of all material events concerning the leases covering the Property.
- A.6. Assignor will keep accurate records of all aspects of leases covering the Property and on request will make them available for Assignee's examination.

A.7. Assignor will apply all rent from the Property to payment of the Note and performance of the obligations in the Deed of Trust, but if the rent exceeds the amount due under the Note and the Deed of Trust, Assignor may retain the excess.

B. Default and Remedies

B.1. If a default exists in payment of the Note or performance of any obligation in the Deed of Trust or this assignment and the default continues after any required notice of the default and the time allowed to cure, Assignee may—

- a. exercise Assignee's rights with respect to rent under the Texas Property Code as then in effect;
- b. increase or reduce rent or change the terms of any lease, if permitted;
- c. enter into new leases in the name of Assignor or otherwise on terms that Assignee chooses; and
- d. sue for the collection of unpaid rent, to cancel any lease in default, and for possession of any portion of the Property covered by a lease in default.

B.2. Assignee will apply all rent collected under this assignment as required by the Texas Property Code as then in effect.

B.3. Assignee may elect not to collect rent under this assignment, but that election will not prejudice Assignee's right to collect rent subsequently. Assignee will never be liable for failure to collect rent but will be accountable for rent received before foreclosure of the Deed of Trust.

B.4. By exercising rights and remedies under this assignment, Assignee does not waive the right to enforce the Note or the Deed of Trust.

C. General Provisions

C.1. Assignee's collection of rent from the Property does not relieve Assignor of any obligations in the Note and the Deed of Trust.

C.2. Neither acceptance of this assignment nor any other act of Assignee under this assignment will be construed as a waiver of the priority of the Deed of Trust lien as to any lease or contract.

C.3. This assignment binds, benefits, and may be enforced by the successors in interest of the parties.

C.4. This assignment terminates on release of the Deed of Trust. At Assignor's expense, Assignee will sign a release of this assignment in recordable form.

C.5. Assignee does not have or assume any obligations as lessor to any occupant of the Property.

C.6. Assignee may exercise Assignee's rights and remedies in this assignment without taking possession of the Property.

C.7. When the context requires, singular nouns and pronouns include the plural.

[Name of assignor]

Include acknowledgment.

Form 10-6

Consent Resolutions

Corporation, Written Consent of Sole Director

Clause 10-6-1

[Name of corporation]

Written Consent of Sole Director

The undersigned, being the sole member of the board of directors of [name of company], a Texas corporation (the "Company"), acting pursuant to the provisions of [section 6.201 of the Texas Business Organizations Code], adopts by consent the following resolutions: [insert resolution recitals (see clauses 10-6-5 and 10-6-6)].

[Name of sole director]

Date:

Corporation, Unanimous Written Consent

Clause 10-6-2

[Name of corporation]

Unanimous Written Consent of Board of Directors

The undersigned, being all the members of the board of directors of [name of company], a Texas corporation (the "Company"), acting pursuant to the provisions of [section 6.201 of the Texas Business Organizations Code], adopt by consent the following resolutions: [insert resolution recitals (see clauses 10-6-5 and 10-6-6)].

[Name of director]

Date:

Repeat for each director.

Limited Liability Company, Written Consent of Sole Member

Clause 10-6-3

[Name of limited liability company]

Written Consent of the [Sole Member/Manager]

The undersigned, being the [sole member/manager] of [name of company], a Texas limited liability company (the "Company"), acting pursuant to the provisions of [article 2.23(B)(1) of the Texas Limited Liability Company Act, Tex. Rev. Civ. Stat. Ann. art. 1528n/section 6.201 of the Texas Business Organizations Code], adopts by consent the following resolutions: [insert resolution recitals (see clauses 10-6-5 and 10-6-6)].

[Name of [sole member/manager]]

Date:

Limited Liability Company, Unanimous Written Consent

Clause 10-6-4

[Name of limited liability company]

Unanimous Written Consent of [Members/Managers]

The undersigned, being all the [members/managers of the board of managers] of [name of company], a Texas limited liability company (the "Company"), acting pursuant to the provisions of [article 2.23(B)(1) of the Texas

Limited Liability Company Act, Tex. Rev. Civ. Stat. Ann. art. 1528n/section 6.201 of the Texas Business Organizations Code], adopt by consent the following resolutions: [insert resolution recitals (see clauses 10-6-5 and 10-6-6)].

[Name of [member/manager]]

Date:

Repeat for each member or manager.

Borrowing Resolution Recitals

Clause 10-6-5

[The Company is the general partner of [name], a [Texas/[state]] limited partnership (“Borrower”). RESOLVED, that [the Company/Borrower] is authorized to borrow the amount of \$[amount] from [name of lender] (“Lender”) to [purchase certain land and improvements located in [county] County, Texas, (the “Property”)/[state other purpose of use of loan proceeds]] and to enter into a promissory note (the “Note”) in the principal amount of \$[amount], payable to the order of Lender.

RESOLVED FURTHER, that to secure the payment of the Note, [the Company/Borrower] is authorized to enter into a deed of trust (the “Deed of Trust”) covering the Property and any necessary modifications, extensions, increases, and renewals of the Deed of Trust.

RESOLVED FURTHER, that [the Company/Borrower] is authorized to enter into any assignments, pledges, mortgages, deeds of trust, security agreements, and other documents and instruments concerning the Property, or any real or personal property, or any interest therein, owned by [the Company/

Borrower] that may be necessary or appropriate, or required by Lender, to evidence and secure the payment of the Note.

Include if applicable.

RESOLVED FURTHER, that [the Company/Borrower] is authorized to contract for the issuance by Lender of letters of credit, to discount with Lender notes, acceptances, and evidences of indebtedness payable to or due [the Company/Borrower], to endorse the same and execute any contracts and instruments for repayment thereof to Lender as Lender may require, to enter into foreign exchange transactions with or through Lender, and to enter into interest-rate hedging transactions with Lender in connection with the Note.

Continue with the following, selecting the appropriate alternative.

RESOLVED FURTHER, that [**name of individual**] (the “Authorized Representative”) is authorized to execute and deliver, on behalf of and in the name of [the Company/Borrower], the Note, the Deed of Trust, and any other agreements, documents, or instruments, and to take or cause to be taken any action necessary or appropriate in connection with the Note and the Deed of Trust or to accomplish the purposes of these resolutions, in the form and with the provisions the Authorized Representative may deem proper.

Or

RESOLVED FURTHER, that the president or any vice president of [the Company/Borrower] is authorized to execute and deliver, on behalf of and in the name of [the Company/Borrower], the Note, the Deed of Trust, and any other agreements, documents, or instruments, and to take or cause to be taken any action necessary or appropriate in connection with the Note and the Deed

of Trust or to accomplish the purposes of these resolutions, in the form and with the provisions that the officers may deem proper.

Continue with the following.

RESOLVED FURTHER, that [the Company/Borrower] confirms and ratifies all actions previously taken by any officer or other representative of [the Company/Borrower] with respect to the loan evidenced by the Note and all documents executed in connection with the loan.

Corporate Guaranty Resolution Recitals

Clause 10-6-6

[Name of lender] (“Lender”) has agreed to make a loan in the amount of \$[amount] to [name of borrower] (“Borrower”) to be evidenced by a note, in the original principal amount of \$[amount], payable to the order of Lender (the “Note”), which is secured by a deed of trust (the “Deed of Trust”) covering the property described in the Deed of Trust.

As a condition to making the loan, Lender has requested that the Company guarantee [a portion of] the indebtedness evidenced by the Note and the obligations of Borrower under the Deed of Trust and any other document executed by Borrower evidencing or securing the Note (the “Guaranteed Obligations”).

RESOLVED, that the Company reasonably may be expected to benefit, either directly or indirectly, from guaranteeing the Guaranteed Obligations.

RESOLVED FURTHER, that the Company is authorized to enter into a guaranty (the “Guaranty”) guaranteeing the Guaranteed Obligations.

RESOLVED FURTHER, that [name of individual] (the “Authorized Representative”) is authorized to execute and deliver, on behalf of and in the name of the Company, the Guaranty and any other agreements, documents, or instruments, and to take or cause to be taken any action necessary or appropriate in connection with the Guaranty or to accomplish the purposes of these resolutions, in the form and with the provisions the Authorized Representative may deem proper.

Or

RESOLVED FURTHER, that the president or any vice president of the Company is authorized to execute and deliver, on behalf of and in the name of the Company, the Guaranty and any other agreements, documents, or instruments, and to take or cause to be taken any action necessary or appropriate in connection with the Guaranty or to accomplish the purposes of these resolutions, in the form and with the provisions that the officers may deem proper.

Continue with the following.

RESOLVED FURTHER, that the Company confirms and ratifies all actions previously taken by any officer or other representative of the Company on behalf of the Company with respect to the Guaranty and all documents executed in connection with the Guaranty.

Form 10-7

Collection and Payment Agreement

Basic Information

Date:

Borrower:

Borrower's Mailing Address:

Lender:

Lender's Mailing Address:

Collection Agent:

Collection Agent's Mailing Address:

Prior Note

Date:

Original principal amount:

Maker:

Payee:

Holder:

Holder's mailing address:

Maturity date:

[Terms:]

Secured by deed of trust

Date:

Recorded in:

Wraparound Note

Date:

Original principal amount:

Maker: Borrower

Payee: Lender

Maturity date:

[Terms:]

Secured by Wraparound Deed of Trust

Date:

Recorded in:

Property (including any improvements):

Particulars of the Agreement

Day of month by which Borrower's deposit must be made:

Date of first deposit:

Amount of deposit for escrow account under Wraparound Note:

Monthly principal and interest due on Wraparound Note:

Collection Agent's fee:

Monthly principal and interest due on Prior Note:

Amount of deposit for escrow account under Prior Note:

Clauses and Covenants

Lender has sold the Property to Borrower, and as partial consideration Borrower has executed and delivered to Lender the Wraparound Note, a copy of which is attached to this agreement. Lender is required to make payments to Holder of the Prior Note, a copy of which is attached to this agreement, according to its terms. Borrower, Lender, and Collection Agent enter into this agreement to facilitate payment of both notes.

A. Borrower's Duties

A.1. Borrower will deposit in Lender's account with Collection Agent on or before each monthly due date an amount equal to the required monthly installment of principal and interest due under the Wraparound Note plus any required monthly payment to the tax and insurance escrow account.

A.2. Borrower will promptly submit to Collection Agent and Lender copies of bills for ad valorem taxes on the Property and for insurance policy premiums on the Property if Borrower receives such bills.

A.3. Borrower will pay Collection Agent one-half of the annual fee for its services as specified below. Borrower also agrees to reimburse Collection Agent for any extraordinary expenses incurred as a result of Borrower's delinquency or default in making deposits.

B. Lender's Duties

B.1. Before the time specified for Borrower to make the first deposit, Lender will open a special account with Collection Agent and will notify Borrower of any information relevant to making deposits to the account.

B.2. Lender will pay Collection Agent one-half of the annual fee for its services as specified below.

B.3. Lender will notify Borrower and Collection Agent of any adjustment in the amount of the monthly escrow account payment that may become necessary.

C. Collection Agent's Duties

C.1. Within [number] business days after each of Borrower's monthly deposits to Lender's special account, Collection Agent will pay on behalf of Lender the required payments due on the Prior Note.

C.2. After paying all amounts then due under the Prior Note, Collection Agent will pay or credit the remaining balance to Lender each month.

C.3. Collection Agent will promptly forward to Lender and Borrower copies of its documents transmitting all payments.

C.4. Unless specified otherwise in this agreement, on termination of this agreement Collection Agent will pay any amounts in Lender's special account to Lender.

D. General Provisions

D.1. No interest will be paid on funds in Lender's account.

D.2. This agreement will terminate on the occurrence of any of the following events or conditions:

- a. The full and final payment of either the Wraparound Note or the Prior Note.
- b. Written notice from Lender and Borrower to Collection Agent. Collection Agent will then transfer all amounts in Lender's account to any successor Collection Agent and be released from further liability. If Lender and Borrower fail to appoint a successor collection agent within thirty days, Collection Agent is unconditionally authorized to deposit the balance of the account with a court of proper jurisdiction.
- c. Acceleration of maturity of the Wraparound Note by Lender. In this event, Lender may terminate this agreement by giving notice to Collection Agent and Borrower.
- d. Collection Agent's resignation. Collection Agent may resign by giving Borrower and Lender written notice at least thirty days before the effective date of the resignation. On such resignation, the balance of the account will be transferred according to written instructions from Borrower and Lender. If Collection Agent does not receive written instructions within thirty days after mailing the notice, Collection Agent is unconditionally authorized to deposit the balance of the account with a court of proper jurisdiction.

D.3. Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

D.4. Collection Agent may rely on any document that it reasonably believes to be authentic in making any delivery of money under this agreement. Collection Agent is not liable for harm resulting from any of its acts or omissions unless the acts or omissions constitute willful misconduct or gross negligence. Borrower and Lender agree that Collection Agent's liabilities and obligations are strictly limited to those enumerated in this agreement. Borrower and Lender also indemnify Collection Agent against all liability, loss, and expense that Collection Agent may incur in exercising any authority granted to it by this agreement.

D.5. This agreement binds, benefits, and may be enforced by the successors in interest of the parties.

D.6. When the context requires, singular nouns and pronouns include the plural.

[Name of borrower]

[Name of lender]

[Name of collection agent]

Form 10-8

Designation of Homestead and Affidavit of Nonhomestead

Date:

Affiant:

Affiant's Homestead Property:

For a rural homestead, indicate the number of acres designated, not to exceed 200 acres if the homestead of a family or 100 acres if the homestead of a single adult. If there is more than one survey, include the number of acres in each. For an urban homestead, indicate the number of acres designated, not to exceed 10 acres.

Current Record Title Holder of Affiant's Homestead Property:

Affiant's Nonhomestead Property:

[Lender:]

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. My full legal name is [full legal name of affiant], and I am over the age of eighteen years.
2. I currently reside at [current residence address].
3. I do not now intend or ever intend to reside on, use in any manner, or claim Affiant's Nonhomestead Property as a business or residence homestead.
4. I disclaim all homestead right, interest, and exemption in Affiant's Nonhomestead Property.

5. I now own and reside on, use, claim, and designate Affiant's Homestead Property as my only legal homestead, exempt from forced sale under the constitution and laws of Texas.

6. This affidavit and this designation are made to [induce Lender to make a loan secured by a deed of trust on Affiant's Nonhomestead Property/[state other purpose of affidavit]].

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on _____ by [name of affiant].

Notary Public, State of Texas

Form 10-9

Affidavit of Homestead

Date:

Affiant:

Affiant's Homestead Property ("Property"):

For a rural homestead, indicate the number of acres designated, not to exceed 200 acres if the homestead of a family or 100 acres if the homestead of a single adult. If there is more than one survey, include the number of acres in each. For an urban homestead, indicate the number of acres designated, not to exceed 10 acres.

Current Record Title Holder of Affiant's Homestead Property:

Lender:

Lender's Address:

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. My full legal name is [full legal name of affiant], and I am over the age of eighteen years.
2. I currently reside at [current residence address].
3. I acknowledge that I am buying the Property and will use and claim the Property as my homestead.
4. I acknowledge that I am obtaining a loan ("Loan") from Lender for a part of the purchase price of the Property.

5. I confirm that Lender has informed me that, as a condition of obtaining the Loan from Lender, I must occupy the Property as my primary residence after the closing so that the Property will constitute my homestead.

6. I also confirm that Lender has informed me that my failure to occupy the Property as my primary residence will impair Lender's security for the Loan and that Lender would not have made the Loan but for my representation and stated intention that the Property will be used as my homestead and residence.

7. I further confirm that I have been informed that, if I cease to occupy the Property as my residence, Lender may accelerate all amounts then due and owing to Lender with respect to the Loan and exercise all rights granted to Lender in the instruments evidencing and securing the Loan.

8. I understand that, if Lender accelerates the Loan in such circumstances, the entire loan balance will be immediately due and payable, and if I fail to pay the amounts due, Lender may institute collection proceedings against me, including, without limitation, nonjudicial foreclosure sale in accordance with the terms and conditions of the deed of trust encumbering the Property that I have executed to secure payment of the Loan.

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on _____ by [name of affiant].

Notary Public, State of Texas

Form 10-10

Lender's Estoppel Certificate

Basic Information

Date:

Borrower:

Borrower's Mailing Address:

Prior Lender:

Prior Lender's Mailing Address:

Prior Lender's Note: Note dated [**date**], in the original principal amount of \$[**amount**], executed by Borrower and payable to Prior Lender.

Prior Lender's Deed of Trust: [**include recording information**]

Subordinate Lender:

Subordinate Lender's Mailing Address:

Subordinate Lender's Loan:

Property:

Clauses and Covenants

Borrower has requested Subordinate Lender to make a loan to be secured by the Property, and Subordinate Lender has agreed that the liens securing the note evidencing Subordinate Lender's Loan will be subordinate to the liens securing Prior Lender's Note. As a

condition to making Subordinate Lender's Loan, however, Subordinate Lender requires Prior Lender to verify the following information concerning Prior Lender's Note. Prior Lender understands that Subordinate Lender will rely on this information in connection with the closing of Subordinate Lender's Loan.

1. Prior Lender certifies to Subordinate Lender the following:
 - a. True copies of Prior Lender's Note and Prior Lender's Deed of Trust are attached as Exhibits [**exhibit numbers/letters**].
 - b. Prior Lender's Note and Prior Lender's Deed of Trust have not been renewed, extended, modified, or amended [**include if applicable:** , except as evidenced by the documents attached as Exhibits [**exhibit numbers/letters**]].
 - c. Prior Lender is the present owner and holder of Prior Lender's Note.
 - d. The unpaid principal balance of Prior Lender's Note as of Date is \$[**amount**].
 - e. The amount of accrued unpaid interest on Prior Lender's Note as of Date is \$[**amount**].
 - f. All amounts required to be paid as of Date under the terms of Prior Lender's Note and Prior Lender's Deed of Trust and any other loan documents have been paid in full.
 - g. No default exists under the terms of Prior Lender's Note or Prior Lender's Deed of Trust or any other loan documents.
 - h. The amount of \$[**amount**] is held in escrow by Prior Lender for the payment of taxes and other amounts required to be escrowed under the terms of Prior Lender's Note and Prior Lender's Deed of Trust.

2. Prior Lender agrees that Prior Lender's Deed of Trust will not secure any indebtedness other than the indebtedness evidenced by Prior Lender's Note, and Prior Lender waives the provisions of any future advance or dragnet clause that would cause Prior Lender's Deed of Trust to secure other indebtedness of Borrower.

3. Prior Lender agrees that Subordinate Lender's Loan will not cause Prior Lender's Note to be in default, and Prior Lender waives the provisions of any due-on-sale clause or due-on-encumbrance clause that would make Subordinate Lender's Loan a default under Prior Lender's Note or Prior Lender's Deed of Trust.

4. Prior Lender agrees to give Subordinate Lender written notice of default not less than [number] days before any acceleration of the unpaid balance of Prior Lender's Note. Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage pre-paid, certified mail, return receipt requested, and addressed to the intended recipient at the address shown in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by written notice given as provided herein.

5. Prior Lender agrees to accept payments on Prior Lender's Note from Subordinate Lender with the understanding that Subordinate Lender in no way obligates itself to make any payments.

6. If Prior Lender transfers Prior Lender's Note to any other party, Prior Lender agrees to notify the transferee of the terms of this estoppel certificate and obtain the transferee's consent to its terms and conditions.

[Name of prior lender]

[Reserved]

Form 10-11

Lienholder's Subordination to Oil, Gas, and Mineral Lease

Basic Information

Date:

Lienholder:

Deed of Trust

Date:

Grantor:

Beneficiary:

Property:

Recording information:

Lease

Date:

Lessor:

Lessee:

Recording information:

Clauses and Covenants

The property described in the Lease includes [all/part] of the Property encumbered by the Deed of Trust. For value received, Lienholder, owner of the Deed of Trust lien, subordinates the lien to the Lease and ratifies the Lease.

If the Deed of Trust lien is foreclosed, the sale of the Property will not affect the Lease if the Lease is maintained according to its terms.

[Name of lienholder]

Include acknowledgment.

Form 10-12

Notice from Lender's Attorney to Borrower

Basic Information

Date:

Borrower:

Lender:

Loan: Loan evidenced by a note dated [date] in the original principal amount of \$[amount], executed by Borrower, payable to Lender, and secured by a deed of trust on the property described therein.

Attorney:

Disclosure of Relationship

This notice discloses the relationship between Attorney, Borrower, and Lender.

1. Lender has engaged Attorney to prepare the note, deed of trust, and other documents relating to the Loan.
2. Attorney has not researched or examined title to the property and makes no representation or warranty about the condition of title, access to the property, or any other matter that might be revealed by an examination of a survey, title commitment, or the property itself. In preparing the documents, Attorney has relied on information provided by other parties, including the title company. If Borrower is purchasing the property, Borrower is cautioned to assure itself that the deed to Borrower conveys what Borrower has contracted to purchase and otherwise conforms with the earnest money contract.

3. Attorney represents only Lender and no other party involved in this transaction, although Attorney's legal fees may be paid by Borrower.

4. Attorney's legal fees are based on a per document or per transaction charge rather than an hourly fee. The legal fees are intended to provide fair compensation for time and labor involved in information gathering, document preparation, processing, and review. No charge has been made for preparation of Truth in Lending disclosures or for any disclosures required by the Real Estate Settlement and Procedures Act, if Attorney has prepared any of those documents.

5. Borrower has the right to be represented by its own attorney and to have its attorney review the Loan documents (including the deed, if there is one) and closing documents and be present at the closing of the Loan.

6. If any documents to be used are prepared by someone other than Attorney, Lender reserves the right to have Attorney review and approve those documents to ensure they properly protect Lender's interests.

By signing below, Borrower indicates that it has been notified of and understands its right to independent legal counsel and that Attorney represents only the interests of Lender and not those of Borrower or any other party.

[Name of borrower]

NOTE TO TITLE COMPANY OR CLOSER: Please return the executed original of this notice to [name and address].

Form 10-13

Subordination of Lien

Basic Information

Date:

Subordinating Party:

Subordinated Lien

Date:

Grantor:

Beneficiary:

Note Secured by Subordinated Lien: Note dated [date], in the original principal amount of \$[amount].

Recording information:

Superior Lien

Date:

Borrower:

Lender:

Note Secured by Superior Lien: Note dated [date], in the original principal amount of \$[amount].

Recording information:

Property:

Terms of Subordination

Subordinating Party is the owner and holder of the Subordinated Lien, which is a lien against the Property.

For value received, Subordinating Party subordinates the Subordinated Lien against the Property to the Superior Lien and agrees that the Subordinated Lien will remain subordinate to the Superior Lien regardless of the frequency or manner of renewal, extension, change, or alteration of the Superior Lien or the Note Secured by Superior Lien.

When the context requires, singular nouns and pronouns include the plural.

[Name of subordinating party]

Include acknowledgment.

Form 10-14

Notice of Final Agreement

Date:

Borrower:

Lender:

To: Borrower and all other debtors and obligors with respect to the Loan identified below.

1. THE WRITTEN LOAN AGREEMENT REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES.

THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES.

2. As used in this notice:

“Obligor” means any entity or individual who (a) is obligated to pay the Loan or (b) otherwise is or becomes obligated to pay the Loan (for example, as cosigner or guarantor) or (c) has pledged any property as security for the Loan.

“Loan” means the loan by Lender that is to be evidenced by the note dated [date] executed by Borrower, payable to the order of Lender, in the original principal amount of \$[amount] as modified and extended by Borrower.

“Written Loan Agreement” means one or more promises, notes, agreements, undertakings, security agreements, deeds of trust, or other documents, or commitments, or any combination of actions or documents relating to the Loan.

3. Each Borrower and Obligor who signs below acknowledges, represents, and warrants to Lender that Lender has given and each respective Borrower and Obligor has received a copy of this notice on or before the execution of any Loan Agreement.

[Name of lender]

[Name of borrower]

[Name of obligor]

Form 10-15

Guaranty

Basic Information

Date:

Guarantor:

Guarantor's Mailing Address:

Borrower:

Borrower's Mailing Address:

Lender:

Lender's Mailing Address:

Guaranteed Indebtedness: The debt evidenced by the note dated [**date**], in the original principal amount of \$[**amount**], executed by Borrower and payable to the order of Lender, the obligations under the deed of trust executed in connection with the note and any other document executed by Borrower evidencing or securing the note (collectively, the "Loan Documents"), plus all interest, penalties, expenses, attorney's fees, and other collection costs as provided in the Loan Documents.

Clauses and Covenants

1. Guarantor agrees to pay, when due or declared due, the Guaranteed Indebtedness to Lender at Lender's Mailing Address.

2. Guarantor waives (a) diligence in preserving liability of any person on the Guaranteed Indebtedness and in collecting or bringing suit to collect the Guaranteed Indebtedness; (b) all rights of Guarantor under chapter 43 of the Texas Civil Practice and Remedies Code, section 17.001 of the Texas Civil Practice and Remedies Code, [and] rule 31 of the Texas Rules of Civil Procedure [**include if applicable:** , and sections 51.003, 51.004, and 51.005 of the Texas Property Code]; (c) protest; (d) notice of extensions, increases, renewals, or rearrangements of the Guaranteed Indebtedness; and (e) notice of acceptance of this guaranty, of creation of the Guaranteed Indebtedness, of failure to pay the Guaranteed Indebtedness as it matures, of any other default, of adverse change in Borrower's financial condition, of release or substitution of collateral, of intent to accelerate, of acceleration, and of subordination of Lender's rights in any collateral, and every other notice of every kind. Guarantor's obligations under this guaranty will not be altered nor will Lender be liable to Guarantor because of any action or inaction of Lender in regard to a matter waived or of which notice is waived by Guarantor in the preceding sentence.

3. Guarantor agrees to pay reasonable attorney's fees and other collection costs if an attorney is retained to enforce this guaranty for collection.

4. This guaranty is an absolute, irrevocable, unconditional, and continuing guaranty of payment and performance and not of collection.

5. Lender need not resort to Borrower or any other person or proceed against collateral before pursuing its rights against Guarantor or any other guarantor. Lender's action or inaction with respect to any right of Lender under the law or any agreement will not alter the obligation of Guarantor hereunder. Lender may pursue any remedy against Borrower or any collateral or under any other guaranty without altering the obligations of Guarantor hereunder and without liability to Guarantor, even though Lender's pursuit of such remedy may result in Guarantor's loss of rights of subrogation or to proceed against others for reimbursement of contribution or any other right.

6. Guarantor will remain liable for the Guaranteed Indebtedness even though the Guaranteed Indebtedness may be unenforceable against or uncollectible from Borrower or any other person because of incapacity, lack of power or authority, discharge, or any other reason.

7. Guarantor consents and acknowledges that Guarantor's obligations will not be released by (a) the renewal, extension, or modification of the Guaranteed Indebtedness or any of the Loan Documents; (b) the insolvency, bankruptcy, liquidation, or dissolution of Borrower or any other obligor; (c) the failure of Lender to properly obtain, perfect, or preserve any security interest or lien in any collateral for the Guaranteed Indebtedness; (d) the release, substitution, or addition of any collateral for the Guaranteed Indebtedness; or (e) the failure of Lender to exercise diligence, commercial reasonableness, or reasonable care in the preservation, enforcement, or sale of any of the collateral.

8. Lender need not notify Guarantor that Lender has sued Borrower, but if Lender gives written notice to Guarantor that it has sued Borrower, Guarantor will be bound by any judgment or decree, to the extent permitted by law.

9. Lender may sue any guarantor without impairing Lender's rights against any other guarantor, with or without making Borrower a party. Lender may settle with Borrower or any other guarantor for such amounts as it may elect or may release Borrower or any guarantor or any collateral securing the Guaranteed Indebtedness without impairing Lender's right to collect the Guaranteed Indebtedness from Guarantor.

10. This guaranty binds Guarantor and Guarantor's heirs, successors, and assigns, and it benefits and may be enforced by Lender and Lender's successors in interest. When the context requires, singular nouns and pronouns include the plural. This guaranty will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. The provisions of this guaranty are severable. If a court of competent jurisdiction finds that

any provision of this guaranty is unenforceable, then the remaining provisions will remain in effect without the unenforceable parts.

11. FINAL AGREEMENT: THIS WRITTEN AGREEMENT REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES. THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES.

[Name of guarantor]

Form 10-16

This disclosure, set forth in Tex. Fin. Code § 343.104, must be made by hand delivery or mail not later than the third business day after the date the lender receives a home loan application. Tex. Fin. Code § 343.001 defines "home loan" for purposes of the required disclosure.

Insurance Notice to Applicant

You may elect to purchase credit life, disability, or involuntary unemployment insurance in conjunction with this mortgage loan. If you elect to purchase this insurance coverage, you may pay for it either on a monthly premium basis or with a single premium payment at the time the lender closes this loan. If you choose the single premium payment, the cost of the premium will be financed at the interest rate provided for in the mortgage loan.

This insurance is NOT required as a condition of closing the mortgage loan and will be included with the loan only at your request.

You have the right to cancel this credit insurance once purchased. If you cancel it within 30 days of the date of your loan, you will receive either a full refund or a credit against your loan account. If you cancel this insurance at any other time, you will receive either a refund or credit against your loan account of any unearned premium. YOU MUST CANCEL WITHIN 30 DAYS OF THE DATE OF THE LOAN TO RECEIVE A FULL REFUND OR CREDIT.

To assist you in making an informed choice, the following estimates of premiums are being provided along with an example of the cost of financing. The examples assume that the term of the insurance product is [number] years and that the interest rate is [percent] percent (a rate that has recently been available for the type of loan you are seeking). PLEASE NOTE THAT THE ACTUAL LOAN TERMS YOU QUALIFY FOR MAY VARY FROM THIS EXAMPLE. "Total amount paid" is the amount that would be paid if you financed only the total insurance pre-

mium for a [number] year period and is equal to the amount you would have paid if you made all scheduled payments. This is NOT the total of payments on your loan.

CREDIT LIFE INSURANCE: Estimated premium of \$[amount]

DISABILITY INSURANCE: Estimated premium of \$[amount]

INVOLUNTARY UNEMPLOYMENT INSURANCE: Estimated premium of \$[amount]

TOTAL INSURANCE PREMIUMS: \$[amount]

TOTAL AMOUNT PAID: \$[amount]

Include the following language if an acknowledgment of receipt is desired.

The undersigned acknowledge[s] receipt of the foregoing notice on [date].

Continue with the following.

[Name of applicant]
Date:

Include additional signature lines for each applicant.

Form 10-17

Loan Agreement

Borrower's Required Insurance Coverages

Basic Information

Date:

Borrower:

Mailing address:

Phone:

E-mail:

Type of entity:

State of organization:

Federal tax identification number:

Lender:

Mailing address:

Phone:

E-mail:

Loan officer:

Guarantor:

Mailing address:

Phone:

E-mail:

Title Company:

Mailing address:

Phone:

E-mail:

Note

Date:

Original Principal Amount:

Maturity date:

Loan Commitment Fee:

Use of Loan Proceeds:

Collateral

Real Property:

Prior liens: **[include recording information]**

Personal property:

Prior security interests: **[include recording information]**

Loan Documents

Loan agreement/note: [list other loan documents, i.e., deed of trust, security agreement, guaranty, etc.]

Financial Covenants:

Additional Loan Requirements:

The Loan

Subject to the terms and conditions of this agreement, Lender will lend Borrower the Original Principal Amount as represented by the Note (the "Loan"), and Borrower agrees to pay the Note.

Clauses and Covenants

A. Conditions Precedent to Loan

The obligation of Lender to make the Loan is conditioned on—

- A.1. the execution and delivery of the Loan Documents;
- A.2. the accuracy, in all material respects, of all representations and warranties in the Loan Documents;
- A.3. no default existing under the Loan Documents;
- A.4. payment of the Loan Commitment Fee and all expenses incurred by Lender in connection with the Loan Documents; and
- A.5. Lender's receipt, in a form acceptable to Lender, of—

- a. opinion of Borrower's counsel as to Borrower's authority to execute and deliver the Loan Documents; the enforceability of the Loan Documents; the nonusurious nature of the Loan [**include if applicable:** , and the validity of Borrower's organization];
- b. certification from Borrower's authorized representative for any Borrower that is an entity attaching (i) a copy of Borrower's organizational documents, (ii) the approval of Borrower's governing authority for the execution and delivery of the Loan Documents, and (iii) specimen signatures from all Borrower representatives authorized to execute the Loan Documents;
- c. certification from governmental authorities for any Borrower that is an entity confirming Borrower's existence [**include if applicable:** and Borrower's account status with the Texas comptroller of public accounts];
- d. appraisal of the Real Property;
- e. survey plat of the Real Property;
- f. environmental assessment of the Real Property;
- g. commitment for issuance of a loan policy of title insurance in the Original Principal Amount insuring the validity of Lender's lien on the Real Property and confirming that no liens exist on the Real Property other than those liens permitted by the Loan Documents;
- h. financing statement reports on the Personal Property issued by all applicable filing officers confirming no financing statements are filed on the Personal Property other than those financing statements permitted by the Loan Documents;

- i. financial statement on Borrower [**include if applicable:** and financial statement on Guarantor]; and
- j. proof of insurance required by the Loan Documents

together with all other documents, instruments, and certificates reasonably requested by Lender.

B. Borrower's Representations

To induce Lender to enter into this agreement and to make the Loan, Borrower represents to Lender that—

B.1. Borrower—

- a. has the power and authority needed to execute and deliver the Loan Documents and to perform Borrower's obligations under the Loan Documents; and
- b. possesses all permits, registrations, approvals, consents, licenses, trademarks, trademark rights, trade names, trade name rights, and copyrights needed to conduct Borrower's business[./ and;]
- c. [**include if applicable:** was validly formed and exists under the laws of the State of Organization[./ and;]]
- d. [**include if applicable:** is in good standing under the laws of the State of Organization and all other jurisdictions where the nature of Borrower's business makes qualification necessary[./ and;]]

- e. [include if applicable: is qualified to do business under the laws of the State of Organization and all other jurisdictions where the nature of Borrower's business makes qualification necessary.]

B.2. the execution, delivery, and performance of the Loan Documents executed by Borrower have been duly authorized and do not and will not (a) contravene or violate any legal requirement; (b) result in the breach of, or constitute a default under, any instrument to which Borrower is a party or by which any of Borrower's property may be bound or affected; or (c) result in a requirement to create any lien on any of Borrower's property other than liens granted to Lender on the Collateral;

B.3. the Loan Documents are legal, valid, and binding obligations of the parties executing the documents;

B.4. Borrower has good and indefeasible title to the Real Property and has good title to the Personal Property, free and clear of all liens except (a) as disclosed in the Loan Documents; (b) liens for ad valorem taxes, general and special assessments, and other governmental charges not yet due or payable; and (c) liens granted to Lender;

B.5. Borrower's financial statements delivered to Lender fairly present the financial condition and the results of Borrower's operations as of the dates and for the periods indicated, and no material adverse change has occurred in the assets, liabilities, financial condition, or business of Borrower since the dates of the financial statements;

B.6. Borrower has no knowledge of any litigation or administrative claim, action, or proceeding, pending or threatened, against Borrower or directly involving the Collateral before or by any governmental authority that, if adversely determined, could have a material adverse effect on Borrower;

B.7. there is no outstanding adverse judgment, writ, order, injunction, award, or decree affecting Borrower or the Collateral;

B.8. Borrower is not in default under any agreement to which Borrower is bound or to which any of the collateral is subject that could have a material adverse effect on Borrower or the Collateral;

B.9. all information and documentation supplied to Lender and all statements made to Lender by or on behalf of Borrower are correct and complete in all material respects as of the date made;

B.10. Borrower has no knowledge of the Real Property's being used for the production, release, or disposal of hazardous wastes or materials;

B.11. the Real Property is taxed and billed separately from any other property for ad valorem tax purposes;

B.12. no part of the Real Property is located within a flood zone;

B.13. Borrower's financial records have been prepared and maintained in accordance with good accounting practices consistently applied and reflect all moneys due or to become due from or to Borrower; and

B.14. Borrower has filed all required tax returns and paid all taxes shown thereon to be due, except those for which extensions have been obtained and those that are being contested in good faith and for which appropriate reserves have been established and disclosed in writing to Lender.

C. Affirmative Covenants

Borrower will—

C.1. apply all proceeds from the sale, collection, or other disposition of the Collateral to amounts owing on the Note unless the Loan Documents authorize an alternate use of the proceeds;

C.2. comply with the Additional Loan Requirements;

C.3. comply with the Financial Covenants;

C.4. operate Borrower's business in accordance with all applicable legal requirements;

C.5. keep at Borrower's address, or such other place as Lender may approve, accounts and records reflecting the operation of Borrower's business and copies of all written contracts, leases, and other instruments that affect the Collateral;

C.6. prepare Borrower's financial records in compliance with good accounting practices consistently applied;

C.7. permit Lender to examine and make copies of Borrower's books, records, contracts, leases, and other instruments at any reasonable time;

C.8. deliver to Lender, at Lender's request from time to time, Borrower's tax returns and [audited/reviewed/compiled/internally prepared] financial statements of Borrower prepared in accordance with good accounting practices consistently applied, in detail reasonably satisfactory to Lender and certified to be true and correct by [**include if applicable:** the chief financial officer of] Borrower [**include if applicable:** and accompanied by an opinion of an independent certified public accountant];

Include if applicable.

C.9. deliver to Lender, at Lender's request from time to time, tax returns of Guarantor, and [audited/reviewed/compiled/internally prepared] financial statements of Guarantor

prepared in accordance with good accounting practices consistently applied, in detail reasonably satisfactory to Lender and certified to be true and correct by [**include if applicable:** the chief financial officer of] Guarantor [**include if applicable:** and accompanied by an opinion of an independent certified public accountant];

Continue with the following.

C.10. execute, acknowledge as required, and deliver to Lender, at Lender's request from time to time, at Borrower's expense, any document needed by Lender to (a) correct any defect, error, omission, or ambiguity in the Loan Documents; (b) comply with Borrower's obligations under the Loan Documents; (c) make subject to and perfect the liens and security interests of the Loan Documents any property intended to be covered thereby; and (d) protect, perfect, or preserve the liens and the security interests of the Loan Documents against third persons or make any recordings, file any notices, or obtain any consents requested by Lender in connection therewith;

C.11. notify Lender promptly (a) on acquiring knowledge of the occurrence of any event of default under the Loan Documents; (b) if any of Borrower's property is surrendered in satisfaction of a debt or obligation [**include if applicable:** or on acquiring knowledge that any of Guarantor's property was surrendered in satisfaction of a debt or obligation]; and (c) of any litigation, arbitration, mediation, or proceedings before any governmental agency that could have a material adverse effect on Borrower or the Collateral [**include if applicable:** or on acquiring knowledge of any litigation, arbitration, mediation, or proceedings before any governmental agency that could have a material adverse effect on Guarantor];

C.12. pay promptly on demand all expenses in connection with (a) the negotiation, preparation, execution, filing, recording, rerecording, modification, and supplementation of the Loan Documents; (b) the collection of the Note; (c) the protection of the Collateral; (d) the

collection, enforcement, sale, or other disposition of the Collateral; and (e) the performance by Lender of any of Borrower's obligations under the Loan Documents;

C.13. use the Note proceeds for the purposes permitted in this agreement[./; and]

Include if applicable.

C.14. do all things necessary to preserve Borrower's existence, qualifications, rights, and franchises in all jurisdictions where Borrower does business.

D. Negative Covenants

Borrower will not—

D.1. use or allow the use of the Collateral in any manner that (a) constitutes a public or private nuisance; (b) makes void, voidable, or cancelable, or increases the premium of, any insurance required by the Loan Documents; or (c) lessens the value of the Collateral, other than as a result of ordinary wear and tear from the Collateral's intended use;

D.2. purchase, acquire, or lease any property from, or sell, transfer, or lease any property to, any equity owner, manager, director, officer, agent, or employee of Borrower, or any person or entity controlled by, controlling, or under common control with Borrower, except on terms then customarily available between unrelated parties in substantially similar transactions;

D.3. lend money to, or guarantee the payment or performance of any liability or obligation of, any person, except short-term loans to Borrower's employees that, in the aggregate, do not exceed \$[amount];

D.4. materially change the nature of Borrower's business or enter into any business that is substantially different from Borrower's existing business;

D.5. incur any indebtedness other than the Note, except short-term indebtedness to trade creditors incurred in the ordinary course of Borrower's business that, in the aggregate, does not exceed \$[amount];

D.6. create or permit any mortgage, security interest, or lien on any Collateral other than mortgages, security interests, or liens existing at the date of this agreement and disclosed to Lender or created pursuant to the Loan Documents;

D.7. purchase or redeem any of Borrower's ownership interests, declare or pay any dividends, or make any distribution to the holders of any of Borrower's ownership interests (to the extent Borrower is an entity);

D.8. sell, transfer, convey, or lease any Collateral except for sales in the ordinary course of business and on the conditions provided in the Loan Documents; [or]

D.9. acquire all or substantially all of the assets or ownership interests of any third party[./; or]

Include if applicable.

D.10. liquidate or dissolve, or become a party to any merger or consolidation.

E. Default and Remedies

E.1. A default exists if—

- a. Borrower fails to timely pay the Note;
- b. a party fails to perform any obligation or covenant in any of the Loan Documents;
- c. any representation made by a party in any of the Loan Documents is false in any material respect when made;

- d. a receiver is appointed for any party executing any of the Loan Documents, or for any of the Collateral;
- e. any Collateral is assigned for the benefit of creditors;
- f. a bankruptcy or insolvency proceeding is commenced by a party executing any of the Loan Documents;
- g. a bankruptcy or insolvency proceeding is commenced against a party executing any of the Loan Documents, and the proceeding continues without dismissal for sixty days, the party against whom the proceeding is commenced admits the material allegations of the petition against it, or an order for relief is entered;
- h. any of the following parties is terminated, begins to wind up its affairs, is authorized by its governing body or persons to terminate or wind up its affairs, or any event occurs or condition exists that permits the termination or winding up of the affairs of any of the following parties: Borrower, a partnership of which Borrower is a general partner, or any other obligated party executing any of the Loan Documents; or
- i. any Collateral is impaired by uninsured loss, theft, damage, or destruction, or by levy and execution, or by issuance of an official writ or order of seizure, unless it is promptly replaced with collateral of like kind and quality or restored to its former condition.

E.2. If a default exists, Lender may—

- a. declare the unpaid principal balance, earned interest, and any other amounts owed on the Note immediately due; and

- b. exercise against Borrower, the Collateral, and any other party executing the Loan Documents any rights and remedies available to Lender under the Loan Documents.

Include if applicable.

E.3. Notwithstanding any other provision in the Loan Documents, in the event of a default, before exercising any of Lender's remedies under the Loan Documents, Lender will first give Borrower notice of default and Borrower will have ten days after delivery of notice in which to cure the default. If the default is not cured within ten days after notice is delivered, Borrower and each surety, endorser, and guarantor waive all demand for payment, presentation for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, protest, and notice of protest, to the extent permitted by law.

Continue with the following.

F. General Provisions

F.1. Any notice required or permitted under this agreement must be in writing. Any notice required by this agreement will be deemed to be given (whether received or not) the earlier of receipt or three business days after being deposited with the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the intended recipient at the address provided in this agreement. Notice may also be given by regular mail, personal delivery, courier delivery, or e-mail and will be effective when received. Any address for notice may be changed by notice given as provided herein.

F.2. The Loan Documents, including any of their exhibits and attachments, constitute the entire agreement of the parties. There are no representations, agreements, or promises by Lender pertaining to the Loan that are not in those documents.

F.3. This agreement may be amended only by an instrument in writing signed by the parties.

F.4. Borrower may not assign this agreement or any of Borrower's rights under it without Lender's prior written consent, and any attempted assignment is void. This agreement binds, benefits, and may be enforced by the parties and their successors in interest.

F.5. Borrower authorizes Lender to charge any amount due Lender under the Loan Documents against any of Borrower's deposit accounts with Lender.

F.6. Except as otherwise provided in the Loan Documents, Borrower waives all demand for payment, presentation for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, protest, and notice of protest, to the extent permitted by law.

F.7. No remedy, right, or power conferred on Lender in this agreement is intended to be exclusive of any other remedy, right, or power now or hereafter existing at law, in equity, or otherwise, and all remedies, rights, and powers are cumulative.

F.8. This agreement will be construed under the laws of the state of Texas, without regard to choice-of-law rules of any jurisdiction. This agreement is to be performed where the Note is payable.

F.9. Interest on the Note will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the Note or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the Note or, if the principal of the Note has been paid, refunded. This provision overrides any conflicting provisions in this and all other Loan Documents.

F.10. It is not a waiver of default if the nondefaulting party fails to declare immediately a default or delays taking any action. Pursuit of any remedies set forth in this agreement does not preclude pursuit of other remedies in the other Loan Documents or provided by law.

F.11. There are no third-party beneficiaries of this agreement.

F.12. If any provision of this agreement is determined to be invalid or unenforceable, the validity or enforceability of any other provision will not be affected.

F.13. The rule of construction that ambiguities in a document will be construed against the party who drafted it will not be applied in interpreting this agreement.

F.14. The parties' relationship is an ordinary commercial relationship, and the parties do not intend to create the relationship of principal and agent, partnership, joint venture, or any other special relationship. Lender in exercising Lender's rights and performing Lender's obligations under the Loan Documents owes no fiduciary duty to Borrower.

F.15. If this agreement is executed in multiple counterparts, all counterparts taken together will constitute this agreement.

F.16. If Lender agrees to waive or defer any of the requirements of this agreement as a condition precedent to the advance of the proceeds of the Note, Borrower will provide any deferred information or documentation within thirty days after the advance.

F.17. In the event of any conflict among the provisions of this Loan Agreement and any of the Loan Documents, the more restrictive provision will control.

F.18. When the context requires, singular nouns and pronouns include the plural.

F.19. The term *Note* includes all extensions and renewals of the Note.

THE WRITTEN LOAN AGREEMENT REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES.

THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES.

Signed on [date].

[Name of borrower]

[Name of lender]

Attach insurance rider if applicable.

Insurance Rider to Loan Agreement

Texas law prohibits additional insured coverage in a construction contract, or in an agreement collateral to or affecting a construction contract, except that pertaining to a single family house, townhouse, duplex, or directly related land development, or to a public works project of a municipality. Tex. Ins. Code ch. 151. See section 17.2:4 in this manual.

Loan Agreement

Date:

Borrower:

Lender:

This insurance rider is part of the Loan Agreement.

Borrower's Required Insurance Coverages

Type of Insurance or Endorsement	Minimum Policy or Endorsement Limit
---	--

General Liability Insurance Policy Required of Borrower:

- | | | |
|---|---|----------|
| <input type="checkbox"/> Commercial general liability
(occurrence basis) | Per occurrence: | \$ _____ |
| | General aggregate: | \$ _____ |
| | Products-completed operations
aggregate: | \$ _____ |
| | Personal and advertising injury: | \$ _____ |
| | Damage to premises rented to you: | \$ _____ |
| | Medical expense: | \$ _____ |

Required Endorsements to Borrower's General Liability Policy:

- | | |
|---|----------|
| <input type="checkbox"/> Designated location(s) general aggregate limit | \$ _____ |
| <input type="checkbox"/> Liquor liability | \$ _____ |

_____ \$ _____

Include any other desired endorsements. See chapter 17

Additional Liability Insurance Policies Required of Borrower:

- Workers' compensation \$500,000
- Employer's liability \$ _____
- Business automobile liability \$ _____
- Garage \$ _____
- Crime (or fidelity) \$ _____
- Innkeepers \$ _____
- Excess liability \$ _____
- Or*
- Umbrella liability (occurrence basis) \$ _____

Commercial Property Insurance Policies Required of Borrower If No Construction Is Contemplated or. If Construction Is Contemplated, for the Period After Construction Is Completed:

- Causes of loss—special form 100 percent of replacement cost of the Property on an agreed-value basis

Required Endorsements to Borrower's Commercial Property Policy:

- Business income and additional expense Sufficient limits to address reasonably anticipated business interruption losses for a period of ____ months
- Boiler and machinery \$ _____
- Flood (if Property is located within a 100-year floodplain (FEMA Flood Zone "A" or any subdesignation of Zone "A")) \$ _____
- Earth movement \$ _____
- Ordinance or law coverage \$ _____

- Terrorism coverage \$ _____
- Glass Sufficient limits to cover plate glass
- Signs Sufficient limits to cover exterior signage

Include any other desired endorsements. See chapter 17

General Insurance Requirements

a. The commercial general liability must be endorsed to name Lender as an “additional insured” and must not be endorsed to exclude the partial, contributory, or comparative negligence of Lender from the definition of “insured contract.”

b. Additional insured endorsements must not exclude coverage for the sole or contributory ordinary negligence of Lender.

c. Property insurance policies must contain waivers of subrogation of claims against Lender.

d. Certificates of insurance and copies of any additional insured and waiver of subrogation endorsements with respect to Borrower’s insurance must be delivered by Borrower to Lender on the date of this agreement and at least [number] days before the expiration of the current policies.

e. Borrower may carry a business owner’s insurance policy, commercial package insurance policy, or other package insurance policy rather than separate commercial property and general liability insurance policies described above, provided that such package policy contains the minimum insurance coverages, endorsements, and limits set forth in this agreement.

Include paragraph f. g. or h. as applicable.

f. If Borrower will employ a third-party manager for the Real Property, Borrower will require that the third-party manager carry the property and liability insurance policies described in Exhibit [**exhibit number/letter**] to this agreement.

And/Or

g. If all or a portion of the Property is to be constructed during the construction period, Borrower will maintain, in lieu of the commercial property insurance described above, the builder's risk insurance described in Exhibit [**exhibit number/letter**] and require that the general contractor and architect carry the liability insurance policies described in Exhibit [**exhibit number/letter**].

And/Or

h. Certificates of insurance and copies of any additional insured endorsements with respect to a third-party manager's, contractor's, subcontractor's, or architect's insurance must be delivered by Borrower to Lender before such party enters the Property and thereafter at least [**number**] days before the expiration of the policies.

Exhibit [exhibit number/letter] to
Insurance Rider to Loan Agreement

Mark applicable boxes.

Additional Insurance Policies Required during Construction Period

FROM GENERAL CONTRACTOR

Type of Insurance or Endorsement Minimum Policy or Endorsement Limit

General Liability Insurance Policy Required of General Contractor:

- Commercial general liability (occurrence basis)
 - Per occurrence: \$ _____
 - General aggregate: \$ _____
 - Products-completed operations aggregate: \$ _____
 - Personal and advertising injury: \$ _____
 - Damage to premises rented to you: \$ _____
 - Medical expense: \$ _____

Required Endorsements to General Contractor's General Liability Policy:

- Designated construction project(s) general aggregate limit \$ _____
- _____ \$ _____

Include any other desired endorsements. See chapter 17 in this manual.

Additional Liability Insurance Policies Required of General Contractor:

- Workers' compensation \$500,000
- Employer's liability \$ _____
- Business automobile liability \$ _____

- Professional liability \$ _____
- Excess liability \$ _____
- Or*
- Umbrella liability (occurrence basis) \$ _____

Commercial Property Insurance Policies Required of General Contractor for General Contractor's Personal Property and Equipment:

- Causes of loss—special form 100 percent of replacement cost of the general contractor's personal property and equipment

FROM ARCHITECT

Type of Insurance or Endorsement Minimum Policy or Endorsement Limit

Professional Liability Insurance Policy Required of Architect:

- Professional liability \$ _____

FROM BORROWER OR GENERAL CONTRACTOR

Type of Insurance or Endorsement Minimum Policy or Endorsement Limit

Builder's Risk Insurance Policy Required of Borrower or General Contractor:

- Builder's risk on a "completed value" basis 100 percent of replacement cost of the improvements to be constructed on the Property

Required Endorsements to Borrower's or General Contractor's Builder's Risk Insurance

Policy:

- Contract penalties \$ _____
- Collapse \$ _____
- Debris removal additional limit \$ _____

- Earthquake \$ _____
- Expediting expenses \$ _____
- Ordinance or law \$ _____
- Pollutant cleanup and removal \$ _____
- Preservation of property \$ _____
- Testing \$ _____
- Flood (if Property is located within a 100-year floodplain (FEMA Flood Zone "A" or any subdesignation of Zone "A")) \$ _____
- Occupancy of up to _____% of covered property to be permitted \$ _____

[Reserved]

Form 10-18

Additional Clauses for Loan Agreements*Capital Expenditures***Clause 10-18-1**

Borrower will not make any expenditures for fixed assets in excess of [amount] dollars (\$[amount]) in any [fiscal/calendar] year. "Fixed assets" means tangible property that has a useful life in excess of [number] years.

*Working Capital***Clause 10-18-2**

Borrower will maintain at all times an excess of current assets over current liabilities of not less than [amount] dollars (\$[amount]). "Current assets" means the sum of Borrower's cash, marketable securities, and other similar assets that are reasonably expected to be converted into cash or applied within twelve months of the date of determination. "Current liabilities" means the sum of all money owed by Borrower that is payable on demand or within twelve months of the date of determination.

*Liquidity Ratio***Clause 10-18-3**

Borrower will at all times maintain a ratio of the sum of cash and marketable securities to current liabilities of not less than [number] to 1. "Current liabilities" means the sum of all money owed by Borrower that is payable on demand or within twelve months of the date of determination.

*Current Ratio***Clause 10-18-4**

Borrower will maintain at all times a ratio of current assets to current liabilities of not less than [number] to 1. "Current assets" means the sum of Borrower's cash, marketable securities, and other assets that are reasonably expected to be converted into cash or applied within twelve months of the date of determination. "Current liabilities" means the sum of all money owed by Borrower that is payable on demand or within twelve months of the date of determination.

*Debt Service Coverage***Clause 10-18-5**

Borrower will maintain a ratio of net operating income to debt service for the [calendar/fiscal] year of not less than [number] to 1. "Net operating income" means gross income less operating expenses. "Debt service" means principal and interest payments on all debts with a maturity in excess of one year.

*Loan-to-Value Ratio***Clause 10-18-6**

Borrower will maintain a loan-to-value ratio on the [Collateral/Real Property/Personal Property] of [ratio] or less. The value of the [Collateral/Real Property/Personal Property] shall be the fair market value of the [Collateral/Real Property/Personal Property] as determined by [Lender/an appraisal acceptable to Lender]. "Loan" means the principal of any indebtedness secured

by a [lien/security interest] on the [Collateral/Real Property/Personal Property].

[Reserved]

Form 10-19

This notice must be provided on a separate document, be in at least fourteen-point type, and use the below or substantially similar language. Tex. Fin. Code § 343.105.

Notice of Penalties for Making False or Misleading Written Statement (Pursuant to Section 343.105, Texas Finance Code)

Warning: Intentionally or knowingly making a materially false or misleading written statement to obtain property or credit, including a mortgage loan, is a violation of Section 32.32, Texas Penal Code, and, depending on the amount of the loan or value of the property, is punishable by imprisonment for life or any term of 2 years to 99 years and a fine not to exceed \$10,000.

[I/We], the undersigned home loan applicant(s), represent that [I/we] have received, read, and understand this notice of penalties for making a materially false or misleading written statement to obtain a home loan.

[I/We] represent that all statements and representations contained in [my/our] written home loan application, including statements or representations regarding [my/our] identity, employment, annual income, and intent to occupy the residential real property secured by the home loan, are true and correct as of the date of loan closing.

[Name of borrower/loan applicant]

Repeat signature lines as necessary.

[Reserved]

Form 10-20

Certification of Trust

Basic Information

Date:

Trust:

Trustee:

Trustee's Mailing Address:

Repeat as necessary.

Settlor:

Repeat as necessary.

Include the following terms as applicable.

Note

Date:

Original principal amount:

Borrower:

Lender:

Deed of Trust

Date:

Grantor:

Beneficiary:

Recording information:

Property:

Buyer:

Continue with the following.

Terms of Certification

1. Trustee is a currently acting trustee of the Trust under an instrument executed on [date], and the Trust exists.

Select one of the following.

2. The Trust powers include at least all those trust powers granted a trustee by subchapter A, chapter 113, of the Texas Property Code.

Or

2. The Trust powers include the power to, and the Trustee is authorized to

Select as applicable.

borrow money in the amount of \$[amount] from Lender to [purchase the Property/[state other purpose or use of loan proceeds]] and to enter into the Note, payable to the order of Lender [;/.]

And/Or

grant security interests in or liens on all or certain assets of the Trust, including entering into the Deed of Trust covering the Property and any necessary modifications, extensions, increases, and renewals of the Deed of Trust [;/.]

And/Or

enter into any assignments, pledges, mortgages, deeds of trust, security agreements, and other documents and instruments concerning the Property, or any real or personal property, or any interest therein, owned by the Trust that may be necessary or appropriate or required by Lender to evidence and secure the payment of the Note [;/.]

And/Or

contract for the issuance by Lender of letters of credit, to discount with Lender notes, acceptances, and evidences of indebtedness payable to or due the Trust, to endorse the same and execute any contracts and instruments for repayment thereof to Lender as Lender may require, to enter into foreign exchange transactions with or through Lender, and to enter into interest-rate hedging transactions with Lender in connection with the Note [;/.]

And/Or

execute deeds or other instruments of conveyance [;/.]

And/Or

enter into a guaranty guaranteeing [a portion of] the obligations of Borrower to Lender [;/.]

And/Or

[state other purpose of certification].

Select one of the following.

3. The Trust is irrevocable.

Or

3. The Trust is revocable, and the power to revoke the Trust is held by [name].

Continue with the following.

4. Under the terms of the Trust, [all/[number]] of the currently acting trustees are required to sign documents in order to exercise the powers of the trustees.

5. Title to the Trust assets should be taken in the following manner: [describe].

6. The Trust has not been revoked or modified or amended in any manner that would cause the representations contained in this Certification to be incorrect.

Trustee:

[Name of trustee]

Repeat signature lines as necessary.

Form 10-21

Release of Collateral Transfer of Note and Lien

Basic Information

Date:

Secured Party:

Secured Party's Mailing Address:

Debtor:

Debtor's Mailing Address:

Collateral Note: \$[amount] Note executed by [maker] and payable to the order of [payee]
dated [date].

Collateral Note Security: Deed of Trust dated [date], recorded in [recording data].

Collateral Transfer of Note and Lien

Date:

Recorded: [recording data]

Purpose of Collateral Transfer of Note and Lien

In the Collateral Transfer of Note and Lien, Debtor granted to Secured Party a security interest in the Collateral Note and the Collateral Note Security, each as described in the Collateral Transfer of Note and Lien.

Release

Secured Party releases Secured Party's security interest in the Collateral Note and Collateral Note Security.

No Release of Underlying Collateral Note Debt and Collateral Note Security

Secured Party's release of its security interest in the Collateral Note and the Collateral Note Security does not affect or release (1) the indebtedness owing to Debtor on the Collateral Note and (2) the liens held by Debtor under the Collateral Note Security documents on the property described in those documents.

When the context requires, singular nouns and pronouns include the plural.

[Name of secured party]

Include acknowledgment.

Form 10-22

Assumption Agreement

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Basic Information

Date:

Transferor:

Transferor's Original Mailing Address:

Assuming Party:

Assuming Party's Mailing Address:

Holder of Note and Lien ("Holder"):

Holder's Mailing Address:

Note

Date:

Original Principal Amount:

Borrower:

Lender:

Unpaid Principal Amount:

Accrued but Unpaid Interest:

Maturity Date:

[Extended Maturity Date of Note:]

Property (including any improvements):

Note and Lien(s) Are Described in the Following Documents (“Lien Documents”): [**include recording information**]

Modified Terms:

Agreement of the Parties

For good and valuable consideration, Transferor, Assuming Party, and Holder are entering into this agreement.

1. Assuming Party and Transferor warrant to Holder that the Note and the Lien Documents, as modified by this agreement, are valid and enforceable, and represent to Holder that the Note and Lien Documents are not subject to rights of offset, rescission, or other claims.

Select one of the following.

2. Assuming Party—
- a. promises to perform all of Borrower’s obligations under the Note and promises to pay to the order of Holder (i) the Unpaid Principal Amount, (ii) the Accrued but Unpaid Interest, and (iii) all other amounts now or hereafter due and owing on the Note; and
 - b. agrees to perform all obligations of grantor [**include if applicable:** and debtor/obligor] under the Lien Documents.

Or

2. Assuming Party and Transferor—
- a. promise to perform all of Borrower's obligations under the Note and promise to pay to the order of Holder (i) the Unpaid Principal Amount, (ii) the Accrued but Unpaid Interest, and (iii) all other amounts now or hereafter due and owing on the Note; and
 - b. agree to perform all obligations of grantor [**include if applicable:** and debtor/obligor] under the Lien Documents.

Select one of the following.

3. Holder consents to Transferor's conveyance of the Property to Assuming Party and Assuming Party's assumption of Transferor's obligations under the Note and the Lien Documents, and Holder releases Transferor from Transferor's obligations to Holder under the Note and the Lien Documents.

[**Include if applicable:** All unpaid amounts owing on the Note are due by the Extended Maturity Date of Note. Assuming Party also extends the liens described in the Lien Documents.]

Or

3. Holder consents to Transferor's conveyance of the Property to Assuming Party and Assuming Party's assumption of Transferor's obligations under the Note and the Lien Documents, but Holder's consent does not release Transferor from Transferor's obligations to Holder under the Note and the Lien Documents.

[Include if applicable: All unpaid amounts owing on the Note are due by the Extended Maturity Date of Note. Transferor and Assuming Party also extend the liens described in the Lien Documents.]

Continue with the following.

4. The Note and the Lien Documents continue as written, except as provided in this agreement.

5. When the context requires, singular nouns and pronouns include the plural.

[Name of transferor]

[Name of assuming party]

[Name of holder]

Include acknowledgments.

Form 10-23

Lender's Rescission and Waiver of Acceleration of Note

Date:

Note

Date:

Original Principal Amount:

Borrower:

Lender:

Original Stated Maturity Date:

Accelerated Maturity Date:

Rescission Date:

Deed of Trust

Date:

Grantor:

Lender:

Recording information:

Property:

[Guarantor:]

Lender, as of the Accelerated Maturity Date, accelerated the maturity of the Note.

Lender hereby rescinds and waives, as of the Rescission Date, its acceleration of the maturity of the Note. Lender hereby reinstates the payment terms of the Note, and the obligation evidenced by the Note will be governed by Texas Civil Practice and Remedies Code section 16.035 as if no acceleration had occurred.

A copy of this rescission and waiver, in accordance with Texas Civil Practice and Remedies Code section 16.038 has been served on each debtor who, according to Lender's records, is obligated to pay the Note.

[Name of lender]

Form 10-24

**Affidavit of Mailing of Lender's Rescission and Waiver
of Acceleration of Note**

Date:

Affiant:

Note

Date:

Original principal amount:

Borrower:

Mortgagee:

Original stated maturity date:

Accelerated maturity date:

Rescission Date:

Deed of Trust

Date:

Grantor:

Mortgagee:

[Servicer: **[include name of servicer if servicer is not mortgagee]**]

Recording information:

Property: [Insert property description and include the following if applicable: including all personal property secured by the security agreement included in the Deed of Trust.]

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. This affidavit is made with respect to Mortgagee's rescission and waiver, as of the Rescission Date, of Mortgagee's prior acceleration of the maturity of the Note.

2. Attached to this affidavit is a copy of the letter and accompanying Lender's Rescission and Waiver of Acceleration of Note (collectively, the "Written Notice") served by [first-class mail/certified mail] on each debtor obligated to pay the Note, in compliance with Texas Civil Practice and Remedies Code section 16.038, by [Mortgagee/Service/an attorney representing Mortgagee], either personally or by an agent, depositing a copy of the Written Notice in the United States mail, postage prepaid, addressed to each debtor obligated to pay the Note at each debtor's last known address.

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on _____ by [name of affiant].

Notary Public, State of Texas

After recording return to:
[name and address]

Include attachments.

Chapter 11
Home Equity Loan Documents

I. Home Equity Loans Generally

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[Reserved]

Chapter 11

Home Equity Loan Documents

I. Home Equity Loans Generally

§ 11.1 General Considerations

Article XVI, section 50, of the Texas Constitution allows a lien on homestead property to secure a home equity loan. In a departure from prior Texas practice, the validity of such a lien is generally not dependent on the use to which the loan proceeds are applied. Constitutional provisions authorizing home equity lending continue, however, to reflect a strong public policy solicited of the homestead as the last shield against destitution. Home equity loans are authorized only on satisfaction of a number of significant constitutional safeguards and restrictions aimed at protecting homestead owners.

These restrictions are nonseverable and non-waivable. Each must be satisfied to create a valid lien. Strict compliance with the requirements of the Texas Constitution is required. *See Toler v. Fertitta*, 67 S.W.2d 229, 230 (Tex. Comm'n App. 1934, holding approved).

Regulatory Commentary: Regulations and official commentary pertaining to home equity lending are available from the following different sources.

Interpretive Rules of Finance Commission and Credit Union Commission: The constitution authorizes the legislature to delegate the authority to issue interpretations of the home equity lending provisions of the constitution. *See* Tex. Const. art. XVI, § 50(u). The legislature, acting pursuant to this amendment, delegated interpretive authority over the home equity provisions to the Finance Commission of

Texas and the Texas Credit Union Commission, which in turn have jointly issued interpretations of home equity lending law. *See* Tex. Fin. Code §§ 11.308, 15.413. The interpretive rules are codified in 7 Tex. Admin. Code ch. 153, which may be accessed at <http://occc.texas.gov/publications>. *See* 7 Tex. Admin. Code §§ 153.1–.96.

1. Lenders authorized by the constitution to make home equity extensions of credit are afforded substantial protections when relying on these interpretations. No act or omission is deemed to violate a home equity constitutional provision if the act or omission conforms to an interpretation of the provision that is in effect at the time of the act or omission and made by a state agency to which the power of interpretation is delegated or by an appellate court of this state or the United States. Tex. Const. art. XVI, § 50(u). However, the validity of certain of the interpretations has been successfully attacked in *Texas Bankers Ass'n v. Ass'n of Community Organizations for Reform Now (ACORN)*, 303 S.W.3d 404 (Tex. App.—Austin 2010, pet. granted). As a result, 7 Tex. Admin. Code §§ 153.1(11), 153.5(3) (defining interest) and § 153.5(4), (6), (8), (9), (12) (incorporating that definition) have been held constitutionally invalid, and 7 Tex. Admin. Code §§ 153.13, 153.18, 153.20, 153.22, 153.84 have been revised by the com-

missions to rectify invalid provisions found by the lower court. The Supreme Court of Texas granted a petition for review of the decision to determine (1) whether deference to agency interpretations should be the standard for appellate review when state agencies, in this case the Finance Commission of Texas and the Credit Union Commission, have been delegated the authority to interpret constitutional home equity provisions by the constitution and statutes of this state; (2) whether the Finance Code's definition of "interest" was properly applied in agency interpretations for purposes of determining the constitutional 3 percent fee cap; and (3) whether agency interpretations should be upheld that allow the signing of an equity loan by power of attorney instead of a required signing by homeowners at locations specified by the constitution. On unopposed motion, the court also ordered ACORN dismissed as a party because of its intervening dissolution and ordered the style of the cause corrected to read *Finance Commission of Texas et al. v. Valerie Norwood et al.*, No. 10-0121, 54 Tex. Sup. Ct. J. 1077 (Tex. Feb. 25, 2011). In an opinion issued on June 21, 2013, the Texas Supreme Court decided (1) that agency interpretations are subject to the same standard of review as courts of appeals, which are reviewed, as a matter of law, *de novo*; (2) that the agency interpretation of the 3 percent fee cap, tying it to the meaning of the Finance Code definition of "interest," was invalid ("interest" as used in that provision means the amount determined by multiplying the loan principal by the interest rate); and (3) that execution of a power of attorney used in an equity loan trans-

action must occur only at the office of a lender, an attorney at law, or a title company. *Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013). On January 24, 2014, on a motion for rehearing filed by the Texas Bankers Association, a supplemental opinion was issued to clarify that per diem interest and discount points were not subject to the 3 percent fee cap and to reaffirm the court's decision relating to the execution of a power of attorney used in an equity loan transaction. *Finance Commission of Texas*, 418 S.W.3d at 595-97.

2. **1998 OCCC Commentary:** On October 7, 1998, the Office of the Consumer Credit Commissioner (OCCC), the Texas Department of Banking, the Savings and Loan Department, and the Credit Union Department issued their joint Regulatory Commentary on Equity Lending Procedures to provide initial guidance to lenders and consumers concerning the regulatory views of the participating agencies. This regulatory commentary is referred to in this chapter as the "1998 OCCC Commentary." Though the 1998 OCCC Commentary has been supplanted by title 7, chapter 153, of the Texas Administrative Code (Home Equity Lending) (*see* 29 Tex. Reg. 84 (2004)), it retains vitality by helping practitioners understand home equity lending restrictions. The 1998 OCCC Commentary is accessible on the OCCC website at <http://occc.texas.gov>.
3. **Department of Insurance Procedural Rules:** The Texas Department of Insurance adopted title insurance coverages specifically for home equity loans along with accompanying procedural rules: (1) Equity Loan Mortgage

Endorsement (T-42) and accompanying Procedural Rule P-44 and (2) Supplemental Coverage Equity Loan Mortgage Endorsement (T-42.1) and accompanying Procedural Rule P-47. These endorsements and procedural rules provide underwriting guidelines that interpret the constitutional requirements for a home equity lien.

Limitation of Chapter: The commentary and forms in this chapter are applicable to a first-lien home equity loan. Texas Finance Code chapter 342 imposes additional duties, prohibitions, and disclosure requirements in connection with secondary mortgage loans. Attorneys are cautioned that some forms in this chapter may require modification for use with a secondary mortgage loan transaction.

Model Forms and Regulations: Home equity loans regulated by the OCCC must be written in plain language designed to be easily understood by the average consumer and must be printed in an easily readable font and type size. Tex. Fin. Code § 341.502(a). The Finance Commission has adopted rules governing loan contracts subject to Texas Finance Code section 341.502, including model loan contracts that in certain cases may be required for use. *See* 7 Tex. Admin. Code ch. 90. Home equity loans that are regulated by the OCCC and therefore subject to these plain language and model form requirements include only loans that (1) provide for an interest rate exceeding 10 percent a year, (2) are extended primarily for personal, family, or household use, (3) are a secondary mortgage loan, and (4) are made by a person engaged in the business of making such loans licensed by the OCCC (other than a bank, savings and loan, or credit union). Tex. Fin. Code §§ 341.101, 341.102–103, 342.005; Tex. Att’y Gen. Op. No. JC-0513 (2002). These requirements do not apply to first-lien home equity loans or home equity loans made by traditional lenders.

§ 11.2 Eligible Homestead Property

Not every homestead may secure a home equity loan. A homestead designated for agricultural use for ad valorem tax purposes on the date of loan closing cannot secure such a loan unless the tract is used primarily for the production of milk. Tex. Const. art. XVI, § 50(a)(6)(I). If a rural tract is used for dairy and other pursuits, no bright-line test is provided to determine the primacy of the dairy use.

A tract is designated for agricultural use by the chief appraiser of the appraisal district in which the tract is located on annual sworn application made by the homestead claimant. Tex. Tax Code §§ 23.43, 23.44. The requirements for agricultural use designation are set out in the Tax Code. *See* Tex. Tax Code § 23.42. A homestead is disqualified from securing a home equity loan only if it is designated for agricultural use for ad valorem tax purposes on the date the home equity loan closes. A change to agricultural use after the inception of the lien will not affect the validity of the lien. Tex. Const. art. XVI, § 50(a)(6)(I). However, on or after January 1, 2008, an individual is not entitled to have land designated for agricultural use if the land secures a home equity loan. Tex. Tax Code § 23.42(a–1).

It is not uncommon for a rural property to have a small portion of the tract subject to a homestead tax exemption with the remainder subject to agricultural use assessment. It is not settled whether the borrower in such a case may render the homestead portion eligible to secure a home equity loan by written designation recognizing the homestead portion as distinct from the land subject to the agricultural use designation. The Texas Supreme Court has held that even if a purported home equity lien against a homestead that was designated for agricultural use is held invalid for that reason, the lender is equitably subrogated to prior lienholders’ purchase-money and tax liens that were paid off with a

portion of the proceeds of the purported home equity loan. *LaSalle Bank N.A. v. White*, 246 S.W.3d 616 (Tex. 2007).

§ 11.3 Authorized Lenders

The seven categories of lenders that may make home equity loans are—

1. a bank, savings and loan association, savings bank, or credit union doing business under Texas or federal law;
2. a federally chartered lending instrumentality;
3. a person approved as a mortgagee by the United States government to make federally insured loans;
4. a person licensed to make regulated loans under Texas law;
5. a seller financing all or part of the homestead purchase;
6. a person related to the borrower within the second degree of affinity or consanguinity; or
7. a person licensed as a mortgage broker under Texas law.

Tex. Const. art. XVI, § 50(a)(6)(P). To qualify as a home equity lender under category 4. above, a lender must obtain a regulated loan license under Texas Finance Code chapter 342. 7 Tex. Admin. Code § 153.17(4). To qualify as a “mortgage broker” under category 7. above, a loan originator must obtain a residential mortgage loan originator license or a residential mortgage loan company license under Finance Code chapter 156, formerly referred to by its short title, the Mortgage Broker License Act, and, effective September 1, 2011, now properly cited as the Residential Mortgage Loan Company and Residential Mortgage Loan Originator Licensing and Registration Act. An individual licensed under chapter 342 as a regulated lender and under chapter 156 as a residential mortgage

loan originator may not be licensed or act as a residential mortgage loan originator unless the individual enrolls in the Nationwide Mortgage Licensing System and Registry and otherwise complies with other applicable requirements of the Texas Secure and Fair Enforcement for Mortgage Licensing Act of 2009, codified as chapter 180 of the Finance Code. Tex. Fin. Code § 180.051(a).

§ 11.3:1 Financial Institutions

Some question remains regarding the eligibility of a financial institution chartered in a foreign state to make a home equity loan. Such institutions are generally considered to be exempt from Texas usury law under 12 U.S.C. § 1831d. Such institutions may make loans to Texas residents under the usury laws of their home states. The 1998 OCCC Commentary recognizes that a financial institution chartered and doing business in a foreign state is not subject to licensure as a Texas-regulated lender but offers no direct opinion on whether such an institution would be recognized under the Texas Constitution as an authorized home equity lender. 1998 OCCC Commentary, at 9.

§ 11.3:2 HUD-Approved Mortgagees

A person approved by the United States government as a mortgagee to make federally insured loans is an authorized home equity lender. The Department of Housing and Urban Development (HUD) approves lenders to make federally insured loans. Federal Housing Administration (FHA) and HUD direct endorsement or non-supervised mortgagees are eligible to make home equity loans. Correspondents to a HUD-approved mortgagee are not authorized to make home equity loans unless they qualify under another category of authorized lender. 7 Tex. Admin. Code § 153.17(2). Unless a HUD-approved mortgagee is also a bank, savings and loan association, or credit union, the mortgagee must obtain a license from the Office of Con-

sumer Credit Commissioner to make junior-lien home equity loans. Tex. Fin. Code §§ 124.005, 339.005, 341.103–.104, 342.051.

§ 11.3:3 VA-Guaranteed Loans

VA-guaranteed loans are backed by a partial guaranty by the Department of Veterans Affairs (VA). *See* 38 U.S.C. § 3703. Though guaranteed, these loans are not technically ‘federally insured.’ The eligibility of VA lenders to make home equity loans remains unclear.

§ 11.3:4 State-Regulated Lenders

A lender authorized under Texas Finance Code chapter 341 must still meet both constitutional and statutory qualifications to make a home equity loan. Generally, a nondepository lender that makes, negotiates, arranges, or transacts a secondary mortgage loan governed by Finance Code chapter 342 must comply with the licensing provisions of that chapter. *See* 7 Tex. Admin. Code § 153.17(1), (3). Residential mortgage loan originators licensed under chapter 156 of the Finance Code, federal and state banks, savings banks, and savings and loan associations are expressly exempt from the licensing requirements of chapter 342. *See* Tex. Fin. Code § 342.051(c)(1), (f). Exempt lenders are nevertheless thought to be subject to the substantive provisions of that chapter applicable to secondary mortgage loans. However, chapter 342 and other chapters of subtitle B, title 4, of the Finance Code do not apply to a credit union’s extension of credit unless the agreement that evidences the transaction specifically provides otherwise. *See* Tex. Fin. Code § 124.005.

§ 11.3:5 Mortgage Brokers

A person licensed by the state of Texas as a mortgage broker is authorized by the constitution to make a home equity loan. Tex. Const. art. XVI, § 50(a)(6)(P)(vi). However, the savings and mortgage lending commissioner, by pub-

lished notice dated August 25, 2011, has clarified that, effective September 1, 2011, to be consistent with revised Texas statutes and applicable federal law, (1) the term *mortgage broker* has been discontinued and that mortgage broker companies licensed under chapter 156 of the Texas Finance Code will now be called ‘mortgage companies’ and that individuals licensed under chapter 156 will now be called ‘residential mortgage loan originators,’ and (2) a person regulated by this state who is licensed under chapter 156 may originate a home equity loan as provided by Tex. Const. art. XVI, § 50(a)(6)(P)(vi).

As amended effective September 1, 2013, chapter 156 is now properly cited by its short title as the Residential Mortgage Loan Company Licensing and Registration Act. All residential mortgage loan originators for first-lien mortgages or secondary mortgage loans licensed under chapter 156 must also comply with applicable provisions of the Texas Secure and Fair Enforcement for Mortgage Licensing Act of 2009, which is codified as chapter 180 of the Finance Code. Tex. Fin. Code §§ 156.201, 180.051(a).

§ 11.3:6 Loans by Relatives

A person related to the borrower within the second degree of affinity or consanguinity may make a home equity loan. Tex. Const. art. XVI, § 50(a)(6)(P)(v). The Texas Government Code gives instructions for computing degrees of affinity and consanguinity. *See* Tex. Gov’t Code §§ 573.021–.025. Individuals also are exempt under licensing and registration requirements of Texas Finance Code chapter 180 when offering or negotiating a residential mortgage loan with, or on behalf of, an immediate family member of the individual. *See* Tex. Fin. Code § 180.003(2). An ‘immediate family member’ for this purpose means the spouse, child, sibling, parent, grandparent, or grandchild of an individual. The term also includes a stepparent, stepchild, and step-

sibling and a relationship established by adoption. *See* Tex. Fin. Code § 180.002(8).

§ 11.3:7 Redlining Restrictions

A lender otherwise authorized to make a home equity loan is ineligible to make such a loan if found by a federal regulatory agency to have engaged in the practice of refusing to make loans because the debtor resides or the property is located in a certain area. Tex. Const. art. XVI, § 50(a)(6)(P). No provision is made in the constitution to rehabilitate or requalify lenders who were once found to have done this.

§ 11.4 Restriction on Loan-to-Value Ratio

The principal amount of a home equity loan when added to the aggregate total of all other indebtedness secured by a lien against the homestead may not exceed 80 percent of the fair market value of the homestead on the date that the extension of credit is made. Tex. Const. art. XVI, § 50(a)(6)(B). For the purpose of this calculation, the principal amount of a home equity loan is the sum of cash advances and charges made at the inception of the loan to the extent that the charges are financed in the principal amount of the note. 7 Tex. Admin. Code § 153.3(1). The 80 percent limit applies to the principal balance of all outstanding debt secured by the homestead on the date that the extension of credit is made. 7 Tex. Admin. Code § 153.3(2). The principal amount of a home equity loan does not include interest accrued after the date that the extension of credit is made (other than any interest capitalized and added to the principal balance on the date that the extension of credit is made) or amounts advanced by the lender after closing as the result of default, including, for example, ad valorem taxes, hazard insurance premiums, and authorized collection costs, including attorney's fees. 7 Tex. Admin. Code § 153.3(3). With a closed-end multiple advance loan, the principal balance includes

contractually obligated future advances not yet disbursed. 7 Tex. Admin. Code § 153.3(4).

Valuation: To establish the fair market value of the homestead, the lender and owner must sign a written acknowledgment establishing its value on the date that the loan is made. Tex. Const. art. XVI, § 50(a)(6)(Q)(ix). A lender or assignee for value may conclusively rely on the fair market value established by this written acknowledgment if that value is established by appraisal or evaluation prepared in accordance with any applicable state or federal requirement and the lender or assignee has no actual knowledge at the time that the loan is made that the fair market value established by the written acknowledgment is incorrect. Tex. Const. art. XVI, § 50(h). The appraisal or evaluation should be attached to the written acknowledgement of value executed by the borrower at closing. *See* Procedural Rule P-47, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*.

Federal banking regulators have issued regulations establishing the minimum criteria for valuations of real estate. An "appraisal" by a state certified or licensed appraiser is generally required for transactions valued at more than \$250,000. An "evaluation" is required for transactions of \$250,000 and less. *See* 12 C.F.R. §§ 34.43(a), (b), 225.63(a), (b), 323.3(a), (b), 564.3(a), (b).

Federal Financial Institutions Examination Council Interagency Appraisal Evaluation Guidelines issued by federal banking regulators provide further specifications for an evaluation. The evaluation must (1) be written; (2) include the preparer's name, address, signature, and date of the evaluation; (3) describe the collateral, its condition, and its current and projected use; (4) describe the source of information used in the analysis; (5) describe the analysis and supporting information; and (6) provide an estimate of the real estate's market value, with any limiting

conditions. Interagency Appraisal and Evaluation Guidelines in Commercial Real Estate and Construction Lending, Comptroller's Handbook, Appendix E (Comptroller of the Currency, November 1995), available at <https://www.occ.gov/publications/publications-by-type/comptrollers-handbook/index-comptrollers-handbook.html>. Qualifying evaluations and appraisals may be performed by lender employees or agents as long as the appraiser or evaluator is independent from the loan decision. Home equity loans made by FDIC-insured institutions must be supported by an appraisal or evaluation complying with these federal requirements.

In some cases, constitutional restrictions against additional collateral for home equity loans may require the partition, subdivision, and replatting of a tract into separate homestead and nonhomestead parcels. The proper apportioning of value between the homestead tract and the nonhomestead tract is essential to compliance with loan-to-value limits. This apportionment of value should take into account that the partitioned unsecured tract may have critical value to the homestead because it provides access to a public street or, conversely, it may have no value save in conjunction with the disposition of the entire property. *See In re Tinsley*, 217 B.R. 188 (Bankr. N.D. Tex. 1997).

Statute of Limitations: The four-year residual limitations period applies to a claim against a home equity lender for violating section 50(a)(6)(B) by lending more than 80 percent of the fair market value of homestead property. *See* Tex. Civ. Prac. & Rem. Code § 16.051. In determining the accrual date for purposes of applying the statute, the courts apply the 'legal injury rule,' which states that a claim accrues "when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later and even if all resulting damages have not yet occurred. *See* *Murphy v. Campbell*, 964 S.W.2d 265, 270 (Tex. 1997). In the case of a claimed

violation of section 50(a)(6)(B), the legal injury is deemed to occur 'on the date the extension of credit is made. Accordingly, such a claim must be brought not later than four years after the date of loan closing. *Rivera v. Countrywide Home Loans, Inc.*, 262 S.W.3d 834, 840 (Tex. App.—Dallas 2008, no pet.).

The four-year residual limitations period also applies to other constitutional infirmities under section 50(a)(6). *See* *Priester v. JP Morgan Chase Bank*, 708 F.3d 667 (5th Cir. 2013). Because cure provisions exist in the Texas Constitution, the court concluded that homestead liens that are constitutionally defective are voidable rather than void ab initio. To the extent that a claim under the Texas Constitution renders a defective homestead lien voidable, rather than void, once the limitations period has passed the lien is no longer voidable and is then valid.

§ 11.5 Restrictions on Open-End Credit

A home equity loan must be for a definite original principal amount. The credit may not be in the form of an open-end account that may be debited from time to time or from which credit may be extended from time to time *unless* the open-end account qualifies as a home equity line of credit. Tex. Const. art. XVI, § 50(a)(6)(F).

The 1998 OCCC Commentary provides that open-end credit is defined by Tex. Rev. Civ. Stat. art. 5069-1B.002(14) (since codified as Tex. Fin. Code § 301.002(a)(14)) as an account under a written contract between a creditor and an obligor in connection with which—

1. the creditor reasonably contemplates repeated transactions and the obligor is authorized to make purchases or borrow money;
2. interest may be charged from time to time on an outstanding unpaid balance; and

3. the amount of the credit that may be extended during the term of the account is generally made available to the extent that any outstanding balance is repaid.

1998 OCCC Commentary, at 5.

The 1998 OCCC Commentary provides that amounts advanced by the lender after closing as a result of default for ad valorem taxes, hazard insurance premiums, and authorized collection costs, including reasonable attorney's fees, are not contemplated repeated transactions that render the loan an open-end account. 1998 OCCC Commentary, at 5.

Home Equity Line of Credit (HELOC): A home equity loan may be of the open-end account type if it qualifies as a home equity line of credit or HELOC. Tex. Const. art. XVI, § 50(a)(6)(F). A HELOC is a form of open-end account that may be debited from time to time, under which credit may be extended from time to time, and under which the borrower requests advances, repays money, and reborrows money. 7 Tex. Admin. Code § 153.82. To qualify as a HELOC, a home equity loan must meet eight additional constitutional requirements:

1. **Borrower-Requested Advances.** With a HELOC, credit may be extended to the borrower from time to time. However, any advances must be borrower-requested. Tex. Const. art. XVI, § 50(t)(1). Only a borrower named in the HELOC may request an advance. An owner may request an advance only if also named as a borrower. A HELOC may contain provisions that restrict which borrowers may request an advance or may require that all borrowers consent to the advance. 7 Tex. Admin. Code § 153.82.
2. **Minimum Advances.** No single debit or advance on a HELOC may be for

less than \$4,000. Tex. Const. art. XVI, § 50(t)(2).

3. **Restriction against Credit/Debit Cards or Preprinted Checks Not Solicited by Borrower.** Advances on a HELOC may not be made by credit card, debit card, or similar device or by preprinted check unsolicited by a borrower. Tex. Const. art. XVI, § 50(t)(3). A borrower may from time to time specifically request preprinted checks for use in obtaining a HELOC advance but may not request the lender to periodically send preprinted checks to the borrower. A borrower may use a check reorder form, which may be included with preprinted checks, as a means of requesting a specific number of preprinted checks. 7 Tex. Admin. Code § 153.84(2).

A lender may offer one or more non-prohibited devices or methods for a borrower to request a HELOC loan advance. 7 Tex. Admin. Code § 153.84(1). The request may be made in person, but this is not required. 7 Tex. Admin. Code § 153.84(3). Permissible advance requests may be made by contacting the lender directly, by telephonic fund transfers, and by electronic fund transfers. Examples of devices to obtain a HELOC advance that are not "prohibited similar devices" to those specifically prohibited by the constitution include prearranged drafts, preprinted checks requested by the borrower, or written transfer instructions. 7 Tex. Admin. Code § 153.84(1).

4. **Restriction on Fees.** The restriction on closing expenses generally applicable to home equity loans is equally applicable to HELOCs. All such fees must be charged or collected only at the time of the initial extension of credit.

- No fee may be charged or collected in connection with any subsequent debit or advance. Tex. Const. art. XVI, § 50(t)(4). For the purpose of this restriction, the date of the initial extension of credit is the closing date of the HELOC. 7 Tex. Admin. Code § 153.85(b).
5. **Restriction on Loan-to-Value Ratio.** The 80 percent restriction on loan-to-value generally applicable to home equity loans also applies to HELOCs. The maximum principal amount that may be extended under the line of credit, when added to the aggregate total of the outstanding principal balances of all indebtedness secured by the homestead on the date of the extension of credit, may not exceed the 80 percent loan-to-value limit. Tex. Const. art. XVI, § 50(t)(5). The maximum principal amount that may be outstanding on a HELOC at any time is determined as of the date of loan closing and does not change during the term of the HELOC. 7 Tex. Admin. Code § 153.86(3). The following amounts, when added together, must be equal to or less than 80 percent of the fair market value of the property: (1) the amount of the advance; (2) the principal amount of the HELOC at the time of the advance; and (3) the principal balance outstanding on all other debts secured by the homestead calculated as of the date of closing of the HELOC. 7 Tex. Admin. Code § 153.86(1), (4).
 6. **Loan-to-Value Limit on Additional Advances.** With a HELOC, no additional advances may be made if the total principal amount outstanding exceeds an amount equal to 50 percent of the fair market value of the homestead as determined on the date of the original extension of credit. Tex. Const. art. XVI, § 50(t)(6); 7 Tex. Admin. Code § 153.87. To calculate the total principal amount outstanding for the purposes of determining the 50 percent threshold, the following amounts are added: (1) the principal amount of the HELOC at the time of the proposed advance and (2) the principal balance outstanding on all other debts secured by the homestead calculated as of the date of closing of the HELOC. 7 Tex. Admin. Code § 153.86(1), (4). If the total principal amount of the HELOC exceeds the 50 percent limitation but then is paid down to an amount equal to or less than 50 percent of the fair market value, subsequent advances are permitted subject to all other HELOC restrictions (for example, minimum advance limit and loan-to-value limit).
 7. **Restriction against Unilateral Lender Amendments.** A lender or holder of a HELOC may not unilaterally amend the extension of credit. Tex. Const. art. XVI, § 50(t)(7).
 8. **Restriction on Amortization.** A HELOC must be repayable in regular periodic installments. The installments must be repayable not more often than every fourteen days and not less often than monthly. The installments must commence not later than two months from the date of the extension of credit. During the period in the loan term during which the borrower may request advances, the amount of each installment must be at least equal to the accrued interest on the loan. During the period in the loan term after which the borrower may not request additional advances, the amount of the installments must be substantially equal and sufficient to

retire the indebtedness over the remaining term of the loan. Tex. Const. art. XVI, § 50(t)(8).

While installments on a HELOC are required to begin not later than two months from the date of the extension of credit, this does not apply when no advance is made at the time of closing. If no advance is made at closing, the repayment period is not required to begin until after the first advance. 7 Tex. Admin. Code § 153.88(b). While HELOC borrowers cannot be *required* to make loan installments more frequently than every fourteen days, this does not prohibit a borrower from voluntarily making payments on a schedule that is more frequent than that required by the lender. 7 Tex. Admin. Code § 153.88(c).

§ 11.6 Restriction on Fees

Home equity loan closing expenses, other than interest, may not exceed 3 percent of the original principal amount of the loan. Loan closing expenses subject to this restriction include any fees paid to anyone to originate, evaluate, maintain, record, insure, or service the extension of credit. Tex. Const. art. XVI, § 50(a)(6)(E). The 3 percent fee limit applies only to charges, other than interest, that are required by the lender to be paid by the borrower or the borrower's spouse at the inception of the loan. Charges after loan closing for such matters as contractually permitted force-placed insurance premiums, returned check fees, late fees, and debt collection and foreclosure costs are subsequent events that are not subject to the 3 percent fee limitation. *See* 7 Tex. Admin. Code § 153.5(15).

§ 11.6:1 Interest

Interest is specifically excluded from the 3 percent fee limitation. Tex. Const. art. XVI, § 50(a)(6)(E). "Interest" had been interpreted by the Texas Finance Commission and Credit Union Commission in 2004 for purposes of the 3 percent fee limitation to mean interest as

defined by Tex. Fin. Code § 301.002(a)(4) and as interpreted by Texas courts. *See* 7 Tex. Admin. Code §§ 153.1(11), 153.5(3). Finance Code section 301.002, which is located in the subtitle of the Code governing usury, defines interest in pertinent part as "compensation for the use, forbearance, or detention of money." *See* Tex. Fin. Code § 301.002(a)(4). However, the supreme court invalidated this broad interpretation of interest as contrary to the intent and meaning of the constitution in *Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013). The case reached the supreme court on petition for review of *Texas Bankers Ass'n v. Ass'n of Community Organizations for Reform Now (ACORN)*, 303 S.W.3d 404 (Tex. App.—Austin 2010, pet. granted), which was so styled and popularly referred to as the 'ACORN' case before the supreme court ordered ACORN to be dismissed as a party because of its intervening dissolution and the style of the cause corrected to read *Finance Commission of Texas et al. v. Valerie Norwood et al.*, No. 10-0121, 54 Tex. Sup. Ct. J. 1077 (Tex. Feb. 25, 2011).

By adopting a definition of interest that is tied to a statute that can be amended by the legislature from time to time, the supreme court found that the commission's interpretation "utterly defeats the clear purpose of constitutionalizing it, which was to place the [fee] limitation beyond the Legislature's power to change without ratification by the voters." *Finance Commission of Texas*, 418 S.W.3d at 587. Moreover, the supreme court found implausible that the legislature intended that the same definition of interest that applies to and strengthens the consumer protections of usury would be applied to determining the constitutional fee limitation, which it weakens, although both are intended as consumer protections. Instead, the court adopted what it characterized as a narrower and 'well-understood meaning of 'interest' the amount equal to the loan principal multiplied by the interest rate." *Finance Commission of Texas*, 418 S.W.3d at 587. The court concluded that

'consistent with the [legislative] history, purpose, and text of Section 50(a)(6)(E), 'interest' as used in that provision means the amount determined by multiplying the loan principal by the interest rate." *Finance Commission of Texas*, 418 S.W.3d at 588. The court noted, however, that "this narrower definition of interest does not limit the amount a lender can charge for a loan, but instead limits only what part of the total charge can be paid in front-end fees rather than interest paid over time. *Finance Commission of Texas*, 418 S.W.3d at 588 n.104.

Per diem interest and discount points are considered "interest" and not subject to the constitutional 3 percent fee cap. *Finance Commission of Texas*, 418 S.W.3d at 596; 7 Tex. Admin. Code § 153.1(11). Discount points, to be excluded from the 3 percent fee cap, must truly correspond to a reduced interest rate. *See* 7 Tex. Admin. Code § 153.5(3).

§ 11.6:2 Voluntary Optional Fees

Optional charges not required by the lender but paid at the sole discretion of the borrower are not fees subject to the 3 percent limit. 7 Tex. Admin. Code § 153.5(1). If the borrower chooses to pay premiums for certain insurance coverage (for example, credit life, credit accident, or health insurance coverage), the premiums are not included within the 3 percent limit. If the lender required these same coverages, the premiums would be fees subject to the 3 percent limit.

§ 11.6:3 Fees to Originate

Fees to originate a home equity loan are subject to the 3 percent limit. 7 Tex. Admin. Code § 153.5(6). Fees required to be paid by the borrower to third parties for separate and additional consideration for activities relating to originating the loan are fees subject to the 3 percent limit. Attorney's fees for document preparation

and broker's fees are considered fees to originate a loan. However, charges for loan origination that third parties absorb and do not require the borrower or borrower's spouse to pay are not fees subject to the 3 percent limit. 7 Tex. Admin. Code § 153.5(7).

§ 11.6:4 Fees Absorbed by Lender

Charges that the lender absorbs that might otherwise be paid by the borrower or borrower's spouse are not fees subject to the 3 percent limit. 7 Tex. Admin. Code § 153.5(5).

§ 11.6:5 Fees to Evaluate

Fees to evaluate the credit decision for a home equity loan are subject to the 3 percent limit. This includes fees collected to cover the expenses of a credit report, survey, flood zone determination, tax certificate, title report, inspection, or appraisal. 7 Tex. Admin. Code § 153.5(8).

§ 11.6:6 Fees to Maintain

Fees to maintain a home equity loan are subject to the 3 percent limit. Fees paid at the inception of the loan as compensation for performing a service for the life of the loan (for example, flood zone determination fee or tax service fee) are subject to the 3 percent limit. Also included in the 3 percent limit are fees to maintain the loan customarily paid at the inception of the home equity loan but deferred for later payment. 7 Tex. Admin. Code § 153.5(9).

§ 11.6:7 Fees to Record

Fees paid to public officials and others for the purposes of recording public documents evidencing the lien are fees subject to the 3 percent limit. 7 Tex. Admin. Code § 153.5(10).

§ 11.6:8 Fees to Insure

Premiums to insure a home equity loan (for example, title insurance) are fees subject to the 3 percent limit. 7 Tex. Admin. Code § 153.5(11).

Premiums that the borrower or borrower's spouse are required to pay to purchase homeowner's insurance are not fees subject to the 3 percent limit. This includes fire and extended coverage insurance and flood insurance. Though the failure to maintain insurance is generally an event of default on the home equity loan, it is not a condition to the extension of the credit. A lender may collect and escrow premiums for this insurance and include the premium in the periodic payment amount or principal amount. If the lender sells insurance to the borrower, the lender must also comply with all applicable law concerning the sale of insurance in connection with a mortgage loan. 7 Tex. Admin. Code § 153.5(16).

§ 11.6:9 Fees to Service

Any fee charged to or paid by an owner at the inception of the loan transaction to service a home equity loan is a fee subject to the 3 percent limit. Also, subject to the 3 percent limit are fees to service a loan customarily paid at the inception of the home equity loan but deferred for later payment. 7 Tex. Admin. Code § 153.5(12).

§ 11.6:10 Escrow Funds

A lender may provide escrow services in a home equity loan transaction. Funds deposited by the borrower into the escrow account for the payment of taxes, insurance premiums, maintenance or homeowner's association assessments, or similar purposes remain the property of the borrower and are not considered fees subject to the 3 percent limit. However, a lender must not contract for a right of offset against escrow

funds. This would result in a violation of prohibitions against additional collateral. 7 Tex. Admin. Code § 153.5(14).

§ 11.6:11 Fees to Subdivide or Replat

In some situations constitutional restrictions against additional collateral for a home equity loan may require the subdivision or replatting of a tract into separate homestead and non-homestead parcels. Fannie Mae policy for the purchase of home equity loans suggests that all lender-required costs incurred by the borrower to resurvey, subdivide, or replat the property are fees subject to the 3 percent limit. Fannie Mae Lender Letter LL02-98 (May 28, 1998).

§ 11.6:12 Subsequent Events

The 3 percent fee limit applies only to fees contracted for or paid by an owner or owner's spouse at the inception of the loan. If the owner fails to perform covenants in the credit documents resulting in the lender's later assessment of costs to the owner, such postclosing costs are not subject to the 3 percent limit. Examples of these costs include lender-acquired homeowner's insurance, late charges, returned check fees, collection costs, and foreclosure costs. 7 Tex. Admin. Code § 153.5(15). However, if the loan is subsequently modified, the original loan and its subsequent modification are regarded as a single transaction for purposes of calculating the 3 percent fee limitation (that is, any fees paid in connection with the loan modification when added to fees charged at loan closing cannot exceed the 3 percent limitation). A modification for this purpose occurs when one or more terms of the loan are amended by written agreement between the lender and owner in which the original promissory note is not satisfied and replaced with a new debt instrument. See 7 Tex. Admin. Code § 153.14(2)(D).

§ 11.6:13 Secondary Mortgage Loans

A secondary mortgage loan as defined by Tex. Fin. Code § 342.001(4) is subject to certain statutory fee limitations. *See* Tex. Fin. Code §§ 342.307, 342.308, 342.502. A home equity loan also constituting a secondary mortgage loan must comply with both the constitutional and statutory fee limitations. 7 Tex. Admin. Code § 153.5(13).

§ 11.7 Restriction against Recourse Debt

A home equity loan must be a nonrecourse loan with no personal liability against the owner or the owner's spouse. Tex. Const. art. XVI, § 50(a)(6)(C). The lender may look to recover only against the homestead property and not pursue a deficiency judgment against any owner or any owner's spouse. 7 Tex. Admin. Code § 153.4(2). If the owner or the spouse of the owner cosigns the home equity loan or consents to the home equity lien, the loan must not give the lender personal recourse against either the owner or the spouse. 7 Tex. Admin. Code § 153.4(1).

Fraud: The lender may have recourse against the owner or owner's spouse if the owner or spouse obtains the extension of credit by actual fraud. Tex. Const. art. XVI, § 50(a)(6)(C). Actual fraud requires a showing of dishonesty of purpose or intentional breach of duty that is designed to injure another or to gain an undue or unconscientious advantage. 7 Tex. Admin. Code § 153.4(3).

§ 11.8 Restriction against Prepayment Penalties

Home equity loans must be capable of being paid in advance without penalty or other charge. Tex. Const. art. XVI, § 50(a)(6)(G). A lockout provision in a loan contract prohibiting a buyer

from paying early is considered a prepayment penalty. 7 Tex. Admin. Code § 153.7(2).

There is no express constitutional prohibition against note provisions applying principal prepayment to the last of the principal payments becoming due or providing that any partial prepayment would not alter the amount or timing of scheduled monthly payments. 1998 OCCC Commentary, at 5.

§ 11.9 Restriction against Additional Collateral

The homestead is the only collateral that may secure a home equity loan. The constitution expressly prohibits the credit from being secured by any other real or personal property. *See* Tex. Const. art. XVI, § 50(a)(6)(H).

§ 11.9:1 Incidental Collateral

A lender and an owner may enter into an agreement whereby a lender may acquire a security interest in items 'incidental' to the homestead collateral. Items not considered additional real or personal property collateral are—

1. escrow funds for the payment of taxes and insurances;
2. an undivided interest in a condominium unit, a planned unit development, or the right to use and enjoy certain property owned by an association;
3. insurance proceeds related to the homestead;
4. condemnation proceeds;
5. fixtures; or
6. easements necessary or beneficial to the use of the homestead including access easements for ingress and egress.

7 Tex. Admin. Code § 153.8(1).

§ 11.9:2 Guaranty

A guaranty or obligation of a cosigner or surety is considered additional collateral not permissible in connection with a home equity loan. A guaranty of a home equity loan is also deemed inconsistent with Tex. Const. art. XVI, § 50(a)(6)(C) (prohibition against personal recourse). 7 Tex. Admin. Code § 153.8(2).

§ 11.9:3 Cross-Collateral Provisions

If the borrower has other loans with the home equity lender secured by nonhomestead property (for example, a loan to purchase a car or boat), the security documents on these other loans may sometimes provide that this other collateral secures all debt of the borrower with that lender. Such a cross-collateral provision violates the constitutional prohibition against other collateral for a home equity loan. 7 Tex. Admin. Code § 153.8(4).

§ 11.9:4 Right of Offset

A contractual right of offset is prohibited additional collateral to a home equity loan. 7 Tex. Admin. Code § 153.8(3).

§ 11.9:5 Undivided Interest in Tenancy in Common

A debtor's undivided interest in a tenancy in common will sustain a homestead claim. *See Laster v. First Huntsville Properties Co.*, 826 S.W.2d 125, 131 (Tex. 1991). If this undivided interest secures a home equity loan, any joinder of the other cotenants required to encumber the entirety of the property may constitute prohibited additional collateral.

§ 11.9:6 Homestead Exceeding Maximum

An urban homestead consists of not more than ten contiguous acres of land located in a city, town, or village, together with improvements thereon. Rural homesteads may be up to one hundred acres for single adults and two hundred acres for a family. Tex. Const. art. XVI, §§ 50, 51, Tex. Prop. Code § 41.002. For a homestead established on a tract that exceeds the maximum allowable land area, the excess is considered additional real property, which may not secure a home equity loan. 7 Tex. Admin. Code § 153.8(5).

The inclusion of nonhomestead acreage may invalidate a home equity lien. Tex. Const. art. XVI, § 50(a)(6)(H). Procedural Rule P-47 requires as a condition to insuring a home equity lien against invalidity for inclusion of additional collateral that each owner execute an affidavit stating that (1) all the property is the homestead of the owner and owner's spouse; (2) no portion of the property is nonhomestead; and (3) the owner and spouse claim no other property as homestead except as described in the affidavit. Procedural Rule P-47, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*.

There is no provision in Tex. Const. art. XVI, § 50, upholding the validity of a home equity lien if the collateral includes only de minimus acreage in excess of the maximum acreage. Procedural Rule P-47 requires, as a condition to insuring against invalidity for inclusion of excess acreage, that the insured obtain a surveyor's certificate or letter stating the exact acreage or square footage of the collateral or that a computation of the acreage be made by a software program designed to compute acreage and generate drawings of land from the entry of boundary description calls.

§ 11.9:7 Options to Purchase

If the home equity lien extends to the maximum permitted acreage, lenders may risk invalidating the lien by taking an option to purchase an adjacent property deemed necessary to realize full value for the collateral. Fannie Mae policy for the purchase of home equity loans prohibits the lender taking such an option on adjacent acreage under circumstances in which such an interest could be construed as additional collateral. Fannie Mae Lender Letter LL02-98 (May 28, 1998).

- (A) electric;
- (B) natural gas;
- (C) sewer;
- (D) storm sewer; and
- (E) water.

Tex. Prop. Code § 41.002(c).

§ 11.9:8 Distinguishing Rural and Urban Homestead

A home equity loan secured by property exceeding ten acres must be secured by a rural homestead. The proper classification of the homestead as rural or urban in certain cases is critical to the validity of the home equity lien.

Whether a homestead is urban or rural is a question of fact. The Texas legislature in 1999 enacted a detailed test for classifying homesteads as urban or rural. Tex. Prop. Code § 41.002(c). If a homestead does not meet the statutory definition of urban, it is classified as rural. The statute is the exclusive vehicle for distinguishing between rural and urban homesteads. *In re Bouchie*, 324 F.3d 780 (5th Cir. 2003).

A homestead is considered to be urban if, at the time the designation is made, the property is—

- (1) located within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision; and
- (2) served by police protection, paid or volunteer fire protection, and at least three of the following services provided by a municipality or under contract to a municipality:

§ 11.9:9 Distinguishing Family and Single Adult Homestead

A rural single adult homestead is limited to one hundred acres. A rural family homestead may include up to two hundred acres. Tex. Const. art. XVI, §§ 50, 51, Tex. Prop. Code § 41.002. Thus, a home equity loan secured by property exceeding one hundred acres may be secured by a family rural homestead only. The proper classification of the property in such cases as a family or single adult homestead is critical to the validity of the home equity lien.

No definition of the word *family* is supplied by the constitution. Case authorities provide that a family consists of (1) a group of people having the social status of a family living subject to one domestic government; (2) with the head of the family legally or morally obligated to support at least one other family member; and (3) a corresponding dependence by the other family members for this support. *NCNB Texas National Bank v. Carpenter*, 849 S.W.2d 875, 879–80 (Tex. App.—Fort Worth 1993, no writ).

A married person with a living spouse can have only a family homestead interest. The spouses in a marriage together enjoy the benefits of the family homestead exemption. The constitution gives each spouse a separate and undivided possessory interest in the homestead, which may be lost only by death or abandonment and may not be compromised by either his heirs or the other spouse. Abandonment by one spouse of his homestead interest does not affect the character of the property as family homestead or the pro-

tection of the family homestead from judgment creditors as long as the other spouse occupies the property as a home. *Salomon v. Lesay*, 369 S.W.3d 540 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

§ 11.10 Restriction on Number of Home Equity Loans

There may be only one home equity loan or reverse mortgage on the owner's homestead at any given time regardless of the aggregate total outstanding debt against the homestead. There is no corresponding restriction on the number of purchase-money, improvement, tax, or owelty liens on the same homestead. Tex. Const. art. XVI, § 50(a)(6)(K); 7 Tex. Admin. Code § 153.10(1). If the property ceases to be the homestead of the owner, the lender may treat a previous home equity lien as a nonhomestead lien for the purposes of this restriction. 7 Tex. Admin. Code § 153.10(2).

§ 11.11 Restriction on Frequency of Home Equity Loans

Home equity loans cannot be closed more frequently than one year after the closing date of the last such loan made on the same property. Tex. Const. art. XVI, § 50(a)(6)(M)(iii). A home equity loan cannot be refinanced until the expiration of one year after its original closing date. 7 Tex. Admin. Code § 153.14(1)(A). Nor may a new home equity loan be made before the expiration of one year even if the previous home equity loan has been paid in full. 7 Tex. Admin. Code § 153.14(1)(B).

Effect of State of Emergency: A home equity loan may be closed before the first anniversary date of a prior home equity loan on the same property if the owner on oath requests an earlier closing due to a state of emergency that (1) has been declared by the President of the United States or governor as provided by law and (2) applies to the area where the homestead

is located. Tex. Const. art. XVI, § 50(a)(6)(M)(iii).

Modification of Home Equity Loans: A home equity loan may be modified before the expiration of one year from the date of the original closing. A modification is a transaction in which one or more terms of the home equity loan are modified but the note is not satisfied and replaced. 7 Tex. Admin. Code § 153.14(2). Any modification of a home equity loan must be agreed to in writing by both the borrower and lender unless the law otherwise requires. An example of a modification that is not required to be in writing is the modification required under the Servicemembers Civil Relief Act. 7 Tex. Admin. Code § 153.14(2)(A). A modification of a home equity loan made within one year of closing may not include the advance of additional funds nor include new terms that would not have been permitted by applicable law on the date of the original loan closing. 7 Tex. Admin. Code § 153.14(2)(B), (C).

§ 11.12 Restriction on Amortization of Home Equity Loans

No balloon payments are allowed with closed-end home equity loans. The loan must be scheduled to be repaid in substantially equal periodic installments. The installments must be payable not more often than every fourteen days or any less often than monthly. The installments must begin no later than two months from closing. Each installment payment must equal or exceed the amount of accrued interest on the note as of the date of that installment and contribute to the repayment of some amount of principal. A home equity loan may not contain a 'negative amortization' feature, in which scheduled payments in the early years of the loan are in an amount less than the accruing interest and the resulting interest deficits are capitalized into the loan principal. Tex. Const. art. XVI, § 50(a)(6)(L); 7 Tex. Admin. Code §§ 153.11, 153.16(2).

There are special amortization rules for home equity loans qualifying as a home equity line of credit. *See* Tex. Const. art. XVI, § 50(a)(6)(L)(ii). *See* section 11.5 above.

§ 11.12:1 Subsequent Events

The constitutional restriction on amortization does not preclude a lender's recovery of amounts made necessary by the borrower's failure to perform loan covenants such as taxes, adverse liens, insurance premiums, collections costs, and similar items. 7 Tex. Admin. Code § 153.11(4).

§ 11.12:2 Prepaid Interest

Scheduled periodic payments must begin no later than two months from the date that the extension of credit is made. This effectively limits prepaid interest to a maximum of one period's interest (first scheduled periodic payment would include interest in arrears for the preceding period). Tex. Const. art. XVI, § 50(a)(6)(L). Nothing in this provision limits or otherwise affects a lender's ability to charge or collect mortgage discount points with a corresponding interest rate reduction.

§ 11.13 Restriction on Interest

Interest on a home equity loan may be for any fixed or variable rate authorized by statute. Tex. Const. art. XVI, § 50(a)(6)(O).

§ 11.13:1 Variable Rate Notes

A home equity loan may be made on a variable interest rate tied to an external index. 7 Tex. Admin. Code § 153.16(3). If a variable interest rate is used, payment adjustments must be regularly made in amounts sufficient to fully amortize the outstanding loan balance in substantially equal successive payments between interest rate adjustments. 7 Tex. Admin. Code

§ 153.16(4)(A). The scheduled payment amount between each payment change date should be substantially equal and the amount of the payment should equal or exceed the amount of interest scheduled to accrue between each payment date and retire a portion of the principal. 7 Tex. Admin. Code § 153.16(4)(B). A home equity loan may contain an adjustable rate of interest that provides a maximum fixed interest rate pursuant to a schedule of stepped or tiered rates or provides a lower initial interest rate through the use of a discounted rate at the beginning of the loan. 7 Tex. Admin. Code § 153.16(5).

§ 11.13:2 Interest Rate

Interest rates on home equity loans must comply with all applicable constitutional and statutory provisions. 7 Tex. Admin. Code § 153.16(1). Tex. Const. art. XVI, § 11, permits interest rates of 10 percent or less on credit transactions unless alternative interest rates are specified by the legislature by statute. Interest rates of first-lien mortgages are nominally controlled by Tex. Fin. Code tit. 4, subtit. A. However, Congress by the enactment of the Depository Institutions Deregulation and Monetary Control Act of 1980 (12 U.S.C. § 1735f-7a) and the Alternative Mortgage Transaction Parity Act (12 U.S.C. §§ 3801-3806) preempted state interest rate limitations on first-lien residential mortgage loans. Secondary mortgage loans that exceed the constitutional rate of 10 percent are controlled by Texas Finance Code chapter 342, subchapter G. Chapter 124 of the Code and federal law provide for maximum rates on certain loans by credit unions. *See* 7 Tex. Admin. Code § 153.16(1).

§ 11.14 Restriction on Basis for Acceleration

The maturity of a home equity loan may not be accelerated because of a decrease in the market value of the homestead or the owner's default under some other indebtedness not secured by a

prior valid encumbrance against the homestead. Tex. Const. art. XVI, § 50(a)(6)(J).

§ 11.14:1 Decrease in Value

The constitution does not prohibit the acceleration of a home equity loan because of a default by the owner of covenants contained in the loan, including covenants not to commit waste or remove property that indirectly bears on the market value of the homestead. 7 Tex. Admin. Code § 153.9(1).

§ 11.14:2 Cross-Default

A home equity loan can contain a cross-default provision only if the lien associated with the home equity loan is subordinate to the lien that is referenced by the cross-default clause. 7 Tex. Admin. Code § 153.9(2).

§ 11.15 Restriction against Confession of Judgment or Waiver of Citation

A home equity borrower may not be required to sign any confession of judgment or power of attorney allowing a confession of judgment or appearance for the debtor by a third party in a judicial proceeding. Tex. Const. art. XVI, § 50(a)(6)(Q)(iv); Tex. Civ. Prac. & Rem. Code § 30.001.

§ 11.16 Restriction against Assignment of Wages

A borrower may not be required to make an assignment of wages as security for a home equity loan. Tex. Const. art. XVI, § 50(a)(6)(Q)(ii).

§ 11.17 Restriction against Same Creditor Payoffs

A lender may not require a borrower to apply the loan proceeds of a home equity loan to pay off any other extension of credit by that same lender except one already validly secured by the homestead. Tex. Const. art. XVI, § 50(a)(6)(Q)(i). This provision precludes a creditor from demanding a security interest in the debtor's homestead as a condition for granting a forbearance, rearrangement, or recasting of an indebtedness not already secured by the homestead.

§ 11.17:1 Required Payment of Debt Secured by Homestead

A lender may require a debt secured by the homestead to be paid by the proceeds of a home equity loan. 7 Tex. Admin. Code § 153.18(2).

§ 11.17:2 Payoffs of Other Creditors

An owner is generally entitled to use the loan proceeds of a home equity loan for any lawful purpose at the owner's discretion. The lender may require that the loan proceeds be used to pay off, prepay, or reduce existing debt to another lender (for example, if underwriting guidelines based on earnings require that the debtor's monthly obligations be reduced to qualify for a loan). *See* 7 Tex. Admin. Code § 153.18(2).

§ 11.17:3 Other Restrictions Prohibited

Other than requiring loan proceeds to be paid on debt secured by the homestead or requiring payment of debt to another lender, the home equity lender may not otherwise specify or restrict the use of the loan proceeds. 7 Tex. Admin. Code § 153.18(1).

§ 11.17:4 Voluntary Payoffs to Same Creditor

The constitution prohibits the home equity lender only from *requiring* the debtor to pay off existing nonhomestead debt to that same lender. An owner is not precluded from voluntarily paying off existing nonhomestead debt to the home equity lender. 7 Tex. Admin. Code § 153.18.

§ 11.18 Required Preloan Disclosures

§ 11.18:1 Twelve-Day Disclosure

The Texas Constitution requires a preloan disclosure specifying certain restrictions on home equity lending. Tex. Const. art. XVI, § 50(g). The required disclosure is reproduced as form 11-1 in this chapter. The text of the preloan disclosure is intended as a summary of the borrower's rights under the constitution. In case of any conflict between the substantive provisions of Tex. Const. art. XVI, § 50, and the text of the preloan disclosure, the substantive provisions are controlling. A lender may supplement the consumer disclosure to clarify any discrepancies or inconsistencies. Tex. Const. art. XVI, § 50(g); 7 Tex. Admin. Code § 153.51(2).

A home equity loan may not be closed before the twelfth calendar day after the later of the date that the borrower submits a loan application to the lender or the date that the lender provides the borrower with a preloan disclosure in a separate instrument. Tex. Const. art. XVI, § 50(g). 7 Tex. Admin. Code §§ 153.12, 153.51.

If the discussions with the borrower are conducted primarily in a language other than English, the lender must provide the borrower with an additional copy of the notice, before the loan closing, that is translated in the written language in which the discussions were conducted. Tex. Const. art. XVI, § 50(g). The Office of the Consumer Credit Commissioner has provided a

Spanish language translation of the notice on its website at <http://occc.texas.gov>.

If the owner has executed a power of attorney in the manner described by title 7, section 153.15(2), of the Texas Administrative Code, then the lender may provide the consumer disclosure to the attorney-in-fact instead of providing it to the owner. 7 Tex. Admin. Code § 153.51(5).

Computation of Time: In computing the expiration of the twelve-day cooling-off period, the date that the disclosure is made is not counted. The twelve-day cooling-off period commences on the day after the lender provides the required preloan disclosure. The loan may be closed at any time on the twelfth day of the notice period. 7 Tex. Admin. Code § 153.12. The lender may establish verifiable procedures to ensure that the owner receives the required notice within the required time frame. 7 Tex. Admin. Code § 153.51(3).

The constitution does not prohibit the required notice being delivered by mail. Government regulations adopted a 'mailbox rule. If a lender mails the notice to the borrower, a reasonable period of time should be allowed for delivery. A three-calendar-day period not including Sundays and federal legal public holidays constitutes a rebuttable presumption for sufficient mailing and delivery. 7 Tex. Admin. Code § 153.51(1).

The required notice should be delivered to each owner and each owner's spouse. If delivery is on different dates, the twelve-day cooling-off period should be calculated from the last delivered notice.

Loan Application: An application is sufficient if submitted to an agent acting on behalf of a lender. 7 Tex. Admin. Code § 153.12(1). An application may be taken orally or electronically. It does not have to be in writing. 7 Tex. Admin. Code § 153.12(2).

§ 11.18:2 One-Day Disclosure

A home equity loan must not be closed until one business day after the owner of the homestead receives a copy of the final loan application, if not previously provided, and a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing. Tex. Const. art. XVI, § 50(a)(6)(M)(ii). The home equity loan may be closed at any time during normal business hours on the next business day following the calendar day on which the borrower receives the one-day preloan disclosure or any date thereafter. 7 Tex. Admin. Code § 153.13(6). A lender may satisfy this disclosure requirement by delivery to the borrower of a properly completed form HUD-1 or HUD-1A. 7 Tex. Admin. Code § 153.13(3).

§ 11.18:3 Bona Fide Emergency

If a bona fide emergency or other good cause exists and the lender obtains the written consent of the owner, the lender may provide the documentation to the owner or the lender may modify previously provided documentation on the day of closing. Tex. Const. art. XVI, § 50(a)(6)(M)(ii). The bona fide emergency must occur before the closing date. A home equity loan secured by a homestead in an area designated by the Federal Emergency Management Agency (FEMA) as a disaster area is an example of a bona fide emergency if the homestead is damaged during FEMA's declared incident period. 7 Tex. Admin. Code § 153.13(4).

§ 11.18:4 Other Good Cause

A condition that would cause the owner "financial impact or an adverse consequence" is an example of other good cause that would allow the required one-day preloan disclosure to be given or modified on the day of closing. 7 Tex. Admin. Code § 153.13(5)(A)(i). Another example of good cause occurs when the modified disclosure contains only a de minimus variance

from the prior disclosure. To qualify as a de minimus variance, one or more of the actual disclosed fees, costs, points, and charges must be less than the initial preloan disclosure or, if greater than the amounts given in the initial preloan disclosure, not vary by the greater of \$100 or 0.125 percent of the principal amount of the home equity loan at closing. 7 Tex. Admin. Code § 153.13(5)(B)(i).

§ 11.19 Borrower's Right of Rescission

The homestead owner or the owner's spouse may rescind a home equity loan transaction without penalty or charge within three days after the date that the extension of credit is made. Tex. Const. art. XVI, § 50(a)(6)(Q)(viii). The borrower's spouse has this right of rescission even if the spouse has no record title to or community property interest in the homestead. 7 Tex. Admin. Code § 153.25(1). Funding of a home equity loan should be delayed until after the expiration of the rescission period.

§ 11.19:1 Calculation of Rescission Period

The rescission period begins at closing (the signing of the loan documents) and continues for three calendar days. If the third calendar day falls on a Sunday or federal legal public holiday, the right of rescission is extended to the next calendar day that is not a Sunday or a federal legal public holiday. 7 Tex. Admin. Code § 153.25(2). Loan proceeds may be disbursed on the day following the expiration of the rescission period.

§ 11.19:2 Truth in Lending Act

A home equity loan transaction may be subject to the provisions of the Truth in Lending Act and Regulation Z, which permit the borrower three business days to rescind a mortgage loan in applicable transactions. For a complete dis-

cussion of right of rescission procedures under the Truth in Lending Act and Regulation Z, see chapter 12 in this manual. A lender's compliance with the right of rescission procedures of the Truth in Lending Act and Regulation Z will satisfy the requirements of the constitution for a home equity loan if the notices are given to all owners of the homestead and to each spouse of an owner. 7 Tex. Admin. Code § 153.25(3).

§ 11.20 Requirements for Loan Documents

§ 11.20:1 Written Contract Required

A home equity lien must be a voluntary lien created under a written agreement. Tex. Const. art. XVI, § 50(a)(6)(A).

Plain Language and Font Requirements:

A home equity loan contract for a home equity loan regulated by the Office of the Consumer Credit Commissioner (OCCC) must be written in plain language designed to be easily understood by the average consumer and must be printed in an easily readable font and type size. See the discussion in section 11.1 above.

Model Forms: In addition to requiring plain-language contracts, the Finance Code empowers the Finance Commission to adopt rules governing loan contracts subject to that section and to adopt model loan contracts. Tex. Fin. Code § 341.502(b). A lender may use either a model contract or its own nonstandard contract if the nonstandard contract has been submitted to, but not disapproved by, the OCCC. See the discussion in section 11.1 above.

§ 11.20:2 Required Loan Conditions

The constitution states that a home equity loan is an extension of credit made on specified conditions. Some of the conditions are self-actuating. See Tex. Const. art. XVI, § 50(a)(6)(Q). Tex. Const. art. XVI, § 50(a)(6)(Q)(vi), requires that

“the security instruments securing the extension of credit contain a disclosure that the extension of credit is the type of credit defined by Section 50(a)(6), Article XVI, Texas Constitution. Practitioners differ as to whether the remaining conditions listed at Tex. Const. art. XVI, § 50(a)(6)(Q), must be included in the home equity loan documents. The home equity extension of credit, form 11-2 in this chapter, includes the conditions. In the absence of definitive authority on this question, the attorney is cautioned to exercise professional judgment regarding the inclusion of these conditions. If the conditions are included in the home equity extension of credit, the conditions may affect the negotiability of the instrument under chapter 3 of the Texas Business and Commerce Code. However, there is some dated authority that a nonrecourse note is by its very nature nonnegotiable. *Hinckley v. Eggers*, 587 S.W.2d 448, 450 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

§ 11.20:3 Required Disclosure

The security documents for a home equity loan must disclose that the credit is an equity loan subject to Tex. Const. art. XVI, § 50(a)(6). This disclosure should appear in the mortgage instrument bold-faced, capitalized, underlined, or otherwise conspicuously set out from the surrounding material. 1998 OCCC Commentary, at 10.

§ 11.20:4 Restriction against Blanks Left in Instruments

The borrower in a home equity loan transaction may not sign any instrument in which blanks for substantive terms of agreement are left to be filled in. Tex. Const. art. XVI, § 50(a)(6)(Q)(iii). The prohibited blanks refer to loan contract terms and not signature blocks that must be signed to execute the document. 7 Tex. Admin. Code § 153.20. No guidance is provided regarding blanks for recording information unknown at the time of closing.

The constitution does not specify the instruments to which this restriction applies. Procedural Rule P-47 requires, as a condition to insuring a home equity lien against invalidity for impermissible blanks, that no such blanks appear in (1) the written acknowledgement of the fair market value, (2) the insured mortgage, (3) the promissory note, or (4) any affidavits of compliance with Tex. Const. art. XVI, § 50(a)(6). See Procedural Rule P-47, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*.

§ 11.20:5 Required Copies

The borrower at closing must receive a copy of the final loan application and all executed documents signed by the borrower at closing and related to the extension of credit. Tex. Const. art. XVI, § 50(a)(6)(Q)(v). It is not required that signed copies be provided as long as the copies accurately reflect the documents that the borrower actually signed at closing. *Pelt v. U.S. Trust N.A.*, 359 F.3d 764, 768 (5th Cir. 2004).

Except for the requirement that the borrower receive a copy of the final loan application, the constitution does not require the lender to provide copies of documents signed by the borrower before closing but related to the extension of credit. See 7 Tex. Admin. Code § 153.22.

§ 11.20:6 Required Signatories

A written instrument creating a home equity lien must be signed by each owner and each owner's spouse (regardless of whether the spouse claims ownership or other interest in the property or is liable on the debt). Tex. Const. art. XVI, § 50(a)(6)(A). A spouse or owner who is not a maker of the note may consent to the lien by signing a written consent to the mortgage instrument. The consent may be included in the mortgage instrument or a separate document. 7 Tex. Admin. Code § 153.2(2).

A lender, at the lender's option, may require each owner and each owner's spouse to consent to the home equity loan. This is in addition to the consent required for the lien. 7 Tex. Admin. Code § 153.2(3).

A trustee may sell or encumber a homestead property for which the trustee holds title in a "qualifying trust" without the joinder of either spouse with a beneficial interest in the trust unless expressly prohibited by the instrument or court order creating the trust. A married person who transfers homestead property to the trustee of a qualifying trust, however, must comply with the requirements relating to the joinder of the person's spouse as provided by chapter 5 of the Texas Family Code. Tex. Prop. Code § 41.0021.

§ 11.20:7 Junior-Lien Requirements

If a home equity loan is subordinate to another lien on the property, the loan may also be governed by Texas Finance Code chapter 342 unless the interest rate is 10 percent per year or less. See Tex. Fin. Code §§ 342.001(4), 342.005. The loan documents must comply with the requirements applicable to secondary mortgage loans. 1998 OCCC Commentary, at 4-5. If the mortgagee has a license from the Office of Consumer Credit Commissioner, both the home equity extension of credit (promissory note) (form 11-2 in this chapter) and deed of trust (home equity loan) (form 11-3) must contain the name, mailing address, and telephone number of the OCCC. Tex. Fin. Code § 14.104. See clause 8-9-24 in this manual for an example of such a disclosure. Additionally, the printed language in the home equity extension of credit and the deed of trust must be modified slightly. In the deed of trust, in paragraph B.4., the phrase "in a form acceptable to Lender" must be struck so that the obligation reads "maintain an insurance policy that This change is necessary because Finance Code sections 342.404, 342.405, and 342.413 prohibit a lender from approving the selection of insurance. See Tex. Fin. Code

§§ 342.404, 342.405, 342.413. Also, Finance Code section 342.404 provides that if insurance is required in connection with a loan made under that chapter, the lender must furnish the borrower a statement like clause 11-4-8, which may be added to the home equity deed of trust as a numbered paragraph under “General Provisions.” See Tex. Fin. Code § 342.404.

The same chapter imposes other requirements if the mortgagee sells or procures insurance related to the loan at a rate not fixed or approved by the State Board of Insurance. See Tex. Fin. Code § 342.405.

Finance Code section 342.307 limits the enforcement fees that may be included in secondary mortgage loan documents. To comply with this section for a home equity loan that is also a secondary mortgage loan, in the home equity extension of credit (promissory note) (form 11-2), the alternative indicated attorney’s fee provision should be used. In the deed of trust (form 11-3), in paragraph E.10., after the words “the hands of an attorney” add “who is not an employee of Lender.”

If the prior lien instrument contains a due-on-sale clause, the home equity deed of trust may violate the due-on-sale clause.

§ 11.20:8 Home Loans

A home equity loan may also be subject to the requirements of Texas Finance Code chapter 343, regulating certain types of “home loans. See section 10.14 in this manual.

§ 11.21 Restriction on Place of Closing

A home equity loan may be closed only at the offices of the lender, an attorney at law, or a title company. Tex. Const. art. XVI, § 50(a)(6)(N). The place of closing must be the permanent

physical address of the office or branch office of the lender, attorney, or title company so that the closing occurs in an authorized physical location other than the homestead. 7 Tex. Admin. Code § 153.15(1). This provision is intended to protect homeowners from coercive conduct in an equity loan closing conducted at the “kitchen table” of one’s home.

‘Closing’ as construed by the Texas Supreme Court in *Finance Commission of Texas v. Norwood*, 418 S.W.3d 566 (Tex. 2013), is a process that includes not just the final action of executing documents and funding the loan but also the initial action of obtaining required consents. Accordingly, the supreme court concluded that a homeowner’s executing a required consent or a power of attorney is part of the closing process and also must occur only at one of the locations authorized by Tex. Const. art. XVI, § 50(a)(6)(N). *Finance Commission of Texas*, 418 S.W.3d at 588; see also 7 Tex. Admin. Code § 153.15(3). The court further concluded that the commission’s interpretations of section 50(a)(6)(N) (which in part authorized a lender to accept a properly executed power of attorney allowing the attorney-in-fact to execute loan documents on behalf of the homeowner or to receive consents of the homeowner required under section 50(a)(6)(A) by mail or other delivery of the homeowner’s signature) contradict the intent and purpose of the text of the provision and are therefore invalid. *Finance Commission of Texas*, 418 S.W.3d at 588–89. Although Fannie Mae generally allows a duly appointed attorney-in-fact to sign the security instrument or note on the borrower’s behalf when certain conditions are met, its Selling Guide has been updated with respect to loans purchased on or after February 1, 2014, to prohibit the use of a power of attorney in cash-out refinance transactions and other transactions in connection with Texas section 50(a)(6) mortgage loans. See Fannie Mae, Selling Guide Announcement SEL-2013-08 (Oct. 22, 2013).

§ 11.21:1 Offices of Lender

A home equity loan may not be closed in the offices of a mere loan broker. To qualify as a lender, the party must advance funds directly to the borrower or be identified as the payee of the note. 7 Tex. Admin. Code § 153.15.

§ 11.21:2 Offices of Title Company

The offices of a title company include the leased or owned Texas office location of a title insurance company or (1) a direct operation, (2) a title insurance agent, or (3) an attorney conducting the attorney's business in the name of the title insurance company, direct operation, or title insurance agent (if the attorney or the attorney's bona fide employees are escrow officers under Tex. Ins. Code § 2501.003(4)). Procedural Rule P-44, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*. The phrase *title company* refers to an agent of a title insurance company. A company merely performing title abstractions is not within the definition of a title company. *Rooms With A View, Inc. v. Private National Mortgage Ass'n, Inc.*, 7 S.W.3d 840, 846-47 (Tex. App.—Austin 1999, pet. denied).

§ 11.22 Restriction on Release or Transfer of Note

Within a reasonable time after repayment of a home equity loan, the lender must cancel and return the promissory note to the borrower and deliver in a recordable form a release of lien. If the loan is being refinanced, a lender may deliver an endorsement and assignment of the lien. Tex. Const. art. XVI, § 50(a)(6)(Q)(vii). The lender is required to provide these copies without charge. 7 Tex. Admin. Code § 153.24(1). The lender is not required, however, to record or pay for the recording of the release of lien. 7 Tex. Admin. Code § 153.24(2). Thirty days is a reasonable time for the lender to perform the duties required by this section.

7 Tex. Admin. Code § 153.24(3). An affidavit of lost note or imaged note, or equivalent, may be returned to the owner in lieu of the original note if the original note has been lost or imaged.

7 Tex. Admin. Code § 153.24(4).

§ 11.23 Restriction on Refinancing

The refinancing of a debt, any portion of which is secured by a home equity lien, may be made only by an extension of credit meeting all of the constitutional requirements of a home equity loan or reverse mortgage. Tex. Const. art. XVI, § 50(f).

Additionally, any refinance of a debt against homestead to secure a debt for purchase money, taxes, owelty of partition, federal tax lien, or improvements that includes the advance of additional funds may not be secured by a valid lien against the homestead unless (1) the additional funds advanced are to pay taxes, an owelty of partition, or improvements, (2) the new loan is made as a home equity loan or reverse mortgage, or (3) the additional funds are for reasonable costs necessary to refinance such debt. Tex. Const. art. XVI, § 50(e); see 7 Tex. Admin. Code § 153.41.

§ 11.24 Forfeiture Provision

Constitutional provisions for home equity lending contain a forfeiture provision for loans failing to meet constitutional requirements. If a lender or holder fails to comply with the lender's or holder's constitutionally mandated obligations within sixty days after notice of the violation by the borrower, the lender or holder forfeits all principal and interest on the note. Tex. Const. art. XVI, § 50(a)(6)(Q)(x). Only a violation of a constitutionally mandated provision in the extension of credit will trigger a forfeiture. *Vincent v. Bank of America*, 109 S.W.3d 856 (Tex. App.—Dallas 2003, no pet.) (citing an earlier version of Tex. Const. art. XVI, § 50(a)(6)(Q)(x)).

§ 11.25 Cure Provisions

If a lender fails to comply with constitutional restrictions on home equity lending, the lender may avoid a forfeiture of all principal and interest and enforce an otherwise invalid lien by timely curing the failure in the manner specified by the Texas Constitution. Constitutional curative measures are equally available to cure lender noncompliance in an original home equity loan or in the refinance of a home equity loan. Tex. Const. art. XVI, § 50(a)(6)(Q)(x); 7 Tex. Admin. Code § 153.95(a); *In re Adams*, 307 B.R. 549, 553–54 (Bankr. N.D. Tex. 2004). Cure procedures are specific to certain identified home equity lending violations:

§ 11.25:1 Violation of Restriction on Fees, Restriction on Prepayment Penalties, or Restriction on Interest

In the event of a violation of the constitutional restrictions found at Tex. Const. art. XVI, § 50(a)(6)(E) (restriction on fees), Tex. Const. art. XVI, § 50(a)(6)(G) (restriction on prepayment penalties), or Tex. Const. art. XVI, § 50(a)(6)(O) (restriction on interest), the lender may cure the violation by refunding the borrower the amount of any overcharge. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(a). The cure is effective when the lender credits the borrower's account with a refund, places the refund in the mail or other delivery carrier, or delivers the refund in person. A cure may also be made using any other delivery method agreed to by the borrower in writing after the lender receives notice of the lender's failure to comply. 7 Tex. Admin. Code § 153.94(a).

§ 11.25:2 Violation of Restriction on Loan-to-Value Ratio

In the event of a violation of the constitutional restriction found at Tex. Const. art. XVI, § 50(a)(6)(B) (restriction on loan-to-value

ratio), the lender may cure the violation by sending the borrower written acknowledgment that the lien is valid only to the extent that the loan amount does not exceed the loan-to-value restriction. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(b). The cure is effective when the lender places the acknowledgment in the mail or other delivery carrier or delivers the acknowledgment in person. A cure may also be made using any other delivery method that the borrower agrees to in writing after the lender receives notice of the lender's failure to comply. 7 Tex. Admin. Code § 153.94(a).

§ 11.25:3 Violation of Restriction against Additional Collateral or Restriction on Qualifying Agricultural Homestead

In the event of a violation of the constitutional restrictions found at Tex. Const. art. XVI, § 50(a)(6)(H) (restriction against additional collateral), or Tex. Const. art. XVI, § 50(a)(6)(I) (restriction on qualifying agricultural homestead), the lender may cure the violation by sending the borrower an acknowledgment that the home equity loan is not secured by the prohibited additional collateral or nonqualifying agricultural property. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(b). The cure is effective when the lender places the acknowledgment in the mail or other delivery carrier or delivers the acknowledgment in person. A cure may also be made using any other delivery method that the borrower agrees to in writing after the lender receives notice of the lender's failure to comply. 7 Tex. Admin. Code § 153.94(a).

§ 11.25:4 Violation of Restriction against Prohibited Amount, Percentage, Term, or Other Provision

In the event of a violation involving some other prohibited amount, percentage, term, or other provision, the lender may cure the violation by

sending written notice to the borrower amending the prohibited provision and adjusting the account of the borrower to ensure that the borrower is not required to pay more than an amount permitted by the constitution or that the borrower is not subject to any other term or provision prohibited by the constitution. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(c). The cure is effective when the lender makes the necessary adjustment to the borrower's account and places the required notice in the mail or other delivery carrier or personally delivers the notice to the borrower. A cure may also be made using any other delivery method agreed to by the borrower in writing after the lender receives notice of the lender's failure to comply. 7 Tex. Admin. Code § 153.94(a).

§ 11.25:5 Violation of Requirement for Delivery of Documents

In the event of a violation of the constitutional restriction found at Tex. Const. art. XVI, § 50(a)(6)(Q)(v) (requirement for delivery to the borrower of copies of all documents signed by the borrower), the lender may cure the violation by delivering the required documents to the borrower. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(d). The cure is effective when the lender delivers the required documents by placing them in the mail or other delivery carrier or by personally delivering the documents to the borrower. A cure may also be made using any other delivery method agreed to by the borrower in writing after the lender receives notice of the lender's failure to comply. 7 Tex. Admin. Code § 153.94(a).

§ 11.25:6 Violation of Requirement for Acknowledgment of Fair Market Value of Homestead

In the event of a violation of the constitutional restriction found at Tex. Const. art. XVI, § 50(a)(6)(Q)(ix) (requirement that lender and borrower sign a written acknowledgment of the

fair market value of the homestead), the lender may cure the violation by obtaining the appropriate signatures on the required acknowledgment of fair market value. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(d).

§ 11.25:7 Violation of Restriction on Number of Home Equity Loans

In the event of a violation of the restriction found at Tex. Const. art. XVI, § 50(a)(6)(K) (antistacking provision allowing only one home equity loan on a homestead at a time), the lender may cure the violation by sending the borrower a written acknowledgment that the accrual of interest and all of the borrower's obligations under the extension of credit are abated while any prior lien remains secured by the homestead. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(e). The cure is effective when the lender places the acknowledgment in the mail or other delivery carrier or personally delivers the acknowledgment to the debtor. A cure may also be made using any other delivery method agreed to by the borrower in writing after the lender receives notice of the lender's failure to comply. 7 Tex. Admin. Code § 153.94(a).

§ 11.25:8 "Catch-All" Cure Provision

In the event of a violation of constitutional restrictions on home equity lending that cannot be cured by any of the above cure provisions, the lender may cure the violation by refunding or crediting the borrower \$1,000 and offering to refinance the extension of credit for the borrower for the remaining term at no cost to the borrower, on the same terms, including interest, as the original extension of credit together with any modifications necessary to comply with the constitution. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(f). The lender must make a \$1,000 refund or give a \$1,000 credit. 7 Tex. Admin. Code § 153.96(b)(1). Additionally, the

lender must either modify or refinance. If modification is elected, the modification may be made without completing the requirements of a refinance. If a refinance is elected, the refinance must meet all constitutional requirements for a home equity loan. 7 Tex. Admin. Code § 153.96(b).

The catch-all cure provision presupposes the debtor's compliance and cooperation with the lender's attempted cure. The debtor may not block the lender's cure by the debtor's refusal to cooperate. The cure protection afforded the lender is complete on the refund or credit of the \$1,000 and the timely delivery of an offer to modify or refinance. 7 Tex. Admin. Code § 153.96; *In re Adams*, 307 B.R. 549, 560 (Bankr. N.D. Tex. 2004). The offer to modify or refinance is delivered by placing the offer in the mail or with other delivery carriers or by personal delivery to the borrower. 7 Tex. Admin. Code § 153.96(a)(2). After the borrower accepts an offer to modify or refinance, the lender or holder must complete, or make a good-faith effort to complete, the modification or refinance with a reasonable time not to exceed ninety days. 7 Tex. Admin. Code § 153.96(d).

§ 11.25:9 Noncurable Violations

Any violation of Tex. Const. art. XVI, § 50(a)(6)(P) (prohibition against home equity loans made by an unauthorized lender), or Tex. Const. art. XVI, § 50(a)(6)(A) (requirement that home equity liens be created by written agreement with the consent of each owner and each owner's spouse), are noncurable and result in the forfeiture of all principal and interest on the home equity loan. An exception to this rule applies in the case in which one spouse fails to consent by signature to the home equity loan but subsequently does consent. *See* Tex. Const. art. XVI, § 50(a)(6)(Q)(xi).

§ 11.25:10 Burden of Proof to Show Cure

The lender bears the burden of showing the lender's compliance with any cure provision relied on by the lender to cure a violation. 7 Tex. Admin. Code §§ 153.94(b), 153.96(c).

§ 11.25:11 Timeliness of Cure

To timely cure a violation of a home equity lending restriction, the lender must comply with the cure provisions within sixty days after the lender is notified of the violation by the borrower. Tex. Const. art. XVI, § 50(a)(6)(Q)(x). The sixty-day cure period begins the day after the lender or holder receives the borrower's notification to the lender or holder. If the borrower mails the notification to the lender or holder, a rebuttable presumption arises that the delivery date is the date indicated on the certified mail receipt or other carrier-delivery receipt signed by the lender or holder. This does not preclude other methods of delivering the notification. However, with other methods of delivery, the borrower has the burden of proving delivery. *See* 7 Tex. Admin. Code §§ 153.92, 153.93. After the commencement of the sixty-day cure period, all calendar days are counted up to day sixty. If day sixty falls on a Sunday or a federal legal public holiday, the cure period is extended to include the next day that is not a Sunday or a federal legal public holiday. 7 Tex. Admin. Code § 153.92(a). If a borrower provides inadequate notice of the alleged violation, the sixty-day cure period does not begin to run. 7 Tex. Admin. Code § 153.92(b).

If a lender or holder appropriately cures the violation before receiving notice of the violation from the borrower, the cure is as effective as if the lender or holder had timely cured the violation after receiving notice from the borrower. 7 Tex. Admin. Code § 153.95(b).

§ 11.25:12 Requirements for Borrower's Notification of Lender's Failure to Comply

The borrower notifies the lender or holder of an alleged failure to comply with an obligation by taking reasonable steps to give notice of the failure. The notification must include an identification of the borrower, an identification of the loan, and a description of the alleged failure to comply. The notice need not cite the section of the constitution allegedly violated. 7 Tex. Admin. Code § 153.91.

To be effective, the borrower's notice to the lender or holder of a failure to comply must be properly delivered. The notice may be delivered to the lender or holder (1) at a point of contact designated by the lender in writing, (2) to the registered agent of the lender or holder (even if a point of contact has been designated by the lender or holder for the receipt of such notice), or (3) to any physical or mailing address of the lender or holder (but only if the lender or holder has failed to designate a point of contact for receipt of such notice). 7 Tex. Admin. Code § 153.93(a)–(d).

To designate a point of contact for receipt of notice of failure to comply, the lender or holder may make at closing a reasonably conspicuous designation in writing of a location where the borrower may deliver written or oral notice of violation of home equity restrictions. The designation may include a mailing address, a physical address, telephone number, e-mail, or other point of contact. The lender or holder may change this point of contact by conspicuous written notice to the borrower. The change is effective when sent by the lender or holder. 7 Tex. Admin. Code § 153.93.

The four-year residual limitations period of Tex. Civ. Prac. & Rem. Code § 16.051 applies to constitutional infirmities under section 50(a)(6). See *Priester v. JP Morgan Chase Bank*, 708 F.3d 667 (5th Cir. 2013). Because cure provisions exist in the Texas Constitution, the court concluded that homestead liens that are constitutionally defective are voidable rather than void ab initio. To the extent that a claim under the Texas Constitution renders a defective homestead lien voidable, rather than void, once the limitations period has passed the lien is no longer voidable and is then valid.

§ 11.26 Nonseverability Provision

Home equity lending is authorized only on condition that none of the constitutional restrictions ever be preempted by federal law. To this end, Tex. Const. art. XVI, § 50(j), contains a "poison pill" provision that all home equity provisions are nonseverable and that none would have been enacted without the other. If any home equity provision is held to be preempted by federal law, all home equity lending provisions are rendered invalid. In such a case, a savings provision upholds the validity of home equity loans made before the decision holding any aspect of home equity lending preempted by federal law. Tex. Const. art. XVI, § 50(j).

§ 11.27 Truth in Lending

A home equity loan may be subject to the Truth in Lending Act and its accompanying Regulation Z. See the discussion of this subject in section 11.19:2 above and chapter 12 in this manual.

[Sections 11.28 through 11.30 are reserved for expansion.]

II. Reverse Mortgage Loans

§ 11.31 Overview

Reverse mortgage loans secured on Texas homestead properties were first authorized by constitutional amendment effective January 1, 1998. Tex. Const. art. XVI, § 50(a)(7), authorizes reverse mortgages, and Tex. Const. art. XVI, § 50(k)-(r), (v), defines and governs them. There are currently no enabling statutes that implement these constitutional provisions or interpretive rule making, although the power to interpret constitutional reverse mortgage provisions has been expressly delegated to the Texas Finance Commission and the Texas Credit Union Commission. *See* Tex. Fin. Code §§ 11.308, 15.413.

Reverse mortgages are a type of home equity loan for which only senior homeowners, age sixty-two or older, are eligible. Tex. Const. art. XVI, § 50(k)(2). The loans are meant to provide senior homeowners the resources needed to remain in their homes for their remaining lives, if they so desire, by converting their home equity into annuity-like periodic payments, or advances, to the homeowners for life (referred to as a "tenure" option) or, if preferred, a term of years (referred to as a "term" option) that may be used to pay for housing costs, medical care, and other costs of living. A homeowner under a reverse mortgage may also elect to receive a single advance at loan settlement (referred to as a 'lump sum' option) or multiple unscheduled advances under a line of credit. Tex. Const. art. XVI, § 50(p).

A reverse mortgage is a nonrecourse obligation generally based on an owner's equity in the owner's homestead property, and the owner is not required to demonstrate general creditworthiness or a source of income or other assets with which to repay the loan. Any Texas resident age sixty-two or older who owns and occupies as a principal dwelling a single-family

home, a qualified condominium unit or townhouse, or a permanently attached and qualified manufactured home in which there is sufficient appraised home equity should qualify for a reverse mortgage. *See* Tex. Const. art. XVI, § 50(k)(2), (4). Home equity means the appraised market value of the homestead property minus the outstanding balance of all mortgages and liens secured on the homestead property. *See* Tex. Const. art. XVI, § 50(a)(6)(B).

An owner generally is not obligated to make any repayments of principal or interest during the term of a reverse mortgage as long as the owner continues to occupy the home as a principal residence and keeps property tax and insurance payments current. Tex. Const. art. XVI, § 50(k)(6). Advances made to a homestead owner under a reverse mortgage accrue interest, including interest on interest, until the occurrence of a maturity event, when the full loan balance of principal and interest is repaid to the lender in one final lump-sum payment, typically from sales proceeds when the homestead property is sold by the owner or by the owner's estate after the owner dies. Maturity events are strictly limited by the constitution. A reverse mortgage generally cannot be called due and payable until (1) the homeowner sells or transfers the homestead property; (2) the homeowner permanently abandons the property for twelve consecutive months without obtaining the lender's prior approval or, if the loan is used for the purchase of a homestead property, the borrower fails to timely occupy the homestead property as the borrower's principal residence within a specified period after loan closing stipulated in the written loan agreement; or (3) the homeowner (or, if married, the last of the homeowners) dies. Tex. Const. art. XVI, § 50(k)(6)(A)-(C). The lender in some cases may, however, call the loan due if discovering

the owner has committed actual fraud in obtaining the loan; has defaulted on contractual obligations in the deed of trust to repair and maintain, pay taxes and assessments on, or insure the homestead property; or has failed to maintain the lender's first-lien priority on the homestead property. Tex. Const. art. XVI, § 50(k)(6)(D).

Texas procedural rules provide the authority for title insurance companies to insure the validity of reverse mortgage liens and for lenders to foreclose reverse mortgage liens under conditions permitted by the Texas Constitution. Specifically, the Texas Commissioner of Insurance has adopted a reverse mortgage endorsement (T-43) to the standard mortgagee's form of title insurance policy in Procedural Rule P-45, and the Supreme Court of Texas has adopted revisions to rules 735 and 736 of the Texas Rules of Civil Procedure to provide for an expedited procedure for foreclosing reverse mortgage loans requiring a court order as a condition to foreclosure. *See* Tex. R. Civ. P. 735–736; Procedural Rule P-45, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*.

Although the Texas reverse mortgage is a particular type of home equity loan, it is important to note that the numerous conditions imposed on home equity loans under section 50(a)(6) described in part I. of this chapter are inapplicable to reverse mortgages authorized by section 50(a)(7). The limitations under section 50(a)(6), for example, restricting the permitted loan-to-value ratio (80 percent) and fees and charges (3 percent) and imposing cooling off and rescission rights and numerous other conditions, are not carried over to the reverse mortgage provisions. Reverse mortgages nevertheless have their own subset of consumer protections spelled out in subsections 50(k)–(p) and 50(v), all of which must be strictly observed to create a valid and enforceable lien on a homestead property.

§ 11.32 Consensual Homestead Lien by Senior Homeowner and Spouse

A reverse mortgage loan may be made only to, and only with the consent of, a person who is, or whose spouse is, sixty-two years of age or older. It may be secured by only a voluntary lien on the owner's homestead property created by a written agreement between the lender, each owner of the homestead property, and the spouse of each owner. Each owner's spouse must consent to the lien securing a reverse mortgage regardless of whether the spouse claims an ownership interest in the property or is an applicant for, or obligor on, the debt. Any homestead property, urban or rural, is eligible as security for a reverse mortgage (with no disqualifying exception for homestead property designated for agricultural use for property tax purposes, unlike Tex. Const. art. XVI, § 50(a)(6), home equity loans). Tex. Const. art. XVI, § 50(k)(1), (2).

§ 11.33 Nonrecourse Debt

A reverse mortgage must be made without recourse for personal liability against any owner or the spouse of any owner. Tex. Const. art. XVI, § 50(k)(3). A reverse mortgage is typically repaid from sales proceeds on the sale of the homestead property by the borrower or the sale by the borrower's estate after the borrower, or the last of the borrowers, dies. If a reverse mortgage is not paid when due, the lender or note holder must look to recovery against the homestead property under its security interest as its exclusive remedy. The homeowner, therefore, will never owe more than the loan balance or the value of the homestead property, whichever is less, and no assets other than the homestead property may be used to repay the debt. Neither the borrower's estate nor the heirs of the estate have any liability for any deficiency that may result from the sale of the homestead property. Tex. Const. art. XVI, § 50(k)(3).

§ 11.34 Advances Based on Equity in Homestead

Advances under a reverse mortgage must be based on the equity in the owner's homestead property or the equity the owner will invest when purchasing a homestead property that the borrower will occupy as a principal residence. Tex. Const. art. XVI, § 50(k), was amended effective January 1, 2014, to authorize a reverse mortgage to be used to finance the purchase of a Texas homestead, and thereby to qualify Texas homeowners for the first time to participate in the Federal Housing Administration's "HECM for Purchase" loan program. *See* Tex. S.J. Res. 18, 83d Leg. R.S., 2013 Tex. Gen. Laws Pamph. 3, at A-7. Owners are not disqualified for a reverse mortgage because they lack income or other assets for repaying the loan. Tex. Const. art. XVI, § 50(k)(4). For purposes of determining eligibility under any state statute relating to payments, allowances, benefits, or services on a "means-tested" basis (including expressly supplemental security income, low-income energy assistance, property tax relief, medical assistance, and general assistance), reverse mortgage advances made to the borrower are considered loan proceeds and not income, and undisbursed funds under a reverse mortgage loan are considered equity in the home and not loan proceeds. Tex. Const. art. XVI, § 50(o).

§ 11.35 No Repayment until Maturity Event Occurs; Grounds for Foreclosure

The borrower must have no legal obligation to repay a reverse mortgage, or any portion of its principal or interest, until the loan balance is due on the occurrence of one of the following maturity events: (1) the last surviving borrower dies, (2) the homestead property is sold or transferred, or (3) all borrowers cease occupying the homestead property as their principal residence for twelve consecutive months (without the lender's

prior written approval) or, if the loan is used for the purchase of a homestead property, the borrower fails to timely occupy the homestead property as the borrower's principal residence within a specified period after loan closing stipulated in the written agreement creating the lien on the property. The lender may also require payment of all principal and interest if the borrower commits actual fraud in connection with the loan; defaults on an obligation provided for in the loan documents to repair and maintain, pay taxes and assessments on, or insure the homestead property; or fails to maintain the priority of the lender's lien on the homestead property. Tex. Const. art. XVI, § 50(k)(6)(A)–(D).

A reverse mortgage debt may be accelerated and declared due and payable only after the occurrence of one of the foregoing constitutional grounds for foreclosure, notice by the lender to the borrower of a claimed ground for foreclosure, and an opportunity for the borrower to remedy the claimed ground for foreclosure in the manner and within a period stipulated by the Texas Constitution. The lender must first give written notice to the borrower that one of these grounds for foreclosure exists and give the borrower an opportunity to cure the ground for foreclosure. Notice must be given in the same manner provided for a notice by mail related to the foreclosure of liens for home equity loans under section 50(a)(6). The owner must be given at least thirty days to either (1) remedy the condition creating the ground for foreclosure, (2) pay the reverse mortgage debt secured by the homestead property from proceeds of the sale of the homestead property or from any other sources, or (3) convey the homestead property to the lender by deed in lieu of foreclosure. A cure period of only twenty days must be given the owner if the claimed ground for foreclosure is a failure of the borrower to maintain the priority of the reverse mortgage lien under section 50(k)(6)(D)(iii). Tex. Const. art. XVI, § 50(k)(10).

§ 11.36 Permitted Uses of Loan Funds

Proceeds from a reverse mortgage may be used by senior homeowners for any purpose, although most often loan proceeds are regarded as a supplement to Social Security benefits and pension payments and used by homeowners to maintain their homes in a good state of repair, pay property taxes and insurance when due, and defray medical and other ordinary costs of living. Significantly, advances under a reverse mortgage are not taxable as income and generally do not affect senior homeowners' eligibility for Social Security or Medicare benefits. *See* Tex. Const. art. XVI, § 50(o). (However, senior homeowners electing a lump-sum advance of proceeds should seek counseling regarding their continued eligibility for Medicaid benefits if retaining the advance as a liquid asset.)

§ 11.37 Foreclosure under Power of Sale and by Court Order

Foreclosure based on either of the grounds set out in Tex. Const. art. XVI, § 50(k)(6)(A), (B), that all borrowers have died or that the homestead property securing the loan has been sold or otherwise transferred, may be carried out under the power of sale contained in the deed of trust securing the loan and the requirements of section 51.002 of the Texas Property Code, pertaining to contractual liens. Tex. Const. art. XVI, § 50(k)(11).

If the foreclosure is for any other ground, however, a reverse mortgage lien may be foreclosed on only by court order pursuant to rules 735 and 736 of the Texas Rules of Civil Procedure. Tex. Const. art. XVI, § 50(k)(11). Rule 735 provides several judicial foreclosure options for a lender foreclosing a reverse mortgage on grounds other than under section 50(k)(6)(A) or (B). Under rule 735, the lender may file (1) a suit seeking judicial foreclosure, (2) a suit or counterclaim seeking a final judgment that includes an order

allowing foreclosure under the security instrument, or (3) an application for an order allowing foreclosure under rule 736 pertaining to expedited foreclosure proceedings. Tex. R. Civ. P. 735. Under the expedited procedures of rule 736, a lender may file a verified application in the district court of the county in which the homestead property is located seeking a court order allowing a foreclosure in accordance with the power of sale under the security instrument and section 51.002 of the Property Code. Under the rule, if no response is timely made, the court must grant the application without further notice or hearing if the application complies in form and content with the requirements of the rule and a copy of the notice and certificate of service has then been on file with the clerk of the court for at least ten days. If a response is made, however, a hearing on the application must be set promptly after reasonable notice to the parties and, in any case, not later than ten business days after a request for hearing by either party. The rule calls for a streamlined hearing in which no discovery is allowed and the court's action in granting or denying the order may not be appealed. On hearing, if the court determines that the applicant has proved that a valid debt exists that is secured by a valid lien on the homestead property created under Texas Constitution, article XVI, section 50(a)(7), the court must grant the application and issue an order to proceed with foreclosure pursuant to the power of sale. Tex. R. Civ. P. 736.

A four-year limitations period applies to actions to foreclose a reverse mortgage lien on a homestead property once a ground for foreclosure has occurred. On the expiration of the four-year limitations period, the real property lien and a power of sale to enforce it become void. *See* Tex. Civ. Prac. & Rem. Code § 16.035(a), (d). Practitioners are cautioned that the accrual date for such an action is not the date that the reverse mortgage debt is accelerated and declared due and payable, but instead the lender's cause of action to enforce a reverse mortgage lien

accrues when one or more of the constitutional conditions to foreclosure has occurred. If the ground for foreclosure is the death of the last surviving borrower, the cause of action accrues on the date of that death—a fact that could be undiscovered by the lender for some extended period of time. *See Financial Freedom Senior Funding Corp. v. Horrocks*, 294 S.W.3d 749 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

§ 11.38 No Closing until Delivery of Twelve-Day Consumer Notice and Certification of Required Counseling

A reverse mortgage may not be closed before the twelfth calendar day after the date the lender provides to the prospective borrower a statutory notice on a separate instrument, which the lender or originator and the borrower must sign for the notice to take effect. See form 11-7 in this chapter for the text of the notice.

Furthermore, a reverse mortgage may not be closed until the prospective borrower and the spouse of the prospective borrower attest in writing that the prospective borrower and the spouse of the prospective borrower received counseling regarding the advisability and availability of reverse mortgages and other financial alternatives that was completed not earlier than the 180th day nor later than the fifth day before the date the extension of credit is closed. *See* Tex. Const. art. XVI, § 50(k)(8), (9).

§ 11.39 Advances According to Authorized Payment Plan (Including Line-of-Credit Method)

The proceeds of a reverse mortgage must be disbursed to the borrower in one or more payments of principal, generally referred to as advances, according to an agreed payment plan. The total loan obligation, generally referred to as the bal-

ance, is the sum of all advances due at loan maturity (including any amounts advanced to cover closing and other costs) plus accrued interest, including interest on interest, and other finance charges, such as mortgage insurance premiums and servicing fees. Line-of-credit advances under a Texas reverse mortgage were first authorized effective November 8, 2005. Tex. S.J. Res. 7, 79th Leg., R.S., 2005 Tex. Gen. Laws Pamph. 1, at A-1. As amended, Tex. Const. art. XVI, § 50(p), expressly permits a line-of-credit method of advances in which an initial advance may be made at any time and future advances may be made at times and in amounts requested by the borrower until the credit limit established by the loan documents is reached (and, thereafter, subsequent advances may be made at times and in amounts requested by the borrower to the extent that the outstanding balance is repaid). Tex. Const. art. XVI, § 50(p)(2)–(4).

In addition, if the borrower fails to timely pay any of the following for which the borrower is obligated under the loan documents, the lender may at any time, to the extent necessary to protect the lender's interest in or the value of the homestead property, advance amounts on behalf of the borrower to pay (1) property taxes, (2) assessments, (3) insurance, (4) costs of repairs and maintenance (when performed by persons who are not employed by or affiliated with the lender), or (5) any lien that has or may obtain priority over the reverse mortgage lien. Tex. Const. art. XVI, § 50(p)(6).

§ 11.40 Prohibitions against Use of Credit Cards and Similar Devices, Transaction Fees, and Unilateral Amendments of Terms

A reverse mortgage must provide that (1) an owner may not use a credit card, debit card, pre-printed solicitation check, or similar device to obtain an advance; (2) a lender may not charge a

transaction fee after closing solely in connection with any debit or advance; and (3) a lender or holder of the reverse mortgage may not unilaterally amend the terms of the extension of credit. Tex. Const. art. XVI, § 50(v).

§ 11.41 Future Advances; Priority of Lien

Advances made and to be made in the future under a recorded reverse mortgage, and interest on those advances, have lien priority over any subsequently filed lien. Therefore, future advances under a reverse mortgage recorded in the real property records of the county in which the homestead property is located will have lien priority over any other lien filed for record after the reverse mortgage instrument has been recorded. Tex. Const. art. XVI, § 50(l).

§ 11.42 Interest; Shared Appreciation

Interest may be charged on a reverse mortgage loan at any fixed or adjustable rate that the parties may agree on (and which, if secured by other than a first lien, does not exceed the maximum lawful rate under the Texas Finance Code), and interest may accrue and be compounded during the term of the loan according to the terms of the loan agreement. Furthermore, interest expressly may be contingent on appreciation in the fair market value of the homestead property, apparently allowing for lenders to charge "equity share" fees based on the appreciation of appraised value of the homestead when the loan matures. Tex. Const. art. XVI, § 50(m).

§ 11.43 Reducing or Failing to Make Advances; Forfeiture

If an adjustable rate of interest is charged, the lender under a reverse mortgage is expressly prohibited from reducing the amount or number of advances made to the borrower because of an adjustment in the interest rate. Tex. Const. art.

XVI, § 50(k)(5). The lender is obligated to make loan advances as required by the loan documents under the penalty of forfeiture. If the lender fails for any reason to make loan advances according to the terms of the loan documents and, after notice from the borrower, fails to cure the default as required in the loan documents, the constitution provides that the lender forfeits all principal and interest on the reverse mortgage. This forfeiture provision does not apply, however, when a governmental agency, such as the Federal Housing Administration under its Home Equity Conversion Mortgage reverse mortgage insurance, takes an assignment of the loan to cure the default. Tex. Const. art. XVI, § 50(k)(7).

§ 11.44 Preemptive Authority

Texas reverse mortgage law as authorized and effected by the constitution expressly supersedes any statutes, including the Texas Property Code, that purport to limit encumbrances that may be fixed on homestead property. Furthermore, a reverse mortgage may be made without regard to any other conflicting state law, including any purported limitations on future advances; any requirement that a maximum loan amount be stated in the reverse mortgage loan documents or that a percentage of reverse mortgage proceeds be advanced before the assignment of the reverse mortgage; or any prohibition on balloon payments, compound interest or interest on interest, or contracting for, charging, or receiving any rate of interest authorized by Texas law. Tex. Const. art. XVI, § 50(q).

§ 11.45 Title Insurance Considerations

The Texas Reverse Mortgage Endorsement (T-43) and Procedural Rule P-45, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*, insure against claims of lien invalidity of a covered reverse mortgage arising out of a lender's failure

to satisfy certain of the constitutional conditions. See Procedural Rule P-45, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*.

The Texas Reverse Mortgage Endorsement (T-43) to the Mortgagee Policy of Title Insurance (T-2) excludes from coverage any loss or damage based on usury or on any consumer credit protection or truth-in-lending law or violation of any subsections of Tex. Const. art. XVI, § 50(k)(3)–(11), (m), (p), (v), and any regulatory or statutory requirements for a mortgage made pursuant to Tex. Const. art. XVI, § 50(a)(7), *except as expressly provided in paragraph 3 of the endorsement*. Form T-43, in paragraphs 1 and 2, insures the validity of future advances made under a reverse mortgage, with certain exceptions, up to the outstanding aggregate amount of loan proceeds actually disbursed and the amount of its unpaid, accrued interest as of the time a loss occurs under the policy. In paragraph 3, form T-43 expressly insures against loss sustained by the lender under the mortgagee policy because of invalidity or unenforceability of the reverse mortgage lien by reason of any of the following: (1) the failure of the insured mortgage to be created under a written agreement with the consent of each owner of the insured homestead property and each owner's spouse; (2) the failure of the insured mortgage to be made to a person who is, or whose spouse is, sixty-two years of age or older; (3) the failure of the written document purporting to be made pursuant to Tex. Const. art. XVI, § 50(k)(8), to be executed by the homeowner on the date that the insured mortgage and promissory note it secures are executed by the owner (provided that the policy does not insure that the document itself complies with section 50(k)(8)); and (4) the failure of the title company or its agents to furnish the homeowner a copy of written notice purporting to be made pursuant to Tex. Const. art. XVI, § 50(k)(9), on the date that the owner executed the insured mortgage and promissory note it secures (provided that the policy does not insure

that the written document itself complies with section 50(k)(9)).

While attachment of the T-43 endorsement to any mortgagee policy of title insurance issued in connection with a reverse mortgage loan is mandatory, under Procedural Rule P-45 the issuing agency may delete any of these four subdivisions of paragraph 3 if it does not consider the additional risk insurable and must delete all four subdivisions if the promissory note and the insured mortgage instrument for the loan are not executed by the borrower at the office of the title company. Furthermore, the insuring agency must delete the second subdivision of paragraph 3 if the age of the owner or spouse is not verifiable "with government issued photographic identification" furnished the title agency and must delete the second and fourth subdivisions if the related documents furnished by the insured are not executed by the homeowner at the office of the title company on the date that the insured mortgage and promissory note it secures are executed. Procedural Rule P-45, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*.

§ 11.46 Truth-in-Lending Disclosure Considerations

Reverse mortgage loans are subject to the federal Truth in Lending Act, 15 U.S.C. §§ 1601–1667f, and its Regulation Z, 12 C.F.R. pt. 1026. In addition to other consumer disclosures required under the Truth in Lending Act, the lender in a reverse mortgage is required to provide the borrower written disclosures under 12 C.F.R. § 1026.33 of the total annual loan cost of credit in the form of appendix K, paragraph (d), of Regulation Z. Generally referred to as the "Total Annual Loan Cost Rate Disclosure," or "TALC," this disclosure contains (1) a statement that the borrower is not obligated to complete the transaction merely because the borrower has received the disclosures or has signed an application for a reverse mortgage loan; (2) a good-

faith projection of the total cost of the credit expressed as a table of “Total Annual Loan Cost Rates,” using that term, that reflects (a) costs and charges to the borrower, (b) payments (advances) to, or for the benefit of, the borrower, (c) additional compensation to the lender (such as shared appreciation the lender is entitled to), (d) any limitations on the borrower’s liability (such as nonrecourse limits), (e) assumed appreciation rates for the dwelling securing the loan at rates of 0 percent, 4 percent, and 8 percent, and (f) assumed loan periods, alternatively, of two years, the actuarial life expectancy of the borrower (or youngest of the borrowers), and that same life expectancy multiplied by a factor of 1.4 and rounded to the nearest full year (and, at the option of the borrower, that same actuarial life expectancy multiplied by a factor of 0.5 and rounded to the nearest full year); (3) an itemization of loan terms, charges, the age of the youngest borrower, and the appraised property value; and (4) an explanation of the total annual loan cost rates as provided in the model form. 12 C.F.R. § 1026.33, pt. 1026 app. K(d).

§ 11.47 Federal Home Equity Conversion Mortgage (HECM) Loan Program

More than 90 percent of all reverse mortgage loan originations nationwide are made under the Home Equity Conversion Mortgage (HECM) program insured by the Federal Housing Administration (FHA) under the Department of Housing and Urban Development (HUD). The HECM program in Texas is regulated by HUD Handbook 4235.1 Rev-1, as supplemented and amended from time to time, and mortgagee letters ML 00-09 and ML 00-10, each dated March 8, 2000; ML 00-34, dated August 30, 2000 (supplementing ML 00-09); ML 00-39, dated November 7, 2000 (supplementing ML 00-09, ML 00-10, and ML 00-34); and ML 06-06, dated March 17, 2006 (in part replacing the guidance set out in ML 00-09, ML 00-34, and ML 00-39). Regulations for the HECM program

are codified in 24 C.F.R. pt. 206. Effective January 1, 2014, Tex. Const. art. XVI, § 50(k), was amended to authorize a reverse mortgage also to be used to finance the purchase of a Texas homestead. Texas homeowners are now able to participate in the FHA’s “HECM for Purchase” loan program for the first time. *See* Tex. S.J. Res. 18, 83d Leg., R.S., 2013 Tex. Gen. Laws Pamph. 3, at A-7.

Model forms set out in full and attached to ML 00-39 replaced earlier versions of Texas model forms published in ML 00-09 and ML 00-34, which at that time constituted the only forms approved by HUD for use to document an HECM loan in Texas. These model forms included Texas forms of a home equity conversion loan agreement, an adjustable rate deed of trust, an adjustable rate note, an adjustable rate second deed of trust, an adjustable rate second note, and a repair rider. With the adoption of the 2005 constitutional amendment authorizing line-of-credit advances under a Texas reverse mortgage loan, however, HUD chose not to publish revised model forms and instead imposed on approved mortgagees the obligation, in consultation with their attorneys, to adapt all forms to ensure compliance with FHA requirements and the Texas Constitution and statutes. These requirements are set forth in ML 06-06, issued March 17, 2006, which authorizes Texas borrowers to choose a line-of-credit payment option, a modified tenure option (a combination of tenure and line-of-credit payment options), or a modified term option (a combination of term and line-of-credit payment options) and provides guidance regarding such matters as the adaptation and preparation of the form of loan documents, including the repair rider, the timing of loan closings and disbursements by the lender, the conditions under which the loan may be accelerated under applicable Texas law, and procedures to be followed under Texas law to conduct foreclosures. ML 06-06 expressly replaces guidance previously issued in ML

00-09, ML 00-34, and ML 00-39 on the same topics.

Model Texas forms were set out as attachments to HUD ML 00-39, dated November 7, 2000, with such adaptations by counsel as may be necessary to conform the instruments to state or local requirements. When adapting these model forms to Texas law and practices, counsel must consult the footnotes to each model form regard-

ing state-specific modifications; instructions in chapter 6 to Handbook 4235.1 Rev-3; Handbook 4165.1 Rev-1 Chg-3, issued November 30, 1995, regarding model mortgage and note forms; ML 97-15; ML 00-09 regarding Texas modifications of the loan agreement form and repair rider; and ML 06-06 regarding line-of-credit terms and other provisions of the 2005 constitutional amendment.

[Sections 11.48 through 11.50 are reserved for expansion.]

III. General Instructions for Completing Forms

§ 11.51 Introduction

For information about completing forms generally, see chapter 3 in this manual. In most forms the information that the attorney must provide is listed at the beginning of the form. Of course, the attorney may add other specific provisions, references, exhibits, and riders as necessary for each specific transaction.

The forms in this chapter are applicable to a first-lien home equity loan. Tex. Fin. Code ch. 342 imposes additional duties, prohibitions, and disclosure requirements in connection with secondary mortgage loans. Attorneys are cautioned that some forms in this chapter may require modification for use with a secondary mortgage loan transaction.

A home equity loan transaction may require documentation in addition to that provided by this chapter. For example, a 'loan agreement' as defined in Texas Business and Commerce Code section 26.02 requires the notice prescribed therein. Form 10-14 in this manual, notice of final agreement, may be modified for use in a home equity transaction. Each transaction is unique, and the practitioner must use individual judgment in ensuring that all required documentation has been adequately prepared.

A home equity loan transaction must be closed at the offices of the lender, an attorney at law, or a title company. Tex. Const. art. XVI, § 50(a)(6)(N). The owner may not be required to sign any instrument in which blanks are left to be filled in. Tex. Const. art. XVI, § 50(a)(6)(Q)(iii). The lender must provide copies of all instruments related to the loan to the homestead owner at the time of closing. Tex. Const. art. XVI, § 50(a)(6)(Q)(v).

§ 11.52 Instructions for Completing Notice Concerning Extensions of Credit

The notice concerning extensions of credit (form 11-1 in this chapter) defined by section 50(a)(6), article XVI, of the Texas Constitution is the preloan disclosure required to be given to the homestead owner under Tex. Const. art. XVI, § 50(g). The home equity loan cannot be closed until the twelfth day after the notice is given. If discussions with the borrower are conducted primarily in a language other than English, the lender must provide the owner with an additional copy of the notice translated into the written language in which discussions were conducted. The Office of the Consumer Credit Commissioner has provided a Spanish language

translation of the notice on its website at <http://occc.texas.gov>. No foreign-language translations of forms are included in this manual.

§ 11.53 **Instructions for Completing Home Equity Extension of Credit (Promissory Note)**

The form for the home equity extension of credit (form 11-2 in this chapter) is principally adapted from form 6-1 (promissory note) in this manual and is redesignated to conform with the terminology used in Tex. Const. art. XVI, § 50(a)(6). The attorney is referred to chapter 6 in this manual for general commentary and instructions for completing promissory notes.

Note that the extension of credit makes no provision for late charges. The attorney is referred to section 6.4:3 and the clauses referenced therein for commentary and instructions on late charges.

As reflected in the “Terms of Payment” paragraph, the home equity extension of credit must be repaid in substantially equal successive periodic installments. Tex. Const. art. XVI, § 50(a)(6)(L). The installments must begin not later than two months from the date of the instrument. Each installment must equal or exceed the amount of accrued interest as of the date of the scheduled installment.

The home equity extension of credit can be converted for a variable rate of interest by deleting the heading for “Annual Interest Rate” and modifying the heading “Terms of Payment” to read “Terms of Payment, Including Variable Interest Rate on Unpaid Principal.” A variable rate interest clause appears at clause 6-2-18.

The security for payment for a home equity extension of credit is fixed by Tex. Const. art. XVI, § 50(a)(6)(A), (H). The home equity extension of credit may be secured only by a lien on the borrower’s homestead. Additional

collateral is prohibited. The home equity extension of credit has no provision referring to a guaranty or guarantor. A guaranty is construed as prohibited additional collateral.

As required by Tex. Const. art. XVI, § 50(a)(6)(C), the home equity extension of credit is a nonrecourse obligation. In addition, the home equity extension of credit contains many other limitations and restrictions unique to home equity lending and required by Tex. Const. art. XVI, § 50(a)(6). These restrictions are discussed in detail in the commentary in this chapter. A lender forfeits all principal and interest if the lender fails to cure a failure to comply with constitutional restrictions on home equity lending after sixty days’ notice of the violation given by the borrower. Tex. Const. art. XVI, § 50(a)(6)(Q)(x). These cure provisions are discussed in detail in section 11.25 above.

If the lender of a home equity extension of credit has a license from the Office of Consumer Credit Commissioner, the home equity extension of credit must contain the name, mailing address, and telephone number of the OCC. Tex. Fin. Code § 14.104. Additionally, if the home equity loan is a secondary mortgage loan, the alternative attorney’s fee provision should be used. See section 8.4 for a discussion of secondary mortgage loans and see the discussion in section 11.20:7 above concerning alternative provisions.

§ 11.54 **Instructions for Completing Deed of Trust (Home Equity Loan)**

The form for the deed of trust (form 11-3 in this chapter) is adapted from form 8-1 in this manual. The attorney is referred to chapter 8 for general commentary and instructions for completing deeds of trust.

A lien securing a home equity loan may be foreclosed only after court order. Tex. Const. art.

XVI, § 50(a)(6)(D). The power of sale of the deed of trust (home equity loan) is conditioned on the lender obtaining a court order allowing foreclosure under any proceeding authorized by the Texas Rules of Civil Procedure and other applicable law.

A question remains whether the assignment of rents in a deed of trust securing a home equity loan constitutes prohibited additional collateral under Tex. Const. art. XVI, § 50(a)(6)(H). The deed of trust (home equity loan) does not contain an assignment of rents clause. In the absence of definitive authority on this question, the attorney is cautioned to exercise professional judgment regarding this provision.

If the home equity extension of credit is a junior lien and if the lender is a bank, savings and loan association, credit union, or lender with a license from the Office of Consumer Credit Commissioner, the deed of trust (home equity) should be modified as discussed in section 11.20:7 above to comply with requirements applicable to secondary mortgage loans governed by Texas Finance Code chapter 342.

The deed of trust (home equity loan) also contains a notice of confidentiality rights as required by Tex. Prop. Code § 11.008(b). See section 3.16 in this manual.

§ 11.55 Instructions for Completing Home Equity Certificate and Agreement

The home equity certificate and agreement contains a written acknowledgment of the fair mar-

ket value of the homestead as required by Tex. Const. art. XVI, § 50(a)(6)(Q)(ix). The acknowledgment of value is necessary to assure compliance with the 80 percent loan-to-value restriction of Tex. Const. art. XVI, § 50(a)(6)(B). The acknowledgment is conclusive evidence of the fair market value of the homestead if the acknowledgment is made under the conditions set out at Tex. Const. art. XVI, § 50(h). To comply with restrictions against additional collateral, the home equity compliance certificate and agreement (form 11-5 in this chapter) contains a waiver by the lender of cross-collateral provisions contained in other debt instruments. In addition, the form contains other representations and warranties to be made by the borrower at closing, evidencing compliance with certain constitutional requirements for creating a valid home equity lien.

The home equity certificate and agreement must be signed on the date that the extension of credit is made. Tex. Const. art. XVI, § 50(a)(6)(Q)(ix).

§ 11.56 Instructions for Completing Election Regarding Right of Rescission

The election regarding right of rescission (form 11-6 in this chapter) confirms the borrower's election to rescind or decline to rescind the home equity extension of credit under Tex. Const. art. XVI, § 50(a)(6)(Q)(viii). For married couples, a separate notice of right of rescission should be given by each spouse. Funding of the home equity loan should be delayed until the rescission period has expired.

Additional Resources

- Alsup, J. Alton. "Documenting Compliance with the New Texas Home Equity Reform Amendment." In *Advanced Real Estate Drafting Course, 2005*. Austin: State Bar of Texas, 2005.
- . "Lines of Credit under Texas Home Equity and Reverse Mortgage Law." In *Advanced Real Estate Law Course, 2006*. Austin: State Bar of Texas, 2006.
- Baggett, W. Mike. "Foreclosure Update Including Foreclosing Home Equity Loans." In *Advanced Real Estate Strategies Course, 2008*. Austin: State Bar of Texas, 2008.
- Beyer, Gerry W. *Real Property*. 2nd ed. West's Texas Forms 13–15. St. Paul, MN: West, 2001. Supplement 2014.
- St. Claire, Frank A., and William V. Dorsaneo III. *Texas Real Estate Guide*. New York: Matthew Bender & Co., 2001.

Form 11-1

Notice Concerning Extensions of Credit

NOTICE CONCERNING EXTENSIONS OF CREDIT DEFINED BY
SECTION 50(a)(6), ARTICLE XVI, TEXAS CONSTITUTION:

SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION ALLOWS CERTAIN LOANS TO BE SECURED AGAINST THE EQUITY IN YOUR HOME. SUCH LOANS ARE COMMONLY KNOWN AS EQUITY LOANS. IF YOU DO NOT REPAY THE LOAN OR IF YOU FAIL TO MEET THE TERMS OF THE LOAN, THE LENDER MAY FORECLOSE AND SELL YOUR HOME. THE CONSTITUTION PROVIDES THAT:

(A) THE LOAN MUST BE VOLUNTARILY CREATED WITH THE CONSENT OF EACH OWNER OF YOUR HOME AND EACH OWNER'S SPOUSE;

(B) THE PRINCIPAL LOAN AMOUNT AT THE TIME THE LOAN IS MADE MUST NOT EXCEED AN AMOUNT THAT, WHEN ADDED TO THE PRINCIPAL BALANCES OF ALL OTHER LIENS AGAINST YOUR HOME, IS MORE THAN 80 PERCENT OF THE FAIR MARKET VALUE OF YOUR HOME;

(C) THE LOAN MUST BE WITHOUT RECOURSE FOR PERSONAL LIABILITY AGAINST YOU AND YOUR SPOUSE UNLESS YOU OR YOUR SPOUSE OBTAINED THIS EXTENSION OF CREDIT BY ACTUAL FRAUD;

(D) THE LIEN SECURING THE LOAN MAY BE FORECLOSED UPON ONLY WITH A COURT ORDER;

(E) FEES AND CHARGES TO MAKE THE LOAN MAY NOT EXCEED 3 PERCENT OF THE LOAN AMOUNT;

(F) THE LOAN MAY NOT BE AN OPEN-END ACCOUNT THAT MAY BE DEBITED FROM TIME TO TIME OR UNDER WHICH CREDIT MAY BE EXTENDED FROM TIME TO TIME UNLESS IT IS A HOME EQUITY LINE OF CREDIT;

(G) YOU MAY PREPAY THE LOAN WITHOUT PENALTY OR CHARGE;

(H) NO ADDITIONAL COLLATERAL MAY BE SECURITY FOR THE LOAN;

(I) THE LOAN MAY NOT BE SECURED BY HOMESTEAD PROPERTY THAT IS DESIGNATED FOR AGRICULTURAL USE AS OF THE DATE OF CLOSING, UNLESS THE AGRICULTURAL HOMESTEAD PROPERTY IS USED PRIMARILY FOR THE PRODUCTION OF MILK;

(J) YOU ARE NOT REQUIRED TO REPAY THE LOAN EARLIER THAN AGREED SOLELY BECAUSE THE FAIR MARKET VALUE OF YOUR HOME DECREASES OR BECAUSE YOU DEFAULT ON ANOTHER LOAN THAT IS NOT SECURED BY YOUR HOME;

(K) ONLY ONE LOAN DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION MAY BE SECURED WITH YOUR HOME AT ANY GIVEN TIME;

(L) THE LOAN MUST BE SCHEDULED TO BE REPAYED IN PAYMENTS THAT EQUAL OR EXCEED THE AMOUNT OF ACCRUED INTEREST FOR EACH PAYMENT PERIOD;

(M) THE LOAN MAY NOT CLOSE BEFORE 12 DAYS AFTER YOU SUBMIT A LOAN APPLICATION TO THE LENDER OR BEFORE 12 DAYS AFTER YOU RECEIVE THIS NOTICE, WHICHEVER DATE IS LATER AND MAY NOT WITHOUT YOUR CONSENT CLOSE BEFORE ONE BUSINESS DAY AFTER THE DATE ON WHICH YOU RECEIVE A COPY OF YOUR LOAN APPLICATION IF NOT PREVIOUSLY PROVIDED AND A FINAL ITEMIZED DISCLOSURE OF THE ACTUAL FEES, POINTS, INTERESTS, COSTS; AND CHARGES THAT WILL BE CHARGED AT CLOSING; AND IF YOUR HOME WAS SECURITY FOR THE SAME TYPE OF LOAN WITHIN THE PAST YEAR, A NEW LOAN SECURED BY THE SAME PROPERTY MAY NOT CLOSE BEFORE ONE YEAR HAS PASSED FROM THE CLOSING

DATE OF THE OTHER LOAN, UNLESS ON OATH YOU REQUEST AN EARLIER CLOSING DATE DUE TO A DECLARED STATE OF EMERGENCY;

(N) THE LOAN MAY CLOSE ONLY AT THE OFFICE OF THE LENDER, TITLE COMPANY, OR AN ATTORNEY AT LAW;

(O) THE LENDER MAY CHARGE ANY FIXED OR VARIABLE RATE OF INTEREST AUTHORIZED BY STATUTE;

(P) ONLY A LAWFULLY AUTHORIZED LENDER MAY MAKE LOANS DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION;

(Q) LOANS DESCRIBED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION MUST:

(1) NOT REQUIRE YOU TO APPLY THE PROCEEDS TO ANOTHER DEBT EXCEPT A DEBT THAT IS SECURED BY YOUR HOME OR OWED TO ANOTHER LENDER;

(2) NOT REQUIRE THAT YOU ASSIGN WAGES AS SECURITY;

(3) NOT REQUIRE THAT YOU EXECUTE INSTRUMENTS WHICH HAVE BLANKS FOR SUBSTANTIVE TERMS OF AGREEMENT LEFT TO BE FILLED IN;

(4) NOT REQUIRE THAT YOU SIGN A CONFESSION OF JUDGMENT OR POWER OF ATTORNEY TO ANOTHER PERSON TO CONFESS JUDGMENT OR APPEAR IN A LEGAL PROCEEDING ON YOUR BEHALF;

(5) PROVIDE THAT YOU RECEIVE A COPY OF YOUR FINAL LOAN APPLICATION AND ALL EXECUTED DOCUMENTS YOU SIGN AT CLOSING;

(6) PROVIDE THAT THE SECURITY INSTRUMENTS CONTAIN A DISCLOSURE THAT THIS LOAN IS A LOAN DEFINED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION;

(7) PROVIDE THAT WHEN THE LOAN IS PAID IN FULL, THE LENDER WILL SIGN AND GIVE YOU A RELEASE OF LIEN OR AN ASSIGNMENT OF THE LIEN, WHICHEVER IS APPROPRIATE;

(8) PROVIDE THAT YOU MAY, WITHIN 3 DAYS AFTER CLOSING, RESCIND THE LOAN WITHOUT PENALTY OR CHARGE;

(9) PROVIDE THAT YOU AND THE LENDER ACKNOWLEDGE THE FAIR MARKET VALUE OF YOUR HOME ON THE DATE THE LOAN CLOSES; AND

(10) PROVIDE THAT THE LENDER WILL FORFEIT ALL PRINCIPAL AND INTEREST IF THE LENDER FAILS TO COMPLY WITH THE LENDER'S OBLIGATIONS UNLESS THE LENDER CURES THE FAILURE TO COMPLY AS PROVIDED BY SECTION 50(a)(6)(Q)(x), ARTICLE XVI, OF THE TEXAS CONSTITUTION; AND

(R) IF THE LOAN IS A HOME EQUITY LINE OF CREDIT:

(1) YOU MAY REQUEST ADVANCES, REPAY MONEY, AND REBORROW MONEY UNDER THE LINE OF CREDIT;

(2) EACH ADVANCE UNDER THE LINE OF CREDIT MUST BE IN AN AMOUNT OF AT LEAST \$4,000;

(3) YOU MAY NOT USE A CREDIT CARD, DEBIT CARD, OR SIMILAR DEVICE, OR PREPRINTED CHECK THAT YOU DID NOT SOLICIT, TO OBTAIN ADVANCES UNDER THE LINE OF CREDIT;

(4) ANY FEES THE LENDER CHARGES MAY BE CHARGED AND COLLECTED ONLY AT THE TIME THE LINE OF CREDIT IS ESTABLISHED AND THE LENDER MAY NOT CHARGE A FEE IN CONNECTION WITH ANY ADVANCE;

(5) THE MAXIMUM PRINCIPAL AMOUNT THAT MAY BE EXTENDED, WHEN ADDED TO ALL OTHER DEBTS SECURED BY YOUR HOME, MAY NOT EXCEED 80 PERCENT OF THE FAIR MARKET VALUE OF YOUR HOME ON THE DATE THE LINE OF CREDIT IS ESTABLISHED;

(6) IF THE PRINCIPAL BALANCE UNDER THE LINE OF CREDIT AT ANY TIME EXCEEDS 50 PERCENT OF THE FAIR MARKET VALUE OF YOUR HOME, AS DETERMINED ON THE DATE THE LINE OF CREDIT IS ESTABLISHED, YOU MAY NOT CONTINUE TO REQUEST ADVANCES UNDER THE LINE OF CREDIT UNTIL THE BALANCE IS LESS THAN 50 PERCENT OF THE FAIR MARKET VALUE; AND

(7) THE LENDER MAY NOT UNILATERALLY AMEND THE TERMS OF THE LINE OF CREDIT.

THIS NOTICE IS ONLY A SUMMARY OF YOUR RIGHTS UNDER THE TEXAS CONSTITUTION. YOUR RIGHTS ARE GOVERNED BY SECTION 50, ARTICLE XVI, OF THE TEXAS CONSTITUTION, AND NOT BY THIS NOTICE.

I have received a copy of this notice concerning extensions of credit defined by section 50(a)(6), article XVI, of the Texas Constitution.

[Name of borrower]

Date:

[Reserved]

Form 11-2

Home Equity Extension of Credit
[Promissory Note]

Basic Information

THE LOAN EVIDENCED BY THIS INSTRUMENT IS AN EXTENSION OF CREDIT AS DEFINED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION (“HOME EQUITY EXTENSION OF CREDIT”).

Date:

Borrower:

Borrower’s Mailing Address:

Lender:

Place for Payment:

Principal Amount:

Annual Interest Rate:

Maturity Date:

Annual Interest Rate on Matured, Unpaid Amounts:

Terms of Payment (principal and interest): The Principal Amount and interest are due and payable in equal periodic installments of [amount] DOLLARS (\$[amount]), on the [specify] day[s] of each month, beginning [date] and continuing until the unpaid principal and accrued, unpaid interest have been paid in full. Payments will be applied first to accrued interest and the remainder to the Principal Amount.

Security for Payment: This Home Equity Extension of Credit is secured by a deed of trust dated [date] from [Borrower/[name of grantor in deed of trust]] to [name of trustee], trustee, which covers the following real property: [property description] (the "Property").

A. Promise to Pay

Borrower promises to pay to the order of Lender the Principal Amount plus interest at the Annual Interest Rate. This Home Equity Extension of Credit is payable at the Place for Payment and according to the Terms of Payment. All unpaid amounts are due by the Maturity Date. If any amount is not paid either when due under the Terms of Payment or on acceleration of maturity, Borrower promises to pay any unpaid amount plus interest from the date the payment was due to the date of payment at the Annual Interest Rate on Matured, Unpaid Amounts.

B. Default and Remedies

If Borrower defaults in the payment of this Home Equity Extension of Credit or in the performance of any obligation in any instrument securing this Home Equity Extension of Credit, Lender may declare the unpaid principal balance and earned interest on the Home Equity Extension of Credit due. Borrower waives all demand for payment, presentation for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, protest, and notice of protest, to the extent permitted by law.

Include the following paragraph only if the loan is not a secondary mortgage loan.

C. Attorney's Fees

Borrower also promises to pay reasonable attorney's fees and court and other costs if an attorney is retained to collect or enforce the Home Equity Extension of Credit. These expenses will bear interest from the date of advance at the Annual Interest Rate on Matured, Unpaid

Amounts. Borrower will pay Lender these expenses and interest on demand at the Place for Payment. These expenses and interest will become part of the Home Equity Extension of Credit and will be secured by the Security for Payment.

Include the following paragraph for a secondary mortgage loan.

Borrower also promises to pay reasonable attorney's fees and court costs and other fees incurred if this Home Equity Extension of Credit is placed in the hands of an attorney who is not an employee of Lender to collect or enforce the Home Equity Extension of Credit. Borrower will pay Lender these expenses on demand at the Place for Payment. These expenses will become part of the Home Equity Extension of Credit and will be secured by the Security for Payment.

Continue with the following.

D. Loan Conditions

The Home Equity Extension of Credit is made on condition that—

D.1. Borrower not be required to apply the proceeds of the Home Equity Extension of Credit to repay another debt except debt secured by the Property or debt to another lender;

D.2. Borrower not assign wages as security for the Home Equity Extension of Credit;

D.3. Borrower not sign any instrument in which blanks are left to be filled in;

D.4. Borrower not sign a confession of judgment or power of attorney to Lender or to a third person to confess judgment or to appear for Borrower in a judicial proceeding;

D.5. Lender, at the time the Home Equity Extension of Credit is made, provide Borrower a copy of all documents signed by Borrower related to the Home Equity Extension of Credit;

D.6. within a reasonable time after termination and full payment of the Home Equity Extension of Credit, Lender cancel and return the Home Equity Extension of Credit to Borrower and deliver, in recordable form, a release of the lien securing the Home Equity Extension of Credit or a copy of an endorsement or assignment of the lien to a lender that is refinancing the Home Equity Extension of Credit;

D.7. Borrower and Borrower's spouse may, within three days after the Home Equity Extension of Credit is made, rescind the Home Equity Extension of Credit without penalty or charge;

D.8. Borrower and Lender sign a written acknowledgment of the fair market value of the Property on the date the Home Equity Extension of Credit is made;

D.9. except as otherwise provided in this paragraph, Lender or any holder of the Home Equity Extension of Credit will forfeit all principal and interest of the Home Equity Extension of Credit if Lender or the holder fails to comply with Lender's or the holder's obligations under Tex. Const. art. XVI, § 50(a)(6), and fails to correct the failure not later than the sixtieth day after the date that the Lender or the holder is notified by Borrower of failure to comply; except as otherwise provided in this paragraph, Lender or holder may correct a failure to comply with Tex. Const. art. XVI, § 50(a)(6), by—

- a. paying to Borrower an amount equal to any overcharge paid by Borrower under or related to the Home Equity Extension of Credit if Borrower has paid an amount that exceeds an amount stated in Tex. Const. art. XVI, § 50(a)(6)(E), (G), or (O);
- b. sending Borrower a written acknowledgment that the lien securing the Home Equity Extension of Credit is valid only in the amount that the Home Equity Extension of Credit does not exceed the percentage described by Tex. Const. art. XVI, § 50(a)(6)(B), if applicable, or is not

- secured by property described in Tex. Const. art. XVI, § 50(a)(6)(H) or (I), if applicable;
- c. sending Borrower a written notice modifying any other amount, percentage, term, or other provision prohibited by Tex. Const. art. XVI, § 50(a)(6), to a permitted amount, percentage, term, or other provision and adjusting the account of Borrower to ensure that Borrower is not required to pay more than an amount permitted by Tex. Const. art. XVI, § 50, and is not subject to any other term or provision prohibited by Tex. Const. art. XVI, § 50;
 - d. delivering the required documents to Borrower if Lender or holder fails to comply with Tex. Const. art. XVI, § 50(a)(6)(Q)(v), or obtaining the appropriate signatures if Lender or holder fails to comply with Tex. Const. art. XVI, § 50(a)(6)(Q)(ix);
 - e. sending Borrower a written acknowledgment, if the failure to comply is prohibited by Tex. Const. art. XVI, § 50(a)(6)(K), that the accrual of interest and all of Borrower's obligations under the Home Equity Extension of Credit are abated while any prior lien prohibited under Tex. Const. art. XVI, § 50(a)(6)(K), remains secured by the homestead; or
 - f. if the failure to comply cannot be cured by (a)–(e) above, curing the failure to comply by refund or credit to Borrower of \$1,000 and offering Borrower the right to refinance the Home Equity Extension of Credit with Lender or holder for the remaining term of this Home Equity Extension of Credit at no cost to Borrower on the same terms, including interest, as the original Home Equity Extension of Credit with any modifications necessary to comply with Tex. Const. art. XVI, § 50, or terms on which Borrower and

Lender or holder otherwise agree that comply with Tex. Const. art. XVI, § 50;

D.10. Lender or any holder of this Home Equity Extension of Credit shall forfeit all principal and interest of this Home Equity Extension of Credit if this Home Equity Extension of Credit is made by a person other than a person described in Tex. Const. art. XVI, § 50(a)(6)(P), or if the lien is not created under a written agreement with consent of Borrower and Borrower's spouse, unless Borrower and Borrower's spouse who did not initially consent subsequently consent to this Home Equity Extension of Credit;

D.11. the Home Equity Extension of Credit is without recourse for personal liability against Borrower or Borrower's spouse unless the Home Equity Extension of Credit was obtained by actual fraud;

D.12. the Home Equity Extension of Credit is not a form of open-end account that may be debited from time to time or under which credit may be extended from time to time unless this Home Equity Extension of Credit is a home equity line of credit as defined by Tex. Const. art. XVI, § 50(t);

D.13. the Home Equity Extension of Credit is payable in advance without penalty or charge; unless Lender agrees otherwise in writing, prepayments will be applied to the last maturing principal; installments will continue as scheduled until the Principal Amount and all accrued interest are paid;

D.14. the Home Equity Extension of Credit may not be accelerated because of a decrease in the market value of the Property or Borrower's default under other indebtedness not secured by a prior valid encumbrance against the Property; and

D.15. the Home Equity Extension of Credit is closed only at the office of Lender, an attorney at law, or a title company.

E. Prepayments

Borrower may at any time make full or partial prepayments on the principal without paying any penalty, in addition to making regularly scheduled payments. Unless Lender agrees otherwise in writing, the making of partial prepayments will not alter the dates or amounts of regularly scheduled payments.

F. Usury Savings

Interest on the debt evidenced by this Home Equity Extension of Credit will not exceed the maximum rate or amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the Principal Amount or, if the Principal Amount has been paid, refunded. On any acceleration or required or permitted prepayment, any excess interest will be canceled automatically as of the acceleration or prepayment or, if the excess interest has already been paid, credited on the Principal Amount or, if the Principal Amount has been paid, refunded. Loan charges, fees, or similar amounts other than interest will not exceed the maximum amount or rate that may be contracted for, taken, reserved, charged, or received under law. Any loan charges, fees, or similar amounts other than interest in excess of that maximum rate or amount will be credited on the Principal Amount or, if the Principal Amount has been paid, refunded. This provision overrides any conflicting provisions in this Home Equity Extension of Credit and all other instruments concerning the debt.

G. Other Clauses

Borrower will provide written notice to Lender or a holder of Lender's on the holder's failure to comply with any obligations of Tex. Const. art. XVI, § 50, the deed of trust, or applicable law delivered by certified or registered mail, licensed courier, or express mail service providing proof of delivery.

When the context requires, singular nouns and pronouns include the plural.

[Name of borrower]

Form 11-3

Deed of Trust
[Home Equity Loan]

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

THE LOAN SECURED BY THIS DEED OF TRUST IS AN EXTENSION OF CREDIT AS DEFINED BY SECTION 50(a)(6), ARTICLE XVI, OF THE TEXAS CONSTITUTION.

Basic Information

Date:

Grantor:

Grantor's Mailing Address:

Trustee:

Trustee's Mailing Address:

Lender:

Lender's Mailing Address:

Home Equity Extension of Credit (Promissory Note)

Date:

Original principal amount:

Borrower:

Lender:

Maturity date:

Property (including any improvements):

Prior Lien: [include recording information]

Other Exceptions to Conveyance and Warranty:

A. Granting Clause

For value received and to secure payment of the Home Equity Extension of Credit, Grantor conveys the Property to Trustee in trust. Grantor warrants and agrees to defend the title to the Property, subject to the Other Exceptions to Conveyance and Warranty. On payment of the Home Equity Extension of Credit and all other amounts secured by this deed of trust, this deed of trust will have no further effect.

B. Grantor's Obligations

Grantor agrees to—

B.1. keep the Property in good repair and condition;

B.2. pay all taxes and assessments on the Property before delinquency, not authorize a taxing entity to transfer its tax lien on the Property to anyone other than Lender, and not request a deferral of the collection of taxes pursuant to section 33.06 of the Texas Tax Code;

B.3. defend title to the Property subject to the Other Exceptions to Conveyance and Warranty and preserve the lien's priority as it is established in this deed of trust;

B.4. maintain, in a form acceptable to Lender, an insurance policy that—

- a. covers all improvements for their full insurable value as determined when the policy is issued and renewed, unless Lender approves a smaller amount in writing;
- b. contains an 80 percent coinsurance clause;
- c. provides fire and extended coverage, including windstorm coverage;
- d. protects Lender with a standard mortgage clause;
- e. provides flood insurance at any time the Property is in a flood hazard area; and
- f. contains such other coverage as Lender may reasonably require;

B.5. comply at all times with the requirements of the 80 percent coinsurance clause;

B.6. deliver the insurance policy to Lender within ten days of the date of this deed of trust and deliver renewals to Lender at least fifteen days before expiration;

B.7. obey all laws, ordinances, and restrictive covenants applicable to the Property;

B.8. keep any buildings occupied as required by the insurance policy; and

B.9. if the lien of this deed of trust is not a first lien, pay or cause to be paid all prior lien notes and abide by or cause to be abided by all prior lien instruments.

C. Lender's Rights

C.1. Lender may appoint in writing a substitute trustee, succeeding to all rights and responsibilities of Trustee.

C.2. If the proceeds of the Home Equity Extension of Credit are used to pay any debt secured by prior liens, Lender is subrogated to all the rights and liens of the holders of any debt so paid.

C.3. Lender may apply any proceeds received under the insurance policy either to reduce the Home Equity Extension of Credit or to repair or replace damaged or destroyed improvements covered by the policy. If Lender reasonably determines that repairs to the improvements are economically feasible, Lender will make the insurance proceeds available to Grantor for repairs.

C.4. Notwithstanding the terms of the Home Equity Extension of Credit to the contrary, and unless applicable law prohibits, all payments received by Lender from Grantor under the Home Equity Extension of Credit or this deed of trust may, at Lender's discretion, be applied first to amounts payable under this deed of trust and then to amounts due and payable to Lender under the Home Equity Extension of Credit, to be applied to principal or interest in the order Lender in Lender's discretion determines.

C.5. If Grantor fails to perform any of Grantor's obligations, including obligations contained in the Home Equity Extension of Credit or any instrument securing the Home Equity Extension of Credit, Lender may perform those obligations and be reimbursed by Grantor on demand for any amounts so paid, including attorney's fees, plus interest on those amounts from the dates of payment at the rate stated in the Home Equity Extension of Credit for matured, unpaid amounts. The amount to be reimbursed will be secured by this deed of trust.

C.6. If there is a default in the payment of the Home Equity Extension of Credit or if Grantor fails to perform any of Grantor's obligations in any instrument securing the Home Equity Extension of Credit, and the default continues after any required notice of default and time allowed to cure, Lender may—

- a. declare the unpaid principal balance and earned interest on the Home Equity Extension of Credit immediately due; and
- b. foreclose this lien under any proceeding authorized by the Texas Rules of Civil Procedure and other applicable law.

C.7. The lien of this deed of trust may be foreclosed only by court order. On obtaining a court order allowing a foreclosure of this lien under this deed of trust and the Texas Property Code as then in effect, Lender may—

- a. direct Trustee to foreclose this lien, in which case Lender or Lender's agent will cause notice of the foreclosure sale to be given as provided by the Texas Property Code as then in effect; and
- b. purchase the Property at any foreclosure sale by offering the highest bid and then have the bid credited on the Home Equity Extension of Credit.

C.8. Lender may remedy any default without waiving it and may waive any default without waiving any prior or subsequent default.

D. Trustee's Rights and Duties

If directed by Lender to foreclose this lien, Trustee will—

D.1. either personally or by agent give notice of the foreclosure sale as required by the Texas Property Code as then in effect;

D.2. sell and convey all or part of the Property "AS IS" to the highest bidder for cash with a general warranty binding Grantor, subject to the Prior Lien and to the Other Exceptions to Conveyance and Warranty and without representation or warranty, express or implied, by Trustee;

D.3. from the proceeds of the sale, pay, in this order—

- a. expenses of foreclosure, including a reasonable commission to Trustee;
- b. to Lender, the full amount of principal, interest, attorney's fees, and other charges due and unpaid;
- c. any amounts required by law to be paid before payment to Grantor; and
- d. to Grantor, any balance; and

D.4. be indemnified by Lender against all costs, expenses, and liabilities incurred by Trustee for acting in the execution or enforcement of the trust created by this deed of trust, which includes all court and other costs, including attorney's fees, incurred by Trustee in defense of any action or proceeding taken against Trustee in that capacity.

E. General Provisions

E.1. If any of the Property is sold under this deed of trust, Grantor must immediately surrender possession to the purchaser. If Grantor does not, Grantor will be a tenant at sufferance of the purchaser, subject to an action for forcible detainer.

E.2. Recitals in any trustee's deed conveying the Property will be presumed to be true.

E.3. Proceeding under this deed of trust, filing suit for foreclosure, filing application for expedited foreclosure proceeding, or pursuing any other remedy will not constitute an election of remedies.

E.4. This lien will remain superior to liens later created even if the time of payment of all or part of the Home Equity Extension of Credit is extended or part of the Property is released.

E.5. If any portion of the Home Equity Extension of Credit cannot be lawfully secured by this deed of trust, payments will be applied first to discharge that portion to the extent permitted by law.

E.6. Grantor assigns to Lender all amounts payable to or received by Grantor from condemnation of all or part of the Property, from private sale in lieu of condemnation, and from damages caused by public works or construction on or near the Property. After deducting any expenses incurred, including attorney's fees and court and other costs, Lender will either release any remaining amounts to Grantor or apply such amounts to reduce the Home Equity Extension of Credit. Lender will not be liable for failure to collect or to exercise diligence in collecting any such amounts. Grantor will immediately give Lender notice of any actual or threatened proceedings for condemnation of all or part of the Property.

E.7. Interest on the debt secured by this deed of trust will not exceed the maximum amount of nonusurious interest that may be contracted for, taken, reserved, charged, or received under law. Any interest in excess of that maximum amount will be credited on the principal of the debt or, if that has been paid, refunded. On any acceleration or required or permitted prepayment, any such excess will be canceled automatically as of the acceleration or prepayment or, if already paid, credited on the principal of the debt or, if the principal of the debt has been paid, refunded. Loan charges, fees, or similar amounts other than interest will not exceed the maximum amount or rate that may be contracted for, taken, reserved, charged, or received under law. Any loan charges, fees, or similar amounts other than interest in excess of that maximum rate or amount will be credited on the principal of the debt or, if the principal of the debt has been paid, refunded. This provision overrides any conflicting provisions in this and all other instruments concerning the Home Equity Extension of Credit.

E.8. In no event may this deed of trust secure payment of any debt that may not lawfully be secured by a lien on real estate or create a lien otherwise prohibited by law.

E.9. Grantor waives all demand for payment, presentation for payment, notice of intention to accelerate maturity, notice of acceleration of maturity, protest, and notice of protest to the extent permitted by applicable law.

E.10. Grantor agrees to pay reasonable attorney's fees, trustee's fees, and court and other costs of enforcing Lender's rights under this deed of trust if an attorney [**include if the transaction is a secondary mortgage loan:** who is not an employee of Lender] is retained for its enforcement.

E.11. If any provision of this deed of trust is determined to be invalid or unenforceable, the validity or enforceability of any other provision will not be affected.

E.12. The term *Home Equity Extension of Credit* includes all extensions and renewals of the Home Equity Extension of Credit and all amounts secured by this deed of trust.

E.13. This deed of trust binds, benefits, and may be enforced by the successors in interest of all parties.

E.14. If Grantor and Borrower are not the same person, the term *Grantor* includes Borrower.

E.15. Grantor represents to Lender that all of the Property is Grantor's homestead.

E.16. The Home Equity Extension of Credit will conform strictly to the provisions of the Texas Constitution applicable to extensions of credit as defined by Tex. Const. art. XVI, § 50(a)(6). In no event will Grantor or Lender be obligated to perform any act or be bound by any requirement that would conflict therewith. If any term, obligation, privilege, or right of the Home Equity Extension of Credit, this deed of trust, any instrument to which Lender is subrogated hereunder, any instrument renewed or extended hereby, or any other document executed in connection with the Home Equity Extension of Credit fails to conform to Tex. Const. art. XVI, § 50(a)(6), or in the event Lender or any holder of the Home Equity Extension

sion of Credit fails to comply with Tex. Const. art. XVI, § 50(a), then, to the extent provided by applicable law, such violation may be cured as set out in Tex. Const. art. XVI, § 50(a)(6).

[Name of grantor]

Include acknowledgment.

[Reserved]

Form 11-4

Additional Clauses for Deeds of Trust (Home Equity Loan)*Extension of Existing Vendor's Lien and Deed of Trust and Security for Cash Advanced***Clause 11-4-1**

The Home Equity Extension of Credit renews and extends the balance of [amount] DOLLARS (\$[amount]) that Grantor owes on a prior note in the original principal amount of [amount] DOLLARS (\$[amount]), which is dated [date], executed by [name], and payable to the order of [name]. The prior note is secured by two instruments, both of which create liens against the Property: a deed retaining a vendor's lien from [name] to [name], dated [date] and recorded in [recording data] of the real property records of [county] County, Texas; and a deed of trust on the Property from [name] to [name], Trustee, dated [date] and recorded in [recording data] of the real property records of [county] County, Texas. [Include if applicable: The prior note and the lien securing it have been transferred to Lender.] The Home Equity Extension of Credit also represents [amount] DOLLARS (\$[amount]) in cash that Lender advanced to Grantor on [date] at Grantor's request. Grantor acknowledges receipt of the amount advanced. Grantor acknowledges that the lien securing the prior note is valid, that it subsists against the Property, and that by this deed of trust it is renewed and extended in full force until the Home Equity Extension of Credit secured by this deed of trust is paid.

*Extension of Mechanic's Lien Contract and Security for Cash Advanced***Clause 11-4-2**

The Home Equity Extension of Credit renews and extends the balance of [amount] DOLLARS (\$[amount]) that Grantor owes on a prior note in the original principal amount of [amount] DOLLARS (\$[amount]), which is dated [date], executed by [name], and payable to the order of [name]. The prior note is secured by a mechanic's lien contract creating a lien on the Property, dated [date] and recorded in [recording data] of the real property records of [county] County, Texas. [Include if applicable: The prior note and the lien securing it have been transferred to Lender.] The Home Equity Extension of Credit also represents [amount] DOLLARS (\$[amount]) in cash that Lender advanced to Grantor on [date] at Grantor's request. Grantor acknowledges that the lien securing the prior note is valid, that it subsists against the Property, and that by this deed of trust it is renewed and extended in full force until the Home Equity Extension of Credit is paid.

*To Pay Ad Valorem Taxes and Security for Cash Advanced***Clause 11-4-3**

The Home Equity Extension of Credit represents [amount] DOLLARS (\$[amount]) in cash that, at Grantor's request, Lender advanced to pay the following taxes [include if applicable: , including penalties, interest, and collection expenses,] assessed and owed on the Property, which Grantor now owns: [amount] DOLLARS (\$[amount]) to [county] County in payment of taxes for the years [specify]; and [amount] DOLLARS (\$[amount]) to the city of [city] in payment of taxes for the years [specify]. The Home Equity Extension of

Credit also represents [amount] DOLLARS (\$[amount]) in cash that Lender advanced to Grantor on [date] at Grantor's request.

To Pay Income Taxes and Security for Cash Advanced

Clause 11-4-4

The Home Equity Extension of Credit includes [amount] DOLLARS (\$[amount]) that, at Grantor's request, Lender advanced to the United States Internal Revenue Service to discharge federal tax lien number [number], which is recorded in [recording data] of the federal tax lien records of [county] County, Texas. Grantor acknowledges this federal tax lien to be valid and subsisting, and the same is renewed and extended by this deed of trust until the Home Equity Extension of Credit is fully paid. This Home Equity Extension of Credit also represents [amount] DOLLARS (\$[amount]) in cash that Lender advanced to Grantor on [date] at Grantor's request.

Tax and Insurance Reserve or Escrow Account

Clause 11-4-5

Grantor agrees to make an initial deposit in a reasonable amount to be determined by Lender and then make periodic payments to a fund for taxes and insurance premiums on the Property. Periodic payments will be made on the payment dates specified in the Home Equity Extension of Credit, and each payment will be in an amount that Lender estimates will be sufficient to pay taxes and insurance premiums. The fund will accrue no interest, and Lender will hold it without bond in escrow and use it to pay the taxes and insurance premiums. If Grantor has complied with the requirements of this paragraph, Lender must pay taxes before [the end of the calendar year/delinquency].

Grantor agrees to make additional deposits on demand if the fund is ever insufficient for its purpose. If an excess accumulates in the fund, Lender may either credit it to future periodic deposits until the excess is exhausted or refund it to Grantor. When Grantor makes the final payment on the Home Equity Extension of Credit, Lender will credit to that payment the whole amount then in the fund [**include if applicable:** or, at Lender's option, refund it after the Home Equity Extension of Credit is paid]. If this deed of trust is foreclosed, any balance in the fund over that needed to pay taxes, including taxes accruing but not yet payable, and to pay insurance premiums will be paid under section D., "Trustee's Rights and Duties." [**Include if applicable:** If the Property is transferred, any balance then in the fund will still be subject to the provisions of this paragraph and will inure to the benefit of the transferee.] Deposits to the fund described in this paragraph are in addition to the periodic payments provided for in the Home Equity Extension of Credit.

Assignment of Insurance Policies

Clause 11-4-6

If the Property is transferred by foreclosure, the transferee will acquire title to all insurance policies on the Property.

Evidence of Payment of Taxes

Clause 11-4-7

Clause 11-4-7 should not be used if the escrow clause at 11-4-5 is used.

Grantor agrees to furnish on Lender's request evidence satisfactory to Lender that all taxes and assessments on the Property have been paid when due.

*Consumer Credit Insurance Notice***Clause 11-4-8**

GRANTOR MAY FURNISH ANY INSURANCE REQUIRED BY THIS DEED OF TRUST EITHER THROUGH EXISTING POLICIES OWNED OR CONTROLLED BY GRANTOR OR THROUGH EQUIVALENT COVERAGE FROM ANY INSURANCE COMPANY AUTHORIZED TO TRANSACT BUSINESS IN TEXAS.

*Due-on-Sale Clause***Clause 11-4-9**

If Grantor transfers any part of the Property without Lender's prior written consent, Lender may declare the debt secured by this deed of trust immediately payable and invoke any remedies provided in this deed of trust for default. If the Property is residential real property containing less than five dwelling units or a residential manufactured home occupied by Grantor, exceptions to this provision are limited to (a) a subordinate lien or encumbrance that does not transfer rights of occupancy of the Property; (b) creation of a purchase-money security interest for household appliances; (c) transfer by devise, descent, or operation of law on the death of a co-Grantor; (d) grant of a leasehold interest of three years or less without an option to purchase; (e) transfer to a spouse or children of Grantor or between co-Grantors; (f) transfer to a relative of Grantor on Grantor's death; and (g) transfer to an inter vivos trust in which Grantor is or remains a beneficiary and occupant of the Property.

*Subordinate Lien Clause***Clause 11-4-10**

The lien created by this deed of trust is subordinate to the lien securing payment of a note, and any renewals, extensions, and modifications thereof, in the original principal amount of [amount] DOLLARS (\$[amount]), which is dated [date], executed by [name], payable to the order of [name], and more fully described in a deed of trust recorded in [recording data] of the real property records of [county] County, Texas. If default occurs in payment of any part of principal or interest of that \$[amount] note or in observance of any covenants of the deed of trust securing it, the entire debt secured by this deed of trust will immediately become payable at the option of Lender.

Or

Clause 11-4-11

If Grantor fails to pay any part of principal or interest secured by a prior lien or liens on the Property when it becomes payable or defaults on any prior lien instrument, the entire debt secured by this deed of trust will immediately become payable at the option of Lender.

Form 11-5

Home Equity Compliance Certificate and Agreement

Basic Information

Date:

Borrower:

[Borrower's Spouse:]

Borrower's Mailing Address:

[Borrower's Spouse's Mailing Address:]

Lender:

Lender's Mailing Address:

Home Equity Extension of Credit (Promissory Note)

Date:

Original principal amount:

Maturity date:

Property (including any improvements):

Fair Market Value of the Property:

A. Agreement of Parties

A.1. Borrower and Lender acknowledge and agree on the Fair Market Value of the Property.

A.2. The Home Equity Extension of Credit is not secured by any additional real or personal property other than the Property. Any provision contained in any other agreement between the Parties or any third party that gives Lender a security interest in any personal or real property other than the Property will not apply to the Home Equity Extension of Credit.

B. Representation and Warranties of Borrower

Borrower represents and warrants the following:

B.1. The Fair Market Value of the Property is an accurate value estimate based on an appraisal or evaluation not disputed by Borrower.

B.2. The original principal amount of the Home Equity Extension of Credit, when added to the aggregate total of the outstanding principal balances of any other indebtedness secured by valid encumbrances of record against the Property, does not exceed 80 percent of the Fair Market Value of the Property.

B.3. Borrower has not been required to pay, in addition to any interest, fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the Home Equity Extension of Credit that exceed, in the aggregate, 3 percent of the original principal amount of the Home Equity Extension of Credit.

B.4. The lien securing the Home Equity Extension of Credit is a voluntary lien on the Property created with the consent of Borrower [**include if applicable:** and Borrower's Spouse].

B.5. The Home Equity Extension of Credit is not secured by any additional real or personal property other than the Property.

Select one of the following.

B.6. The Property on the date of loan closing is not designated for agricultural use under statutes governing taxation of real property.

Or

B.6. The Property is primarily used for the production of milk.

Select one of the following.

B.7. The Home Equity Extension of Credit is the only debt secured by the Property.

Or

B.7. The Home Equity Extension of Credit is the only debt secured by the Property except the debts and liens described in the following documents: **[specify]**.

Continue with the following.

B.8. The closing of the Home Equity Extension of Credit did not occur before the twelfth day after the later of the date that Borrower submitted a loan application to Lender for the Home Equity Extension of Credit or the date that Lender provided Borrower a copy of a notice concerning the Home Equity Extension of Credit making all disclosures required by section 50(g), article XVI, of the Texas Constitution.

Select one of the following.

B.9. The closing of the Home Equity Extension of Credit did not occur before one business day after the date that Borrower received a copy of the loan application if not previously provided and a final itemized disclosure of the actual fees, points, interest, costs, and charges that were charged at closing.

Or

B.9. Borrower understands that under the Texas Constitution this home equity loan may not be closed before one business day after the date that Borrower receives a copy of the loan application if not previously provided and a final itemized disclosure of actual fees, points, interest, costs, and charges to be charged at the closing of the loan unless Borrower consents in writing for this information to be originally given or modified on the date of closing because of the existence of a bona fide emergency or other good cause. Borrower acknowledges the existence of a bona fide emergency or other good cause being [**specify nature of bona fide emergency or other good cause; see 7 Tex. Admin. Code § 153.13**] and consents to Lender providing a final itemized disclosure of actual fees, points, interest, costs, and charges to be charged on the loan on the loan closing date.

Select one of the following.

B.10. The closing of the Home Equity Extension of Credit did not occur before the first anniversary of the closing date of any other home equity extension of credit made under section 50(a)(6), article XVI, of the Texas Constitution and secured by part or all of the Property.

Or

B.10. Borrower requests a closing of the Home Equity Extension of Credit before the first anniversary of the closing date of any other extension of credit made under section 50(a)(6), article XVI, of the Texas Constitution and secured by part or all of the property due to an emergency that has been declared by the President of the United States or the governor as provided by law and that applies to the area where the property is located.

Continue with the following.

B.11. The closing of the Home Equity Extension of Credit has taken place at the office of Lender, an attorney at law, or a title company.

Select one of the following.

B.12. Borrower has not been required to apply the proceeds of the Home Equity Extension of Credit to repay another debt.

Or

B.12. Borrower has not been required to apply the proceeds of the Home Equity Extension of Credit to repay another debt except debt to another lender.

Or

B.12. Borrower has not been required to apply the proceeds of the Home Equity Extension of Credit to repay another debt except debt secured by the Property.

Or

B.12. Borrower has not been required to apply the proceeds of the Home Equity Extension of Credit to repay another debt except debt to another lender and debt secured by the Property.

Continue with the following.

B.13. Borrower has not assigned wages as security for the Home Equity Extension of Credit or signed a confession of judgment or power of attorney to Lender or anyone to confess judgment or appear for Borrower in a judicial proceeding.

B.14. Borrower has not signed any instrument relating to the Home Equity Extension of Credit in which blanks were left to be filled in.

B.15. Borrower has received, as of the time the Home Equity Extension of Credit was made, a copy of the loan application and all executed documents signed by Borrower at closing related to the Home Equity Extension of Credit.

B.16. All of the Property is the homestead of Borrower. No portion of the Property is nonhomestead.

Select one of the following.

B.17. The Home Equity Extension of Credit is not a form of open-end account that may be debited from time to time or under which credit may be extended from time to time.

Or

B.17. The Home Equity Extension of Credit is a home equity line of credit constituting an open-end account that may be debited from time to time and under which credit may be extended from time to time subject to the restrictions found at Tex. Const. art. XVI, § 50(t).

Continue with the following.

B.18. Borrower has been advised that Borrower may, within three days after the Home Equity Extension of Credit is made, rescind the Home Equity Extension of Credit without penalty or charge. [Include if applicable: Borrower's Spouse has been advised that Borrower's Spouse may, within three days after the Home Equity Extension of Credit is made, rescind the Home Equity Extension of Credit without penalty or charge.]

B.19. Borrower understands and agrees that Lender is relying on the truth and accuracy of each of the representations and warranties in this Certificate and Agreement. Borrower acknowledges that Lender would not make the Home Equity Extension of Credit if any of the representations and warranties were not true and accurate.

[Name of borrower]

SUBSCRIBED AND SWORN TO before me on _____ by [name of affiant].

Notary Public, State of Texas

Include the following if applicable.

[Name of borrower's spouse]

SUBSCRIBED AND SWORN TO before me on _____ by [name of affiant].

Notary Public, State of Texas

Continue with the following.

[Name of lender]

SUBSCRIBED AND SWORN TO before me on _____ by [name of affiant].

Notary Public, State of Texas

[Reserved]

Form 11-6

Note: For married couples, a separate election regarding right of rescission should be given by each spouse.

Election Regarding Right of Rescission

Date:

Borrower:

[Borrower's Spouse:]

Borrower's Mailing Address:

[Borrower's Spouse's Mailing Address:]

Lender:

Lender's Mailing Address:

Home Equity Extension of Credit

Date:

Original principal amount:

In accordance with Tex. Const. art. XVI, § 50(a)(6)(Q)(viii), [Borrower/Borrower's Spouse] provides Lender with the following notice regarding the Home Equity Extension of Credit:

- I have elected not to rescind the Home Equity Extension of Credit. I acknowledge that more than three days have expired from the date that the Home Equity Extension of Credit was made.

- I have elected to rescind the Home Equity Extension of Credit. This notice is given within three days from the date that the Home Equity Extension of Credit was made.

[Name of [borrower/borrower's spouse]]

Form 11-7

This form provides the notice required by Tex. Const. art. XVI, § 50(k)(9), as amended November 5, 2013.

**IMPORTANT NOTICE TO BORROWERS
RELATED TO YOUR REVERSE MORTGAGE**

UNDER THE TEXAS TAX CODE, CERTAIN ELDERLY PERSONS MAY DEFER THE COLLECTION OF PROPERTY TAXES ON THEIR RESIDENCE HOMESTEAD. BY RECEIVING THIS REVERSE MORTGAGE YOU MAY BE REQUIRED TO FORGO ANY PREVIOUSLY APPROVED DEFERRAL OF PROPERTY TAX COLLECTION AND YOU MAY BE REQUIRED TO PAY PROPERTY TAXES ON AN ANNUAL BASIS ON THIS PROPERTY.

THE LENDER MAY FORECLOSE THE REVERSE MORTGAGE AND YOU MAY LOSE YOUR HOME IF:

(A) YOU DO NOT PAY THE TAXES OR OTHER ASSESSMENTS ON THE HOME EVEN IF YOU ARE ELIGIBLE TO DEFER PAYMENT OF PROPERTY TAXES;

(B) YOU DO NOT MAINTAIN AND PAY FOR PROPERTY INSURANCE ON THE HOME AS REQUIRED BY THE LOAN DOCUMENTS;

(C) YOU FAIL TO MAINTAIN THE HOME IN A STATE OF GOOD CONDITION AND REPAIR;

(D) YOU CEASE OCCUPYING THE HOME FOR A PERIOD LONGER THAN 12 CONSECUTIVE MONTHS WITHOUT THE PRIOR WRITTEN APPROVAL FROM THE LENDER OR, IF THE EXTENSION OF CREDIT IS USED FOR THE PURCHASE OF THE HOME, YOU FAIL TO TIMELY OCCUPY THE HOME AS YOUR PRINCIPAL RESIDENCE WITHIN A PERIOD OF TIME AFTER THE EXTENSION OF CREDIT IS MADE THAT IS STIPULATED IN THE WRITTEN AGREEMENT CREATING THE LIEN ON THE HOME;

(E) YOU SELL THE HOME OR OTHERWISE TRANSFER THE HOME WITHOUT PAYING OFF THE LOAN;

(F) ALL BORROWERS HAVE DIED AND THE LOAN IS NOT REPAYED;

(G) YOU COMMIT ACTUAL FRAUD IN CONNECTION WITH THE LOAN; OR

(H) YOU FAIL TO MAINTAIN THE PRIORITY OF THE LENDER'S LIEN ON THE HOME, AFTER THE LENDER GIVES NOTICE TO YOU, BY PROMPTLY DISCHARGING ANY LIEN THAT HAS PRIORITY OR MAY OBTAIN PRIORITY OVER THE LENDER'S LIEN WITHIN 10 DAYS AFTER THE DATE YOU RECEIVE THE NOTICE, UNLESS YOU:

(1) AGREE IN WRITING TO THE PAYMENT OF THE OBLIGATION SECURED BY THE LIEN IN A MANNER ACCEPTABLE TO THE LENDER;

(2) CONTEST IN GOOD FAITH THE LIEN BY, OR DEFEND AGAINST ENFORCEMENT OF THE LIEN IN, LEGAL PROCEEDINGS SO AS TO PREVENT THE ENFORCEMENT OF THE LIEN OR FORFEITURE OF ANY PART OF THE HOME; OR

(3) SECURE FROM THE HOLDER OF THE LIEN AN AGREEMENT SATISFACTORY TO THE LENDER SUBORDINATING THE LIEN TO ALL AMOUNTS SECURED BY THE LENDER'S LIEN ON THE HOME.

IF A GROUND FOR FORECLOSURE EXISTS, THE LENDER MAY NOT COMMENCE FORECLOSURE UNTIL THE LENDER GIVES YOU WRITTEN NOTICE BY MAIL THAT A GROUND FOR FORECLOSURE EXISTS AND GIVES YOU AN OPPORTUNITY TO REMEDY THE CONDITION CREATING THE GROUND FOR FORECLOSURE OR TO PAY THE REVERSE MORTGAGE DEBT WITHIN THE TIME PERMITTED BY SECTION 50(k)(10), ARTICLE XVI, OF THE TEXAS CONSTITUTION. THE LENDER MUST OBTAIN A COURT ORDER FOR FORECLOSURE EXCEPT THAT A COURT ORDER IS NOT REQUIRED IF THE FORECLOSURE OCCURS BECAUSE:

- (1) ALL BORROWERS HAVE DIED; OR
- (2) THE HOMESTEAD PROPERTY SECURING THE LOAN IS SOLD OR OTHERWISE TRANSFERRED.

YOU SHOULD CONSULT WITH YOUR HOME COUNSELOR OR AN ATTORNEY IF YOU HAVE ANY CONCERNS ABOUT THESE OBLIGATIONS BEFORE YOU CLOSE YOUR REVERSE MORTGAGE LOAN. TO LOCATE AN ATTORNEY IN YOUR AREA, YOU MAY WISH TO CONTACT THE STATE BAR OF TEXAS.

THIS NOTICE IS ONLY A SUMMARY OF YOUR RIGHTS UNDER THE TEXAS CONSTITUTION. YOUR RIGHTS ARE GOVERNED IN PART BY SECTION 50, ARTICLE XVI, OF THE TEXAS CONSTITUTION, AND NOT BY THIS NOTICE.

[Name of borrower]

[Name of lender/originator]

Chapter 12

Federal Consumer Disclosure Documents

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Chapter 12

Federal Consumer Disclosure Documents

Note: The Consumer Financial Protection Bureau (CFPB) was created by the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) (Pub. L. No. 111-203, 124 Stat. 1376) in 2010 to administer and enforce federal consumer finance law. All rulemaking and enforcement authority for the Real Estate Settlement Procedures Act (RESPA and Regulation X), the Truth in Lending Act and Regulation Z, the Equal Credit Opportunity Act and Regulation B, the Home Mortgage Disclosure Act and Regulation C, and other federal statutes regulating consumer finance was transferred to, and consolidated within, the CFPB as of July 21, 2011. The CFPB is required to adopt new mortgage finance regulations to implement and interpret the extensive reform measures of the Dodd-Frank Act. The CFPB adopted final rules integrating the RESPA and Truth in Lending Act consumer disclosures on November 20, 2013. 78 Fed. Reg. 79,730 (Dec. 31, 2013). The rules may be found at <https://www.federalregister.gov/d/2013-28210> (Final Rule). These rules became effective October 3, 2015. 80 Fed. Reg. 43,911 (July 24, 2015). Any references in this chapter made to the Final Rule incorporates any amendments thereto.

The CFPB has implemented these Title XIV consumer disclosures as part of rulemaking in which mortgage disclosure forms that consumers receive under the Truth in Lending Act and RESPA when applying for and closing on a home mortgage loan are integrated into a single set of disclosures as required by Title X of the Dodd-Frank Act. By delaying the implementation of the Title XIV disclosure rules to coincide with the integrated RESPA and Truth in Lending Act disclosure rules, the CFPB hoped to reduce the consumer confusion and compliance burden on the industry caused by a trickling down of multiple new rule releases.

The full text of the Dodd-Frank Act may be accessed at <https://www.gpo.gov/fdsys/pkg/PLAW-111-publ203/content-detail.html>.

I. Truth-in-Lending Disclosure Documents

§ 12.1 Overview of the Truth in Lending Act and Regulation Z

§ 12.1:1 Source of Authority

The federal Truth in Lending Act, 15 U.S.C. §§ 1601–1667f, requires a creditor extending consumer credit, including mortgage credit secured by a dwelling, to make meaningful disclosures of actual credit terms that enable the consumer to more readily compare those terms with the terms of competitors and make an informed decision regarding the use and costs of credit. The Act is implemented by Regulation Z (12 C.F.R. pt. 1026), which is an official interpretive rule adopted and published by the CFPB, and the official staff interpretations of Regulation Z (12 C.F.R. pt. 1026, supp. I), which the CFPB staff updates and publishes annually. Reliance on and good-faith compliance with Regulation Z and the official staff interpretations afford creditors protection from civil liability and administrative penalties for failure to comply with disclosure and other requirements imposed on creditors under the Act. *See* 15 U.S.C. § 1640(f). Closed-end credit, including traditional mortgage loans, is regulated under subpart C of Regulation Z, 12 C.F.R. §§ 1026.17–.24.

§ 12.1:2 Coverage

Generally, the Act covers any credit transaction in which a creditor offers or extends a consumer credit at or below a threshold amount adjusted on January 1 each year that is primarily for personal, family, or household purposes and for which a finance charge is made in connection with the credit or, by written agreement, the credit is to be repaid in more than four installments. 12 C.F.R. § 1026.3(b). The threshold amount in 2015 was \$54,600 and will adjust in

tandem with the annual percentage increase in the Consumer Price Index in effect on June 1 of the preceding year. *See* Official Interpretation to 12 C.F.R. § 1026.3(b), Comment 3(b)-1. As discussed below, the Act also covers most consumer credit transactions secured by real property (or by personal property, such as a mobile home, used or intended to be used as the borrower's principal dwelling) regardless of the loan amount. For the Act to apply in any case, the creditor must be a person (including a natural person or a corporate or other business organization) who regularly extends credit of this type, which generally means that the person has extended credit more than twenty-five times in the preceding calendar year or more than five times for transactions secured by a dwelling during the preceding or current calendar year, and the consumer must be a natural person. *See* 15 U.S.C. § 1603.

For the purposes of providing disclosures under the TILA-RESPA Integrated Disclosures Rule (TRID), the rule applies to most closed-end consumer credit transactions secured by real property but does not apply to home equity lines of credit, reverse mortgages, or chattel-dwelling loans such as mobile homes or other dwellings that are not attached to real property. 12 C.F.R. § 1026.19. Loans made by a person or entity not considered to be a creditor are not covered by the rule. 12 C.F.R. § 1026.2(a)(17). Certain transactions, such as down payment assistance loans, have a partial exemption. 12 C.F.R. § 1026.3(h). Construction-only loans and loans secured by vacant land or by twenty-five or more acres are not subject to RESPA but are still subject to the disclosure requirements of TRID. *See* 12 C.F.R. §§ 1024.5, 1026.19. Credit extended to land trusts or trusts for tax or estate planning purposes is also covered. Official Interpretation to 12 C.F.R. § 1026.3(a), Comment 3(a)-10.

§ 12.1:3 Required Consumer Disclosures

Written disclosures must be made for each credit transaction subject to the Act before consummation; must reflect the terms of the actual legal obligation between the parties; and must show the calculated annual percentage rate (APR), finance charge, amount financed, payment schedule, and total of payments and other material disclosures of the cost of credit within permitted tolerances for accuracy. Creditors must disclose information germane to a loan transaction, including the loan details, payment schedule, loan fees, cash to close, service providers, escrows, and relevant state law provisions. All of this information must be provided in a dynamic format, such that the form changes with changes in the loan data and contains only provisions that reflect the terms of the loan transaction. Creditors are further required to ensure that the disclosures are clearly and conspicuously in writing in a form that the consumer can keep. *See* Final Rule, 78 Fed. Reg. 79,730 (Dec. 31, 2013); *see generally* 12 C.F.R. §§ 1026.17, 1026.18, pt. 1026, app. H.

Under the final rule, the new initial disclosure is referred to as the loan estimate (LE) (which combines the good-faith estimate and initial truth-in-lending (TIL) disclosure statement); the new final disclosure is referred to as the closing disclosure (CD) (which combines the HUD-1 settlement statement and the final TIL disclosure statement). *See* Final Rule, 78 Fed. Reg. 79,730 (Dec. 31, 2013). For loan transactions not subject to the new disclosure requirements, the initial and final TIL disclosure statements, good-faith estimate, and HUD-1, as applicable, are still used. *See* Final Rule, 78 Fed. Reg. 79,730 (Dec. 31, 2013). The following consumer disclosures, as applicable, are required under the Act and Regulation Z.

Early Disclosures: Creditors must make early disclosures to the consumer within three busi-

ness days after loan application and at least seven business days before loan closing. *See* 12 C.F.R. § 1026.19(e)(1)(iii). The disclosures must be made before the consumer pays any fee other than a bona fide and reasonable fee for obtaining credit history. *See* 12 C.F.R. § 1026.19(e)(2)(i)(B).

Correction Disclosures: Creditors are permitted to provide a revised LE only if there is a “changed circumstance” defined as (1) an extraordinary event beyond the control of any interested party or other unexpected event specific to the consumer or transaction; (2) information specific to the consumer or transaction that the creditor relied on when providing the disclosures that was inaccurate or changed after the disclosures were provided; or (3) new information specific to the consumer or transaction that the creditor did not rely on when providing the original disclosures. 12 C.F.R.

§ 1026.19(e)(3)(iv)(A). Revised CDs must be received no later than three days before loan consummation if the disclosed APR becomes inaccurate, the loan product changes, or a prepayment penalty is added; for any other changes, the creditor must ensure receipt of the revised CD at or before loan consummation. 12 C.F.R. § 1026.19(f)(2)(i). If a subsequent event causes the disclosure of the APR to be inaccurate outside of permitted tolerances, the creditor must make a correction disclosure of the APR and all other changed terms at least three business days before loan consummation. *See* 12 C.F.R. § 1026.19(a)(2)(ii).

Final Disclosures: Creditors must ensure that the borrower receives a final CD no later than three business days before loan consummation. *See* 12 C.F.R. § 1026.19(f).

Notice of Right of Rescission: If a security interest is or will be retained or acquired in the consumer’s principal dwelling in connection with a mortgage loan, the Act provides the consumer a right to rescind the loan transaction

within three business days. The consumer may exercise the right to rescind until midnight of the third business day after loan consummation, delivery of notice of right of rescission, or delivery of the material disclosures, whichever occurs last. Certain loan transactions, including a loan to finance the purchase or initial construction of the consumer's principal dwelling, are exempt from the right of rescission. *See* 12 C.F.R. § 1026.23(f). Certain required disclosures, such as the amount of the finance charge, the amount financed, and the APR, are regarded as *material* disclosures and must be provided to the consumer before the prescribed three-business-day rescission period begins to run. The failure to timely provide these material disclosures within prescribed tolerances for accuracy not only subjects the creditor to substantial liability under the Act for administrative penalties and costs, restitution, and civil damages but may also have the legal effect of extending the rescission period for up to three years after loan closing. *See* 12 C.F.R. § 1026.23(a)(3). The content and model form of the required rescission notice is set out in 12 C.F.R. § 1026.23(b)(1), (2) and appendix H to Regulation Z.

Variable-Rate Loan Disclosures: Special disclosure requirements apply to variable-rate transactions secured by a principal dwelling under 12 C.F.R. § 1026.19(b), requiring (1) delivery to the consumer at the time of loan application of detailed written adjustable-rate mortgage loan program disclosures and a pre-printed disclosure booklet titled *Consumer Handbook on Adjustable Rate Mortgages*, published by the CFPB, and (2) a loan program disclosure for each variable-rate program for which the consumer expresses an interest, with periodic written disclosures of adjustments made to the interest rate in a variable-rate transaction subject to section 1026.19(b). *See* 12 C.F.R. § 1026.20(c). Home equity lines of credit and other open-end credit secured by residential dwellings require written disclosures and are

subject to substantive rules under subpart B, 12 C.F.R. §§ 1026.5–.13.

Loan Assumption Disclosures: A creditor must provide a consumer new written disclosures when the consumer assumes an existing residential mortgage obligation with the written consent of the creditor and the creditor agrees to accept that consumer as the principal obligor. *See* 12 C.F.R. § 1026.20(b).

Mortgage Loan Sale Disclosure: Creditors that purchase or accept the sale and assignment of a whole loan secured by a consumer's principal dwelling on or after May 29, 2009, must provide the borrower obligated under the loan a written notice within thirty days after the sale or assignment containing information identifying the new creditor, the date of transfer of the loan, the location where the transfer of the loan is recorded, and other relevant information about the creditor. *See* section 404a of the Helping Families Save Their Homes Act of 2009 (Pub. L. No. 111-22), codified at 15 U.S.C. § 1641(g), amending section 131 of the Truth in Lending Act (15 U.S.C. §§ 1601–1667f), and Final Rule, Federal Reserve Board of Governors, published September 24, 2010, at 75 Fed. Reg. 58,489. *See also* 12 C.F.R. § 1026.39.

HOEPA and Higher-Priced Loan

Disclosures: Special rules regarding high-rate, high-cost loans (generally referred to as "Section 32," or Home Ownership and Equity Protection Act (HOEPA) loans) are set out under subpart E, 12 C.F.R. §§ 1026.31, 1026.32, 1026.34. Creditors making HOEPA loans must furnish consumers a written disclosure meeting the requirements of section 1026.32(c) at least three business days before loan consummation and abide by certain substantive terms of that section. Special rules effective October 1, 2009, regarding a new category of higher-priced mortgage loans (HPMLs) are also set out in 12 C.F.R. § 1026.35. The Home Ownership and

Equity Protection Act is codified at 15 U.S.C. § 1639.

Reverse Mortgage Loan Disclosures:

Creditors making reverse mortgage loans subject to 12 C.F.R. § 1026.33(a) must provide consumers an additional written disclosure of the “total annual loan cost of credit” (generally referred to as the “TALC” disclosure) in content set out in 12 C.F.R. § 1026.33(b) and substantially in the model form found in paragraph (d) of appendix K to 12 C.F.R. pt. 1026.

§ 12.1:4 Certain Consumer Protection Provisions

Regulation Z contains various substantive provisions intended to protect consumers from certain unfair, deceptive, and abusive practices of originators and servicers of home mortgage loans. *See* 73 Fed. Reg. 44,522 (July 30, 2008).

Prohibited Deceptive Advertising: Advertising rules targeting deceptive and misleading practices apply to all consumer credit transactions secured by dwellings. Advertisements occurring on or after October 1, 2009, that promote mortgage credit secured by a dwelling are regulated by extensive new advertising rules set out in amendments to 12 C.F.R. §§ 1026.16, 1026.24 (open- and closed-end credits, respectively). The rules are intended to ensure that advertisements for credit clearly and conspicuously provide accurate and balanced information about rates, monthly payments, and other loan features and that several deceptive and misleading advertising practices are banned. The advertising regulations apply to any advertisement (including promotional materials accompanying applications) in any medium promoting a credit transaction secured by a dwelling (except radio and television advertisements, to which new alternative regulations apply).

Unfair or deceptive acts and practices in home mortgage advertising are also regulated by a

final rule of the Federal Trade Commission (FTC) for business entities under its regulatory jurisdiction, including “nondepository covered persons” such as independent mortgage bankers and brokers. *See* 76 Fed. Reg. 43,826 (July 22, 2011); 16 C.F.R. pt. 321. The regulations prohibit any misrepresentation in any commercial communication regarding any term or feature of any mortgage credit product and impose certain recordkeeping requirements. Rulemaking authority of the FTC was transferred to the CFPB on July 21, 2011, pursuant to Title X of the Dodd-Frank Act, but the FTC, the CFPB, and any state’s attorney general or other authorized state officer have statutory authority to bring enforcement actions and seek civil penalties under these deceptive advertising regulations.

Prohibited Coercion of Appraisers: Creditors, mortgage brokers, and their affiliates are prohibited from coercing, influencing, or otherwise encouraging an appraiser to misstate or misrepresent the value of a consumer’s principal dwelling securing a covered loan. Any creditor who knows at or before a loan closing of a violation of these anticoercion regulations is prohibited from extending credit based on such an appraisal unless the creditor documents that it has acted with reasonable diligence to determine that the appraisal does not materially misstate or misrepresent the value of the appraised property. *See* 12 C.F.R. § 1026.42.

Prohibited Servicing Practices: Mortgage servicers of loans secured by principal dwellings are prohibited from (1) failing to timely credit payments as of the date of receipt, with certain exceptions, (2) imposing a late charge on a consumer in connection with the receipt of a payment when the only delinquency is attributable to a late fee or delinquency charge assessed on an earlier payment (and the current payment is otherwise a full payment made on or before its due date or within an applicable grace period), and (3) failing to provide an accurate payoff

statement within a reasonable time after receiving a request for it by a consumer (or a person acting on behalf of a consumer). See 12 C.F.R. § 1026.36(c).

Prohibited Steering and Certain Loan Originator Compensation Practices: Effective for closed-end loans secured by a dwelling for which creditors receive the application on or after April 1, 2011, amendments to 12 C.F.R. § 1026.36 prohibit three certain loan originator compensation practices:

1. *Compensation Based on Loan Terms.* Mortgage brokers and other loan originators are prohibited from charging or receiving compensation based on any terms and conditions of the loan transaction other than the loan amount. This has the effect of prohibiting creditors from paying so-called yield-spread premiums to mortgage brokers (that is, compensation based on spreads in the interest rate) although paying a fee based on a fixed percentage of the loan amount is authorized. “Compensation,” for purposes of the rule, means all amounts paid to and retained by the mortgage broker or other loan originator from salaries, commissions, annual or periodic bonuses, incentive compensation, or awards of merchandise, services, trips, or similar prizes but does not include fees charged to the consumer that are passed through by the loan originator to third-party providers to pay for services such as a property appraisal and a consumer credit report.
2. *Receiving Compensation from Both the Creditor and Consumer.* Mortgage brokers and other loan originators are prohibited from directly receiving compensation from both the creditor, or any other person, and the consumer in the same loan transaction. That is to

say, if any loan originator receives compensation directly from a consumer in a loan transaction, neither the creditor nor any other person may provide any compensation to the loan originator, directly or indirectly, in connection with that same loan transaction.

3. *Steering Consumer to Loan Not in Consumer’s Interest for Greater Compensation.* Mortgage brokers and other loan originators are prohibited from steering consumers to consummate a loan not in the consumer’s interest in order to receive greater compensation from the creditor for the loan than for other loan transactions that the loan originator offered or could have offered the consumer and for which the consumer likely could have qualified. “Steering” for this purpose means advising, counseling, or otherwise influencing a consumer to accept and actually consummate a particular loan transaction. “Safe harbor” procedures are set out in the C.F.R. that may be relied on to assure compliance under which the consumer must be presented with various loan options from a significant number of creditors to choose from.

The new rule applies to all loan originators, including mortgage brokers and loan officers employed by mortgage brokers, mortgage bankers, and financial institutions that, for compensation, arrange, negotiate, or otherwise obtain a consumer loan for another person. Managers, administrative staff, and other employees of such loan originators who do not engage in these activities (and whose compensation is not based on where any particular loan is originated) are not considered loan originators. The rule also applies to creditors who close transactions that are table funded (that is, closings in which the creditor named as payee on the promissory note

does not actually fund the loan from its own resources or a bona fide warehouse line of credit for which it is obligated, but instead obtains funding by another party who is immediately assigned the loan). See Final Rule of the CFPB, published September 24, 2010, in the Federal Register at 75 Fed. Reg. 58,509–58,538, implementing 12 C.F.R. § 1026.36(d), (e).

Prohibited Practices Applicable to HOEPA and HPML Loans: Certain consumer protections apply only to so-called high-rate, high-cost loans (“Section 32” or HOEPA loans), which bear interest rates or fees above a certain percentage or amount described in 12 C.F.R. § 1026.32 and a new category of HPMLs, which bear interest rates above standards described in 12 C.F.R. § 1026.35.

1. *Prohibited Lending without Regard to Repayment Ability.* Creditors are prohibited from extending credit for HOEPA loans or HPMLs to any consumer based on the value of the consumer’s collateral without regard to the consumer’s ability as of the date of consummation to repay the loan from sources other than the collateral itself. Creditors are required to verify each borrower’s income and assets relied on in underwriting the loan and are prohibited from relying on stated amounts of income, including expected income, or assets unless the creditor verifies such amounts according to standards set out in the rules. See 12 C.F.R. §§ 1026.34(a)(4), 1026.35.
2. *Restrictions on Prepayment Penalties.* HOEPA loans and HPMLs may provide for a prepayment penalty only if (1) the penalty is otherwise permitted by state or other applicable law; (2) the source of prepayment funds is not a refinancing by the same creditor or its affiliate; (3) the prepayment pen-

alty will not apply after the two-year period following loan consummation; and (4) the amount of the periodic payment of principal, interest, or both does not change during the four-year period following loan consummation. HOEPA loans have one additional condition not applicable to HPMLs: the consumer’s total monthly debt payments (including amounts owed under the mortgage loan) may not exceed 50 percent of the consumer’s gross monthly income as of the date of loan consummation and as verified under the standards set out in the regulations. See 12 C.F.R. §§ 1026.32(d)(6), 1026.35.

3. *Mandatory Escrow Accounts.* Before consummating a first-lien HPML, the creditor must establish, and thereafter maintain, an escrow account to collect reserves from the consumer for the payment of property taxes and premiums for mortgage-related insurance required by the creditor. The creditor or loan servicer may permit a consumer to cancel the mandatory escrow account if the consumer requests cancellation in a dated written request received by the creditor no earlier than 365 days after loan consummation. Mandatory escrow account regulations apply to covered loans for which applications are received on or after April 1, 2010, or, if such loans are secured by manufactured housing, October 1, 2010. See 12 C.F.R. § 1026.35(b).

§ 12.2 General Considerations

This chapter discusses four of the forms designed to comply with the consumer disclosure requirements applicable to closed-end credit under the Truth in Lending Act and Regu-

lation Z. The following forms are the model forms in appendix H of Regulation Z:

- loan estimate (fixed-rate loan) (from app. H-24(B)) (available at http://files.consumerfinance.gov/f/201403_cfpb_loan-estimate_fixed-rate-loan-sample-H24B.pdf);
- closing disclosure (fixed-rate loan) (from app. H-25(B)) (available at http://files.consumerfinance.gov/f/201403_cfpb_closing-disclosure_cover-H25B.pdf);
- truth-in-lending (sale) disclosure statement (from app. H-1);
- truth-in-lending (loan) disclosure statement (from app. H-2);
- notice of right of rescission (general) (from app. H, clause H-8) (form 12-1 in this chapter); and
- notice of right of rescission (refinancing) (from app. H, clause H-9) (form 12-2).

The forms may require modification to comply with federal and state consumer laws.

Regulation Z, a complex set of rules, mandates making certain disclosures at specified times to any person who obtains consumer credit from a creditor. “Consumer credit” means credit offered or extended to a consumer primarily for personal, family, or household purposes. A “creditor” is the person to whom a consumer credit obligation is initially payable. A creditor must give the consumer (the borrower) truth-in-lending disclosures in a consumer credit transaction if the creditor regularly extends consumer credit that is subject to a finance charge or that is payable by written agreement in more than four installments, not including a down payment, and to whom the obligation is initially payable. A person “regularly extends consumer credit” only if credit is extended in the current or preceding calendar year more than twenty-five times for general transactions or more than five times for

transactions secured by dwellings. 12 C.F.R. § 1026.2. A credit transaction, other than one secured by real property or personal property used as the principal dwelling of the consumer, is exempt from Regulation Z if the total amount financed in the transaction exceeds the threshold amount. 12 C.F.R. § 1026.3(b).

By these definitions, most entities providing credit for home equity financing transactions or for building or improving homes are subject to the requirements of Regulation Z. Chapter 20 in this manual describes transactions involving mechanic’s liens and suggests which of those transactions require use of these forms.

For a description of home equity financing transactions, see chapter 11.

§ 12.2:1 Disclosure Statements

General requirements for the disclosure statements applicable to closed-end credit are set forth in 12 C.F.R. §§ 1026.17, 1026.18. Among other requirements, the disclosures must be made “clearly and conspicuously in writing, in a form that the consumer may keep. They must be segregated from other information, and they “shall not contain any information not directly related to the disclosures required under § 1026.18 or § 1026.47.” 12 C.F.R.

§ 1026.17(a). These disclosures may be provided to the consumer in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act). 15 U.S.C. §§ 7001–7031.

If the creditor is the seller, the (sale) disclosure is used.

Generally, disclosures must be made before the transaction is consummated, but certain transactions involving residential mortgages, mail or telephone orders, or a series of sales have different timing requirements. 12 C.F.R.

§ 1026.17(b). Disclosures for most residential mortgage transactions, for example, must be given at the time of loan application or delivered or placed in the mail not later than three business days after the creditor receives the consumer's written loan application. Redisclosure may be required before loan consummation if there is a changed circumstance, if the disclosed annual percentage rate terms change before loan settlement, or if a subsequent event makes disclosed terms inaccurate. 12 C.F.R.

§§ 1026.17(f), 1026.19(a).

§ 12.2:2 Notices of Right of Rescission

The two notices of right of rescission, forms 12-1 and 12-2 in this chapter, differ only to the extent that one applies to original financing and the other to refinancing. A refinancing involves the satisfaction of one financing transaction with a new financing transaction by the same lender and borrower. 12 C.F.R. § 1026.20(a). In either case the notice provides a cooling-off period of three business days after a person obtains credit involving a lien against the person's principal dwelling. During this period the homeowner may rescind the transaction.

Regulations governing the right to rescind appear at 12 C.F.R. § 1026.23, and forms 12-1 and 12-2 are drafted in accordance with that section.

Creditors subject to truth-in-lending requirements should provide the appropriate notice of right of rescission, form 12-1 or 12-2, if a transaction creates a lien or other security interest in a consumer's principal dwelling, except when the transaction finances the acquisition or initial construction of the dwelling. 12 C.F.R.

§ 1026.23. Typical transactions requiring this form are a refinancing of a residential mortgage transaction by a new creditor, a home equity extension of credit, and a home improvement loan secured by a mechanic's lien. A consumer's principal dwelling may be an ordinary resi-

dence, a condominium, a cooperative unit, a mobile home, or a trailer. A person may have only one principal dwelling, and it may or may not be attached to real property. *See* 12 C.F.R. § 1026.2(a)(19).

All persons who have ownership interests in the dwelling used as security and who use it as their principal dwelling may be entitled to rescind the transaction. 12 C.F.R. § 1026.23(a).

Transactions exempt from the right of rescission and this notice requirement are described in 12 C.F.R. § 1026.23(f). A refinancing by the same creditor of an extension of credit already secured by the consumer's principal dwelling is subject to the right of rescission only to the extent that the new loan amount exceeds the sum of the unpaid principal balance and accrued finance charges of the existing extension of credit and closing costs related to the refinancing transaction. Certain other transactions are also exempt from the right of rescission, including a residential mortgage transaction to finance the acquisition or initial construction of a principal residence. 12 C.F.R. § 1026.23(f).

§ 12.2:3 References

Regulation Z requires strict compliance, and even minor errors or omissions in drafting truth-in-lending documents may lead to administrative enforcement actions, statutory penalties, and individual and class actions for civil liability against creditors. *See* 15 U.S.C. § 1640. Accordingly, attorneys should consult Regulation Z itself, especially the sections addressing these forms (12 C.F.R. §§ 1026.17–.24), for aid in drafting the documents. Section 1026.18 establishes contents for the disclosure statements, and section 1026.23 governs the right of rescission. Regulation Z is published in title 12 of the Code of Federal Regulations, part 1026.

The official commentary to Regulation Z offers additional useful information; commentaries are

issued periodically by officials in the CFPB, and they are published in several places. One generally accessible source for these interpretations is CCH Incorporated's *Consumer Credit Guide*, which may be ordered online at <http://business.cch.com/creditRegulation>. Another source is available online at <https://www.fdic.gov/regulations/laws/rules/6500-100.html>.

§ 12.3 Cautions

The disclosure statements must be completed in compliance with 12 C.F.R. § 1026.18. That section provides, among many other requirements, that if the consumer wishes to have an itemization of the amount financed, the itemization must be given in a separate writing.

For the notices of right of rescission, the creditor should observe certain cautions during the three-business-day cooling-off period: other than money in escrow, no funds should be disbursed; no improvements to the property should be made; no service related to the transaction should be provided to the consumer; and no goods or materials for construction should be delivered to the property. If the consumer rescinds the transaction, within twenty calendar days the creditor must return any money or property received from the consumer. 12 C.F.R. § 1026.23(d).

Any disclosure statements required at consummation, including notices of the right of rescission, and other documents related to the transaction should be signed or delivered to the consumer at loan settlement. The creditor must provide each consumer entitled to rescind two copies of the notice of the right to rescind. A consumer may exercise the right to rescind until midnight of the third business day following the last to occur of loan consummation, delivery of the material disclosures, or delivery of the notices of the right of rescission. A consumer may rescind by written notice to the creditor,

which is effective when mailed, sent by other means, or delivered to the creditor. The creditor must delay disbursing funds and otherwise performing under the extension of credit until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded. Failure of the creditor to deliver required notices or statements can subject the creditor to statutory penalties and civil liability for damages and have the further legal effect of extending the period during which the consumer may rescind the transaction for up to three years after the date of consummation. 12 C.F.R. § 1026.23(a).

§ 12.4 Instructions for Completing Disclosure Statements

Attorneys completing the disclosure statements should follow closely the instructions in 12 C.F.R. § 1026.18 and should also consult the more detailed instructions promulgated by the CFPB (see section 12.2:3 above).

Disclosures not relevant to the transaction may be omitted; for example, the total sale price may be omitted in a loan transaction.

The creditor must be identified at least by name, but this disclosure may appear apart from the other disclosures. When a transaction involves multiple creditors, any one of them may make the disclosures, but the disclosing creditor must be identified. 12 C.F.R. §§ 1026.17(d), 1026.18(a).

The annual percentage rate is determined by methods set forth in 12 C.F.R. § 1026.22. The CFPB provides other useful aids for this calculation, including appendix J of Regulation Z and annual percentage rate tables available from the Board.

“Finance charge” is defined in 12 C.F.R. § 1026.4, which offers several examples and lists certain charges excluded from the finance

charge. Calculating this charge is central to the disclosure statements, so it should be done with great care. Generally, any charge payable directly or indirectly by the consumer that is imposed directly or indirectly by the creditor as an incident to or condition of the extension of credit constitutes a finance charge unless the charge is expressly excluded under 12 C.F.R. § 1026.4. Most notable among the exclusions are charges of a type that would be payable in a comparable cash transaction and the 'real estate related fees' enumerated in 12 C.F.R. § 1026.4(c)(7).

Section 1026.4 also excludes some insurance premiums under certain conditions. Many creditors find this exclusion highly desirable. Premiums for credit life, accident, health, or loss-of-income insurance may be excluded under the following conditions: the creditor does not require such coverage and discloses that fact; the creditor discloses the premium for the initial term of insurance coverage; and the consumer signs or initials an affirmative written request for the insurance after receiving the required disclosures. Premiums for insurance against loss of or damage to property or against liability arising from the ownership or use of property may be excluded under the following conditions: the coverage may be obtained from a person of the consumer's choice, and that fact is disclosed; and if it is obtained from or through the creditor, the creditor discloses the premium for the initial term of coverage.

Determination of the amount financed under 12 C.F.R. § 1026.18(b) requires determining the principal loan amount or cash price less any down payment, adding other amounts financed except the finance charge, and subtracting any prepaid finance charge. The creditor may include other items in this amount, such as rebates or loan premiums.

If the consumer wants an itemization of the amount financed or if the creditor prefers to sup-

ply one as a matter of course, it must be provided in a separate document at the same time as other disclosures required by section 1026.18. A model for this disclosure appears in appendix H-3 of Regulation Z.

In the late-payment disclosure, the creditor must reveal any charge that may be imposed before maturity due to a late payment, other than a deferral or extension charge. 12 C.F.R.

§ 1026.18(*l*). If the creditor merely continues to assess interest at the rate charged before default, that fact need not be disclosed.

For a home equity extension of credit (see chapter 11 in this manual), the description of the security should be inserted as 'your home.'

Regulation Z requires that the disclosure statement include an appropriate version of the assumption policy model clause when the transaction involves a residential mortgage. 12 C.F.R. § 1026.18(*q*). A "residential mortgage transaction" is defined as a transaction in which a "consensual security interest is created or retained in the consumer's principal dwelling to finance the acquisition or initial construction of that dwelling. 12 C.F.R. § 1026.2(a)(24). For this type of transaction, the appropriate form of this model clause (H-6), which can be found at appendix H of Regulation Z, should be added to the disclosure statement.

Appendix H of Regulation Z offers other model clauses that may be suitable for the disclosure statements: variable rate (H-4), demand feature (H-5), and required deposit (H-7).

The truth-in-lending disclosure statements are designed for simple, fixed-interest-rate transactions. If a variable-interest-rate transaction is involved, the disclosure statement forms in this manual must be revised to include variable-interest-rate disclosures. Additionally, if the interest rate on a loan secured by a consumer's principal dwelling, such as a home equity extension of credit or credit for building or improving

a consumer's home, may increase after funding and the term of the credit exceeds one year, variable-interest-rate disclosures in addition to those contained in the truth-in-lending disclosure statement must be given by the creditor to the borrower at the earlier of the time the borrower either receives the loan application form or pays a nonrefundable fee. *See* 12 C.F.R. § 1026.19(b). These variable-rate mortgage loan disclosures are extensive and include twelve features of the variable-rate loan program that must be disclosed. The disclosures would thus be unique to any specific loan program offered by a creditor, and it would be impractical for this manual to provide a model variable-rate mortgage loan disclosure form. If a variable-rate credit secured by the consumer's principal dwelling is desired, the attorney should be sure that the creditor has given appropriate variable-rate disclosures to the borrower.

The other information required in the disclosure statements should be provided in careful accordance with the guidelines of 12 C.F.R. § 1026.18 and the CFPB's commentary on that section.

§ 12.5 Instructions for Completing Notices of Right of Rescission

The attorney should be careful to use the appropriate model form for the notice of right of rescission. The refinancing notice of right of rescission (form 12-2 in this chapter) should be used only for refinancings by the same creditor. *See* section 12.2:2 above. The general form (form 12-1) should be used in other consumer credit transactions requiring the notice.

The date of the transaction is the date the consumer initially becomes obligated, either by signing a note or retail installment contract (home improvement) or by assuming a contractual obligation, whichever is first.

The creditor's name and mailing address must be provided.

The date of the end of the rescission period must be stated accurately; it is the third business day following the date of the transaction specified on the form. A definition of "business day" is given in 12 C.F.R. § 1026.2(a)(6).

Finally, the consumer should sign the form to acknowledge its receipt.

§ 12.6 Additional Documents

For other documents related to mechanic's lien transactions that may require a disclosure statement and notice of right of rescission, see chapter 20 in this manual.

§ 12.7 Other Comments

Regulation Z requires that creditors give consumers the disclosure statements "in a form that the consumer may keep." 12 C.F.R.

§ 1026.17(a). Also, the creditor must retain evidence of compliance, such as by keeping a copy of the executed form showing the consumer's acknowledgment of receiving it, for two years after the date disclosures are required to be made or action is required to be taken. 12 C.F.R. § 1026.25. The form need not be filed or recorded.

Each consumer entitled to rescission must be provided two copies of the notice of right of rescission, one for potential use in canceling the transaction and one for recordkeeping. Each person whose ownership interest in the dwelling is subject to the security interest and who also uses it as his or her principal dwelling should receive two copies of the notice (one copy to each if the notice is provided in electronic form in accordance with the consumer consent and other applicable provisions of the E-Sign Act). As with the disclosure statement, the creditor should also keep a copy of the executed form for two years.

During the three-business-day rescission period provided by the notice, the creditor may accrue finance charges on the amount loaned.

Consumers may waive the right to rescind by providing a signed, dated statement that the loan is necessary to cope with a bona fide personal financial emergency. The waiver form must describe the emergency and specifically waive the right to rescind. Printed or otherwise standard waiver forms generally may not be used for

this purpose, and everyone entitled to rescind must sign the waiver. 12 C.F.R. § 1026.23(e).

The borrower may not be charged for the preparation of truth-in-lending documents. If an attorney for the lender prepares truth-in-lending documents, the lender should pay any fee for that service separately and may not charge or pass through to the borrower (as part of loan settlement or closing costs or otherwise) that fee. 12 U.S.C. § 2610.

[Sections 12.8 through 12.10 are reserved for expansion.]

II. RESPA Consumer Disclosure Documents

§ 12.11 Overview of the Real Estate Settlement Procedures Act

§ 12.11:1 Source of Authority

The Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. §§ 2601–2617, is a federal consumer disclosure and protection statute intended to ensure consumers are provided greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by abusive settlement practices, such as kickbacks or referral fees that tend to increase the costs of settlement services.

RESPA was implemented by Regulation X, 12 C.F.R. pt. 1024, which was an official interpretive rule adopted and published by the Department of Housing and Urban Development (HUD) under its previously congressionally delegated authority to interpret and implement the statute. The Consumer Financial Protection Bureau (CFPB) has enforcement authority. The CFPB reissued its regulation of these statutes under 12 C.F.R. pt. 1024. Regulation X provides

“reliance on rule” protections to lenders and other settlement service providers. No provision of Regulation X imposing liability will apply to any act done or omitted in good-faith compliance with Regulation X or any other official HUD rule, regulation, or interpretation, even if after the act or omission has occurred the rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other means to be invalid for any reason. *See* 12 U.S.C. § 2617(b).

§ 12.11:2 Coverage

RESPA applies to all *federally related mortgage loans*, a term broadly defined by regulation in 12 C.F.R. § 1024.5(a) to include virtually any mortgage loan made by a creditor in the United States that is secured by a lien on a one- to four-family residential dwelling. Certain loans, such as business purpose loans, loans secured by vacant land, and temporary financing, such as a construction loan, with a term of less than two years that is not convertible to permanent financing, are exempt from coverage. *See* the exemptions at 12 C.F.R. § 1024.5(b).

§ 12.11:3 Consumer Disclosures

Generally, RESPA requires that loan originators provide written disclosures to loan applicants and borrowers at various stages of loan origination, settlement, and servicing of a federally related mortgage loan. The rules regulating the form, content, and timing of these required consumer disclosures and certain other key provisions are summarized below.

Loan Estimate: A loan originator, either the lender or the mortgage broker, of a federally related mortgage loan must provide a loan applicant a loan estimate (LE) within three business days after receiving an application (or information sufficient to complete an application). The lender or mortgage broker must provide the LE by hand delivery or by placing the LE in the mail within the three-business-day period. The LE is an estimate of all fees and charges a borrower is likely to incur at loan closing that must be accurate within narrow permitted tolerances; the applicant can comparison shop estimated costs among competing lenders and brokers. "Application," for this purpose, is defined in 12 C.F.R. § 1024.2(b). The form, content, and timing of a standardized LE disclosure must comply with the requirements of 12 C.F.R. § 1025.7 and appendix C, as amended.

Special Information Booklets: A mortgage lender or mortgage broker must provide loan applicants a preprinted special information booklet within three business days after receiving a loan application (unless the application is declined or withdrawn within that three-day period) consisting as applicable of either *Your Home Loan Toolkit—A Step-by-Step Guide* (as revised and effective August 2015 and accessible at http://files.consumerfinance.gov/f/201503_cfpb_your-home-loan-toolkit-web.pdf), in the case of closed-end credits to purchase a home, or *When Your Home is On the Line: What You Should Know about Home Equity Lines of Credit* (Consumer Financial Pro-

tection Bureau), in the case of open-end credit plans. See 12 C.F.R. §§ 1024.6, 1026.19(g).

Escrow Account Notices: When escrow accounts are established and maintained by the lender to reserve for property tax and insurance premium payments, the lender or loan servicer must provide the borrower an initial escrow account statement at loan settlement (or within forty-five days after settlement), and thereafter the servicer must provide the borrower an annual escrow account statement within thirty days after the end of each account computation year (which need not be a calendar year). The initial notice must itemize the amounts of the required initial deposit to the account to be collected from the borrower at loan settlement, the monthly deposits to be collected from the borrower during the twelve months thereafter, and the amounts and timing of payments from the account for that twelve-month computation year. RESPA, section 10, substantively regulates the maximum amount, including any cushion, that a mortgage lender may require the borrower to reserve in an escrow account and the method of analyzing and accounting for escrow balances, including any surpluses, shortages, and deficiencies that may occur. See 12 C.F.R. § 1024.17. The form and content of the initial and annual escrow account statements must comply with the requirements of sections 1024.17(h) and 1024.17(i), respectively, and the Public Guidance Documents referenced therein.

Loan Servicing Transfer Notices: Mortgage lenders, mortgage brokers who anticipate using table funding (that is, closings in which the note is made payable to the mortgage broker and the loan proceeds are advanced by an investor on contemporaneous assignment of the note and security instrument), and dealers of manufactured homes who anticipate a first-lien dealer loan must provide loan applicants a servicing disclosure statement at the time of application or within three business days after submission of an application that indicates whether the servic-

ing of the loan may be assigned, sold, or transferred at any time while the loan is outstanding. The form, content, and timing of the servicing disclosure statement must generally conform to the model format set out in appendix MS-1 to Regulation X, 12 C.F.R. pt. 1024. *See* 12 C.F.R. § 1024.33(b). The term *servicing* generally refers to such contract administration services as collecting scheduled monthly or other periodic payments from the borrower, remitting principal and interest payments to the holder of the loan, disbursing property tax and insurance premium payments from escrow accounts when due, maintaining accounting and business records of account activity, and providing notices and reports required by law or the terms of the mortgage contract. The term *servicer* generally refers to the entity or other person responsible for performing servicing. These terms are defined in 12 C.F.R. § 1024.2.

A written notice of transfer also must be provided to the borrower on the actual assignment, sale, or transfer of servicing by the transferor servicer at least fifteen days before the effective date of the transfer and by the transferee servicer not later than fifteen days after the effective date. A combined written notice of transfer by the transferor and transferee given at loan settlement also satisfies these timing requirements. The notice of transfer must include such information as the effective date of the transfer of servicing; the date on which the transferor servicer will cease accepting payments on the loan and the date the transferee servicer will begin to accept the payments; the names, addresses, and toll-free numbers of the transferor and transferee servicers where inquiries regarding the servicing transfer may be directed; a statement of the borrower's rights regarding complaint resolution; and other content as set out in appendix MS-2 to Regulation X, 12 C.F.R. pt. 1024. A late fee may not be charged for any misdirected payments by a borrower during the sixty-day period beginning on the effective date of the transfer, and misdirected payments may not be treated as late

for credit reporting or other purposes. *See* 12 C.F.R. § 1024.33(c).

Affiliated Business Arrangement Disclosure Statement: Any mortgage lender, mortgage broker, real estate broker, or other person or entity in a position to refer settlement service business that refers a borrower or other person to an affiliated business to perform a settlement service must provide the borrower or other person to whom the referral is made a written affiliated business arrangement disclosure statement. The disclosure statement must generally be in the format of appendix D to Regulation X, 12 C.F.R. pt. 1024. The statement must describe the nature of the relationship between the person making the referral and the referred settlement service provider, set out the estimated charge or range of charges by the provider for the settlement services, and disclose that the borrower or other person is not required to use the referred service provider and is free to “shop around” for the best services and rates that may be available from other service providers. An affiliated business arrangement exists when a person or entity in a position to refer settlement service business, or an associate of such a person, has an affiliate relationship with, or a direct or beneficial interest of more than 1 percent in, a provider of settlement services and directly or indirectly refers such settlement service business to that provider (or affirmatively influences the selection of that affiliated provider). The disclosure statement must be on a sheet of paper separate from other disclosures and be provided at the time the referral is made. If a lender makes the referral to a borrower, the disclosure may be provided at the time the good-faith estimate disclosure is provided to the borrower. *See* 12 C.F.R. § 1024.15.

§ 12.11:4 Prohibition against Kickbacks and Unearned Fees

RESPA, section 8, prohibits kickbacks, referral fees, and unearned fees in connection with fed-

erally related mortgage loans. 12 U.S.C. § 2607. Specifically, section 8, as interpreted by Regulation X, provides that “[n]o person shall give and no person shall accept any fee, kickback or other *thing of value* pursuant to any agreement or *understanding*, oral or otherwise, that business incident to or part of a *settlement service* involving a federally related mortgage loan shall be *referred* to any person.” 12 C.F.R. § 1024.14(b) (emphasis added). Payment of a fee or other thing of value in consideration of a referral of a settlement service or an agreement to split or pay a portion of a fee charged for the performance of a settlement service with a person referring the business, other than for the reasonable value of services actually performed by the person accepting the payment, is a violation of section 8. A violation implicates both the party giving and the party receiving the unlawful kickback, referral fee, or other thing of value. Moreover, against the weight of judicial authority, the CFPB construes section 8 to prohibit unearned fees even when the fee is not split between two parties, including a charge by any person for which no or nominal services are performed or for which duplicative fees are charged. Section 8 violations are rife with enforcement actions by the CFPB and civil litigation under private rights of action, including class action.

Practitioners are cautioned that section 8 violations are most often inferred from specific facts, and careful analysis of all relevant facts is often required to determine if a violation has occurred. Key elements of the offense are broadly construed. A ‘referral, for example, includes any oral or written action directed to the borrower or other person that has the effect of affirmatively influencing the person’s selection of a particular provider of a settlement service for which the person will be charged. 12 C.F.R. § 1024.14(f). An “understanding” need not be written or oral, but may be inferred from a practice, pattern, or course of conduct. 12 C.F.R. § 1024.14(e). Moreover, a ‘thing of value’ does not require a

transfer of money and may be any of a number of seemingly unrelated benefits to the party making a referral: discounts, credits, equity adjustments, deferred rents, debt reduction or forgiveness, free promotions and advertising, assumption of business expenses, expense-paid travel and vacations, and any other imaginable benefit. 12 C.F.R. § 1024.14(d).

Section 8, however, expressly permits payment to attorneys, title agents, or other settlement service providers for goods or facilities actually furnished or services actually performed; fee splits between real estate agents and real estate brokers pursuant to cooperative brokerage agreements; and compensation by an employer to its own employees for referrals either to the employer or to an affiliated business. *See* 12 C.F.R. § 1024.14(g)(1).

Referrals of borrowers or other persons to affiliates to perform settlement services are permitted under strict guidelines for affiliated business arrangements set out in 12 C.F.R. § 1024.15, which requires that written disclosure of the business arrangement is timely made in the form of an affiliated business arrangement disclosure statement described above, that the borrower or other person is not required to use any particular provider of the service, and that the only thing of value that is received from the arrangement is a bona fide return on the ownership interest the referring party may have in the affiliate or a franchise relationship. A prohibited “required use” for this purpose is defined in 12 C.F.R. § 1024.2. **Caution:** HUD published an ‘Advanced Notice of Proposed Rulemaking’ in the Federal Register on June 3, 2010, at 75 Fed. Reg. 31,334 to strengthen and clarify the RESPA, section 8, prohibition against the “required use” of affiliated settlement service providers, examining in particular the practice of homebuilders’ conditioning construction discounts or discounted upgrades on the use of the homebuilder’s affiliated mortgage lender.

HUD's Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements, 61 Fed. Reg. 29,258 (June 7, 1996), provides guidance on the affiliated business arrangement exemption to section 8 prohibitions against referral fees. According to the policy statement, Congress did not intend this exemption to promote disguised referral fee payments through sham arrangements or shell entities for which there is no bona fide business purpose. By definition, for this exemption to apply, the person or entity receiving the referral must be a bona fide provider of settlement services. If the person or entity is not, considering particular factors enumerated in the policy statement, the arrangement would not qualify for the exemption even if the three safe harbor conditions of 12 C.F.R. § 1024.15 are otherwise met.

HUD's Statement of Policy 1996-3, Rental of Office Space, Lock-outs, and Retaliation, 61 Fed. Reg. 29,264 (June 7, 1996), also addresses the application of section 8 to the practice of settlement service providers (such as mortgage lenders) leasing desks or office space at real estate brokerage offices in anticipation of loan referrals. This practice is permitted only if the general market value of the desk rental or other arrangement is paid by the settlement service provider. The "general market value" for this purpose, which also may include an appropriate portion of the cost for related office services actually provided under the arrangement (such as secretarial service, utilities, telephone, and other office equipment), means the rental amount that a *non-settlement service provider* (that is, one who would not be renting in anticipation of referrals) would pay for the same amount of space and services in the same or a comparable building.

HUD's interpretive rule published June 25, 2010, in the Federal Register at 75 Fed. Reg. 36,271 addressed the application of section 8 to payments by home warranty companies to real

estate brokers and agents for services performed in connection with home sales transactions in which a home warranty is sold to the purchaser. HUD concluded that a broker or agent may not be compensated by a home warranty company for marketing services directed to particular homebuyers or sellers and deemed any payments by a home warranty company to a broker or agent to be lawful only if services are actually performed by the broker or agent, are not nominal and are necessary and distinct from the primary services performed by the real estate broker or agent in the same transaction, and are services for which there is no duplicative charge. For example, conducting actual inspections of items to be covered by the home warranty to identify preexisting conditions, recording serial numbers of the items, documenting the condition of the items by taking photographs, and preparing a report to the home warranty company of findings may be compensable services. Any payment for compensable services nevertheless must reasonably relate in amount to the value of services actually performed.

Persons violating section 8, on conviction, may be fined not more than \$10,000, imprisoned for not more than one year, or both. Any person violating section 8 provisions also is jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for the service. In any private action brought under section 8, the court may award court costs and reasonable attorney's fees to the prevailing party. See 12 U.S.C. § 2607(d); 12 C.F.R. § 1024.14(a). Violations may also be grounds for disbarment, suspension, or ineligibility of lenders participating in federally insured or guaranteed loan programs or for enforcement actions by federal or state agencies having supervisory authority over lenders. 12 C.F.R. § 1024.14.

§ 12.11:5 Prohibition against Required Use of Particular Title Company

RESPA, section 9, provides that no seller of property that will be purchased with the assistance of a federally related mortgage loan may require that, as a condition of selling the property, title insurance covering the property must be purchased by the buyer from any particular title company. 12 U.S.C. § 2608. This provision is thought by some practitioners to be inapplicable to Texas practice, in which the seller customarily purchases and pays the premium for the owner's title insurance policy. An offer of a discounted package or of discounts or rebates for the purchase of multiple settlement services as an inducement to the buyer to use a particular title company may be permitted without violating this prohibition against a required use. See the definition of "required use" at 12 C.F.R. § 1024.2. Any seller who violates section 9 is liable to the buyer in an amount equal to three times all charges paid for the title insurance. *See* 12 U.S.C. § 2608; 12 C.F.R. § 1024.14.

§ 12.11:6 Prohibition against Charging for Preparation of Regulatory Disclosures

RESPA, section 12, provides that no fee or charge may be imposed or charged by a lender of a federally related mortgage loan, or by the servicer of the loan, for the preparation and distribution to the borrower or other person of a HUD-1 or HUD-1A settlement statement; escrow account notices and statements required by RESPA, section 10; or statements required by the Truth in Lending Act. *See* 12 U.S.C. § 2610; 12 C.F.R. § 1024.12.

§ 12.11:7 Prohibition against Collecting Excessive Escrow Deposits

RESPA, section 10, substantively limits the amounts that a lender of a federally related mortgage loan may require the borrower to deposit in any escrow account established by the lender to ensure timely payment of property taxes, insurance premiums, or other property charges. 12 U.S.C. § 2609. When establishing the account, typically at loan closing, the lender may require an initial deposit equal to the proportion of total annual costs reasonably anticipated to be paid from the account for the period beginning with the date on which the costs were last paid (or the date on which each of the costs would have been paid under the normal lending practices of the lender and local custom) and ending on the due date of the first installment payment under the mortgage loan plus an additional reserve (for unanticipated disbursements) of no more than one-sixth of the total of all such costs to be paid from the escrow account over the ensuing twelve-month period (that is, a two-month cushion). Thereafter, a lender may not require the borrower to deposit in any such escrow account in any month a sum greater than one-twelfth of the total of the estimated taxes, insurance premiums, and other charges that are reasonably anticipated to be paid from the account during the ensuing twelve months plus a cushion of no more than one-sixth of the monthly amount. If a lender conducts an account analysis, however, and determines there is or will be a deficiency in the escrow account, the lender may require the borrower to make additional monthly deposits to the account to avoid or eliminate the deficiency, subject to substantive and procedural rules set out in Regulation X, 12 C.F.R. § 1024.17(f). Violations of section 10 of RESPA are subject to civil penalties set out in 12 U.S.C. § 2609(d).

§ 12.12 Upcharges Prohibited

The amount stated on the HUD-1 or HUD-1A settlement statement for any itemized settlement service must not exceed the amount actually received by the settlement service provider for that service (unless the charge is an average charge in accordance with 12 C.F.R. § 1024.8(b)(2)). Third-party fees disclosed on the good-faith estimate (GFE) may not exceed

the estimated amounts to be paid the third-party settlement service providers, and such fees reported on the HUD-1 may not exceed the amounts actually paid to such third parties. Thus, even earned markups that were permitted based on the value of actual services performed by the lender or mortgage broker in connection with services principally performed by third parties now appear to be prohibited.

Additional Resources

Consumer Financial Protection Bureau, *TILA-RESPA Integrated Disclosure—Guide to the Loan Estimate and Closing Disclosure Forms*, http://files.consumerfinance.gov/f/201508_cfpb_tila-respa-integrated

-disclosure-guide-to-the-loan-estimate-and-closing.pdf.

Hall, Kenneth F. *Mortgage and Consumer Loan and Lease Disclosure Handbook*. 2015–2016 ed. Thomson Reuters, 2015.

Form 12-1

This form is based on the model form at 12 C.F.R. pt. 226 app. H, clause H-8.

Truth-in-Lending Notice of Right of Rescission
[Notice of Right to Cancel—General]**[Identification of transaction]****Your Right to Cancel**

You are entering into a transaction that will result in a [mortgage on/lien on/security interest in] your home. You have a legal right under federal law to cancel this transaction, without cost, within three business days from whichever of the following events occurs last:

1. the date of the transaction, which is [date]; or
2. the date you received your Truth-in-Lending disclosures; or
3. the date you received this notice of your right to cancel.

If you cancel the transaction, the [mortgage/lien/security interest] is also canceled. Within twenty calendar days after we receive your notice, we must take the steps necessary to reflect the fact that the [mortgage on/lien on/security interest in] your home has been canceled, and we must return to you any money or property you have given to us or to anyone else in connection with this transaction.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to

the address below. If we do not take possession of the money or property within twenty calendar days of your offer, you may keep it without further obligation.

How to Cancel

If you decide to cancel this transaction, you may do so by notifying us in writing, at [creditor's name and business address].

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by signing and dating the notice of cancellation below. Keep one copy of this notice because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice not later than midnight of [date] (or midnight of the third business day following the latest of the three events listed above). If you send or deliver your written notice to cancel in some other way, it must be delivered to the above address no later than that time.

In this agreement "you" and "your" refer to the consumer, and "we" and "us" refer to the creditor.

Consumer acknowledges receipt of the completed Truth-in-Lending Notice of Right of Rescission.

Consumer's signature

Date:

Notice of Cancellation

I WISH TO CANCEL.

Consumer's signature

Date:

[Reserved]

Form 12-2

This form is based on the model form at 12 C.F.R. pt. 226 app. H, clause H-9.

Truth-in-Lending Notice of Right of Rescission
[Notice of Right to Cancel—Refinancing]

[Identification of transaction]

Your Right to Cancel

You are entering into a new transaction to increase the amount of credit previously provided to you. Your home is the security for this new transaction. You have a legal right under federal law to cancel this new transaction, without cost, within three business days from whichever of the following events occurs last:

1. the date of this new transaction, which is [date]; or
2. the date you received your new Truth-in-Lending disclosures; or
3. the date you received this notice of your right to cancel.

If you cancel this new transaction, it will not affect any amount that you presently owe. Your home is the security for that amount. Within twenty calendar days after we receive your notice of cancellation of this new transaction, we must take the steps necessary to reflect the fact that your home does not secure the increase of credit. We must also return any money you have given to us or anyone else in connection with this new transaction.

You may keep any money we have given you in this new transaction until we have done the things mentioned above, but you must then offer to return the money at the address below.

If we do not take possession of the money within twenty calendar days of your offer, you may keep it without further obligation.

How to Cancel

If you decide to cancel this new transaction, you may do so by notifying us in writing, at **[creditor's name and business address]**.

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by signing and dating the notice of cancellation below. Keep one copy of this notice because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than midnight of **[date]** (or midnight of the third business day following the latest of the three events listed above).

If you send or deliver your written notice to cancel in some other way, it must be delivered to the above address no later than that time.

In this agreement "you" and "your" refer to the consumer, and "we" and "us" refer to the creditor.

Consumer acknowledges receipt of the completed Truth-in-Lending Notice of Right of Rescission.

Consumer's signature

Date:

Notice of Cancellation

I WISH TO CANCEL.

Consumer's signature

Date:

[Reserved]

Chapter 13

Residential Contracts for Deed

The Real Estate Forms Committee has removed the chapter on residential contracts for deed. These transactions are heavily regulated, and in the majority of circumstances the risks and consequences of failure of compliance outweigh the usefulness of the transaction in light of the fact that the same result can be accomplished by a note, deed, and deed of trust. *See, e.g. Morton v. Nguyen*, 369 S.W.3d 659 (Tex. App.—Houston [14th Dist.] 2012, pet. filed).

Contracts for deed, sometimes referred to as ‘installment land contracts’ or ‘rent-to-own’ financing arrangements, are legal and have been used and litigated in Texas for seller-financed property sales for more than a hundred years. *See Taber v. Dallas Co.*, 106 S.W. 332 (Tex. 1908). Contracts for deed are now, however, characterized by Texas Property Code section 5.062 as “executory contracts,” transactions that are incomplete or unfinished in a material respect, namely, the delivery of the deed.

The restrictions of the statute do not apply to a contract that provides for the seller to deliver a deed within 180 days, to commercial transactions, or to transactions in which the buyer is not going to use the property as his principal residence. *See* Tex. Prop. Code § 5.062.

The Code was amended in 1995, 2001, and 2005 to remedy what were perceived as seller abuses of contracts for deed, for example, collecting a large down payment and then, if the buyer fell behind, using the eviction process to repossess the property as if the buyer were no more than a tenant.

Because of this history, burdensome consumer protection rules and restrictions now apply, including the following: These contracts must now be recorded. A thorough financial disclosure and detailed calculations must be given to the buyer at closing. The seller must provide the buyer with a current survey and copies of documents from the chain of title. Many precontract and preclosing disclosures are required for which there are no standard forms. Certain statutory language must be included in the contract, or it can be canceled and rescinded by the buyer at any time, and the buyer will be entitled to a full refund of all sums paid to the seller. The seller must provide the buyer with tax and insurance information and copies of policies. Buyers also have a right to convert to a deed, note, and deed of trust. And the seller must provide a detailed accounting statement every January. *See* Tex. Prop. Code §§ 5.063--085.

Failing to comply with the statutory requirements may constitute a deceptive trade practice and result in treble damages. Additionally, the seller can be assessed penalties of \$250 per day for each day after January 31st that the annual accounting statement is not delivered. There are restrictions and prohibitions against selling under an executory contract if there is a mortgage on the property. *See* Tex. Prop. Code §§ 5.069, 5.070, 5.072, 5.077, 5.078, 5.085.

Accordingly, contracts for deed have fallen into disuse, which was exactly the legislature’s intent.

Note that even if a seller is willing to endure the various restrictions, risks, and potential liability involved in selling the property under a contract for deed, the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 licensing requirements may still apply. *See* the sections titled ‘Dodd-

Frank Wall Street Reform and Consumer Protection Act' and "Mortgage Loan Originators" in chapter 2 of this manual.

The 2005 amendment to the Code expanded the definition of "executory contract" to include lease-option agreements. *See* Tex. Prop. Code § 5.0621. Clever draftsmanship will not avoid section 5.061. The courts look to substance over form in interpreting these transactions.

For these reasons, before advising a client to sell property under an executory contract, all circumstances and alternatives should be thoroughly evaluated.

Chapter 14

Foreclosure Documents

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Chapter 14

Foreclosure Documents

The Real Estate Forms Committee would like to acknowledge the contribution of G. Tommy Bastian and his work on the new rules for home equity foreclosures. Please see G. Tommy Bastian, *Expedited Foreclosure Home Equity, Home Equity Line of Credit, Reverse Mortgage, and Tax Lien Transfer and Property Tax Loan Forms for the New Supreme Court Rules*, in State Bar of Tex. Prof. Dev. Program, Advanced Real Estate Drafting Course ch. 15, 16–20, 27–30 (2012).

§ 14.1 General Considerations

This chapter summarizes the nonjudicial foreclosure process for real and personal property. The forms in this chapter are drafted specifically for the loan documents in this manual. Foreclosure by a mortgage servicer on behalf of a mortgagee requires a special notice of sale. See form 14-13 in this chapter. The attorney is cautioned that these letters and documents are provided as examples only and should not be used as standard forms. As each foreclosure is unique and requires careful consideration, the attorney must tailor the forms to fit the facts of the case. A complete analysis of Texas foreclosure law is beyond the scope of this manual.

For a thorough discussion of Texas foreclosure law, with additional forms and examples, see William H. Locke, Jr., Ralph Martin Novak, Jr. & G. Tommy Bastian, eds. *Texas Foreclosure Manual*, State Bar of Texas (3rd ed. 2014 & Supp. 2015). See also ‘Additional Resources’ at the end of these practice notes for related bibliographical material.

§ 14.2 Real Estate Foreclosures

§ 14.2:1 General

A real property foreclosure must be conducted by a trustee or substitute trustee in strict compliance with Tex. Prop. Code §§ 51.0001, 51.002,

51.0021, 51.0025, 51.0074, 51.0075, 51.009, 51.015 and with any requirements set out in the deed of trust.

The attorney must carefully review all loan documents to determine if additional notices, postings, or procedures apply to the foreclosure. For example, the prior version of the foreclosure statute required posting the foreclosure notice in three public places. That language was incorporated into many old deed-of-trust forms. Even though the law no longer requires these postings, if the deed of trust includes the language, the postings must be made. *Harwath v. Hudson*, 654 S.W.2d 851, 854 (Tex. App.—Dallas 1983, writ ref’d n.r.e.).

Many deed-of-trust forms have a foreclosure section that essentially tracks the language of section 51.002 of the Property Code. Sections 51.0001, 51.0021, 51.0025, 51.0075, and 51.009 regulate foreclosures by mortgage servicers. Section 51.0075(f) allows the foreclosure purchaser and the trustee or substitute trustee to agree on a reasonable time after acceptance of the bid within which to deliver the purchase price; otherwise, the purchase price is payable without delay after acceptance of the bid. The deed of trust and security agreement forms in this manual do not repeat the statutory language but instead require the mortgagee or mortgage servicer to foreclose in accordance with the law then in effect.

§ 14.2:2 Statutory Requirements

In Texas, a nonjudicial foreclosure sale must be conducted by trustees or substitute trustees on the first Tuesday of a month in the county in which part or all of the real estate is located. Tex. Prop. Code § 51.002. The sale must take place at the county courthouse in the county in which the property is located unless the commissioner's court designates another public place within a reasonable proximity to the county courthouse, as determined by the commissioner's court where the sale will be held. Tex. Prop. Code § 51.002(h). The commissioner's court designation of sales location must be recorded in the real property records of that county, but will not be effective before the ninetieth day after the designation is recorded. Tex. Prop. Code § 51.002(h). A designation by a commissioner's court is not a ground for challenging or invalidating any sale. Tex. Prop. Code § 51.002(h). If the first Tuesday falls on a courthouse holiday, the sale may still be conducted. *Koehler v. Pioneer American Insurance Co.*, 425 S.W.2d 889, 891 (Tex. Civ. App.—Fort Worth 1968, no writ) (July 4th). If the deed of trust covers property that lies in two or more counties, the notice should provide where the sale is to take place. The notice must be posted in all counties in which the real property is located. Tex. Prop. Code § 51.002(b). If the deed of trust covers multiple properties located in different counties, all properties can be foreclosed in one sale, even if the tracts are not contiguous. *Bateman v. Carter-Jones Drilling Co.*, 290 S.W.2d 366, 370 (Tex. Civ. App.—Texarkana 1956, writ ref'd n.r.e.); *Dall v. Lindsey*, 237 S.W.2d 1006, 1009–10 (Tex. Civ. App.—Amarillo 1951, writ ref'd n.r.e.); see also *Lewis v. Dainwood*, 130 S.W.2d 456, 457 (Tex. Civ. App.—San Antonio 1939, writ ref'd).

Section 51.0001 of the Texas Property Code recognizes the effects of the national Mortgage Electronic Registration System and the securitization of mortgages. This section added defini-

tions of “book entry system,” “debtor’s last known address,” “mortgage servicer,” “mortgagee,” “mortgagor,” “security instrument,” “substitute trustee,” and “trustee.”

Section 51.002(b) of the Property Code has three requirements for a foreclosure sale: (1) the mortgage servicer must give written notice of the sale to all debtors obligated to pay the debt, (2) the notice of the sale must be posted at the county courthouse of each county in which the property is located designating the county in which the property will be sold, and (3) a notice of the sale must be filed with the county clerk of each county in which the property is located. These steps must be completed at least twenty-one days before the sale date. Tex. Prop. Code § 51.002(b). However, if the courthouse or county clerk’s office is closed because of inclement weather, natural disaster, or other act of God, the notices required by section 51.002(b) may be posted or filed up to forty-eight hours after the courthouse or county clerk’s office reopens for business. Tex. Prop. Code § 51.002(b–1).

Additionally, the Property Code requires the mortgage servicer to give at least twenty days’ notice of default before posting the property for foreclosure if the property is the debtor’s residence. Tex. Prop. Code § 51.002(d).

Property Code section 51.002 requires the mortgage servicer to serve written notice of the sale on “each debtor who, according to the records of the mortgage servicer of the debt, is obligated to pay the debt. See Tex. Prop. Code § 51.002(b)(3). Although a guarantor has been held not to be such a debtor, many attorneys elect to send a notice of the foreclosure sale to a guarantor in the same manner as sent to the debtor. See *Long v. NCNB—Texas National Bank*, 882 S.W.2d 861, 866 (Tex. App.—Corpus Christi 1994, no writ); *Bishop v. National Loan Investors, L.P.* 915 S.W.2d 241, 245 (Tex. App.—Fort Worth 1995, writ denied).

The notice must designate the county in which the property will be sold. Tex. Prop. Code § 51.002(b)(1). If no area has been designated for foreclosure sales by the county commissioner's court, the notice of sale must designate the area where the sale is to take place. Tex. Prop. Code § 51.002(a). The notice of sale also must state the earliest time at which the sale will begin and the names and street addresses for the trustees or substitute trustees. Tex. Prop. Code §§ 51.002(b), 51.0075(e). The notice must also include conspicuous language regarding the rights of members of the armed forces. Tex. Prop. Code § 51.002(i). Beyond these requirements (and the disclosure required if a mortgage servicer is administering the foreclosure sale on behalf of the mortgagee that is discussed below in this section) there is little statutory or judicial guidance concerning the content of the notice.

The sale must take place between the hours of 10 A.M. and 4 P.M. of the first Tuesday of a month. The sale must begin at the time stated in the notice of sale or not later than three hours after the time listed in the notice of sale. Tex. Prop. Code § 51.002(a), (c).

The sale must be a public auction with the trustee announcing the property to those gathered at the courthouse and offering the property for sale to the highest bidder for cash. Often the mortgagee is the only bidder. Section 51.0075(f) of the Property Code allows the foreclosure purchaser and the trustee or substitute trustee to agree on a reasonable time after acceptance of the bid within which to deliver the purchase price; otherwise, the purchase price is payable without delay after acceptance of the bid. Most trustees will accept, and some may prefer, the cash bid in the form of a cashier's check or a certified check.

A mortgage servicer may administer a foreclosure for a mortgagee if two requirements are met. First, there must be an agreement between

the mortgagee and mortgage servicer granting the mortgage servicer the right to service the mortgage. Second, the notice of sale must disclose that the mortgage servicer is representing the mortgagee servicing agreement, the name of the mortgagee, and the address of the mortgagee or the mortgage servicer authorized to service the mortgage. Tex. Prop. Code § 51.0025. Trustees or substitute trustees can set reasonable conditions for conducting the public sale if the conditions are announced before the bidding is opened for the first sale of the day. Tex. Prop. Code § 51.0075(a). A purchaser at the foreclosure sale acquires the property 'AS IS' without any express or implied warranties except warranties of title from the mortgagor, but the foreclosing lender does not. *Sandel v. Burney*, 714 S.W.2d 40 (Tex. App.—San Antonio 1986, no writ). The purchase is made at the purchaser's own risk. Tex. Prop. Code § 51.009(1). A purchaser at foreclosure is not a consumer. Tex. Prop. Code § 51.009(2).

§ 14.2:3 Suit for Deficiency—Real Property

A person liable on the debt, including a guarantor, may introduce evidence of the fair market value of the property as of the date of the foreclosure sale. Tex. Prop. Code §§ 51.003, 51.005. The attorney should discuss these rights with the mortgagee-client before foreclosure to decide if a deficiency is likely and if so whether it would be prudent to obtain an appraisal to document fair market value and if a judicial foreclosure is a better alternative.

The rights granted to an obligor, including a guarantor, in sections 51.003 and 51.005 may be waived. See *LaSalle Bank N.A. v. Sleutel*, 289 F.3d 837, 841–42 (5th Cir. 2002); *Segal v. Emmes Capital, L.L.C.* 155 S.W.3d 267, 279–80 (Tex. App.—Houston [1st Dist.] 2004, pet. dismissed).

§ 14.2:4 Residential Property

If the property is used as the borrower's residence, the mortgagee or mortgage servicer must allow the borrower at least twenty days to cure the default before accelerating the maturity of the debt and giving the twenty-one-day foreclosure notice. Tex. Prop. Code § 51.002(d). The delinquent payment of ad valorem taxes may not be considered a default under a deed of trust or other contract lien if the owner of the residence has entered into an installment agreement for the payment of such taxes under section 33.02 of the Texas Tax Code. Tex. Prop. Code § 51.0011.

§ 14.2:5 Federal Interests

If the federal government has a property interest that would be extinguished through foreclosure, including a security interest, lien, or mortgage, the government's consent may be required to eliminate that interest; the government has a one-year right of redemption for certain liens eliminated by foreclosure of a superior lien without its consent. 12 U.S.C. § 1825(b)(2); 28 U.S.C. § 2410(c).

Before foreclosure, the federal tax lien records of the county in which the real property is located should be examined. If personal property secures the loan, the federal tax lien records of the secretary of state's office or other appropriate office should also be examined. *See* 26 U.S.C. § 6323(f)(1)(A). If the property is encumbered by an inferior federal tax lien filed more than thirty days before the scheduled foreclosure sale, the mortgagee or mortgage servicer must give a special notice to the Internal Revenue Service at least twenty-five days in advance of the sale. *See* 26 U.S.C. § 7425(b), (c). The Internal Revenue Code provides that unless a proper notice is given, a foreclosure sale will not affect the subordinate tax lien. In the case of real property, the IRS has a 120-day right of redemption following the sale, provided a proper notice was given. 26 U.S.C. § 7425(d).

§ 14.2:6 Beachfront Property

If the property is located seaward of the Gulf Intracoastal Waterway, as defined in Tex. Nat. Res. Code § 61.025, the purchaser should receive the statutory notice specified by that section. *See* Tex. Att'y Gen. Op. No. JM-834 (1987). *See* also the section titled "Coastal Properties" in chapter 2 of this manual.

§ 14.2:7 Personal Property Included in Deed of Trust

If the deed of trust includes a security agreement for personal property, the real property foreclosure sale can include the personal property in which a security interest is granted in the deed of trust as part of the foreclosure. *See* Tex. Bus. & Com. Code § 9.604(a). If personal property is sold in connection with the foreclosure sale of real property, the commercially reasonable standard of the Texas Business and Commerce Code does not govern the sale. *Huddleston v. TCB-Dallas*, 756 S.W.2d 343 (Tex. App.—Dallas 1988, writ denied).

§ 14.2:8 Deed in Lieu of Foreclosure

The Supreme Court of Texas has ruled that there is no such thing as a "deed in lieu of foreclosure." *Flag-Redfern Oil Co. v. Humble Exploration Co.*, 744 S.W.2d 6, 8 (Tex. 1987). The supreme court held that a deed in lieu of foreclosure is merely a conveyance by the borrower as a payment for the debt and that, because the deed does not have the effect of a lien foreclosure, the deed does not extinguish any subordinate liens. Deeds in lieu of foreclosure are, however, recognized by statute in Texas. Tex. Prop. Code § 51.006. A creditor who accepts a deed in lieu of foreclosure may void that deed within four years of accepting it if the debtor fails to disclose a lien before executing the deed and the creditor has no personal knowledge of the undisclosed lien. Tex. Prop. Code § 51.006(b). Some borrowers prefer to execute a

deed in lieu of foreclosure to avoid the publicity associated with a public foreclosure. Before advising a client about a deed-in-lieu transaction, the attorney should review the law on this subject. See the articles listed as 'Additional Resources' at the end of these practice notes. For an example of a deed in lieu of foreclosure, see form 5-13 in this manual.

§ 14.2:9 Home Equity Loan Lien Foreclosure

Tex. Const. art. XVI, § 50(a)(6), authorizes a voluntary lien on a Texas homestead for a home equity loan. (See chapter 11 in this manual for a discussion of home equity loans.) A lien on a Texas homestead securing the payment of a home equity loan may be foreclosed only by court order. Tex. Const. art. XVI, § 50(a)(6)(D). Article XVI, section 50(r), directs the Texas Supreme Court to promulgate rules of civil procedure for an expedited court order, and, acting pursuant to that authority, the Texas Supreme Court adopted rules 735 and 736 of the Texas Rules of Civil Procedure. The court approved forms for expedited foreclosure proceedings on February 10, 2014 (Misc. Docket No. 14-9047, Feb. 10, 2014). The forms may be found at www.txcourts.gov/media/847145/expedited-foreclosure-forms-for-website.pdf. Although rules 735 and 736 do require a judicial order before proceeding with the foreclosure of a home equity loan lien, those rules do not otherwise change existing Texas real property foreclosure law. See Tex. R. Civ. P. 735.2. The right of a lender to foreclose a home equity loan lien therefore remains conditioned on an underlying default on the home equity loan. (See forms 14-30 and 14-31 in this chapter for a notice of default and notice of acceleration letters on a home equity loan.)

Rules 735 and 736 were substantially amended effective January 1, 2012.

Rule 736 provides the procedure for obtaining a court order to allow foreclosure of a lien containing a power of sale in a security instrument securing a home equity loan. Tex. R. Civ. P. 735.1. Forms 14-32 through 14-37 are some of the forms promulgated by the supreme court. In addition, the practitioner should review section 14.4:5 below for additional information on consumer debt collection activities.

Rule 736 establishes an expedited judicial procedure for obtaining a court order that allows a lender to proceed with the foreclosure of a home equity loan lien. Under the rule, a lender files an application (see form 14-32) in any court with appropriate jurisdiction in any county where all or any part of the real property is located, including probate courts. Tex. R. Civ. P. 736.1(a). The required contents of the application were changed when the rule was amended and are set out in detail in Tex. R. Civ. P. 736.1(d).

The process for service of a rule 736 application changed effective January 1, 2012. Under the previous rule, the applicant or applicant's attorney mailed the application to the obligor and obligor's attorney. The new rule requires the clerk of the court to prepare and serve a citation by both certified and regular mail for each respondent named in the application. A citation addressed to 'the occupant of the property' must also be issued. Tex. R. Civ. P. 736.3(a), (b). Other requirements for service by the clerk of the court may be found in Tex. R. Civ. P. 736.3.

A response to an application for a court order permitting the lender to proceed with the foreclosure of a home equity loan lien is due on the first Monday following the expiration of thirty-eight days from the date the citation was placed in the custody of the United States Postal Service. Tex. R. Civ. P. 736.5(b).

The response must be signed in accordance with rule 57 and may be in the form of a general denial under rule 92, except that the respondent

must affirmatively plead the defenses relied on as set out in rule 736.5(c)(1)–(5). Tex. R. Civ. P. 736.5(c). The response may not state an independent claim for relief, and the court is required to strike any such claim without a hearing. Tex. R. Civ. P. 736.5(d).

The court must not conduct a hearing unless a response is filed. Tex. R. Civ. P. 736.6.

No discovery is permitted in a proceeding governed by rule 736, and the only issue to be determined is whether a party may obtain an order to proceed with foreclosure under applicable law and the terms of the loan agreement, contract, or lien sought to be foreclosed. Tex. R. Civ. P. 735.2, 736.4.

An order under rule 736 is without prejudice and has no res judicata, collateral estoppel, estoppel by judgment, or other effect in any other judicial proceeding. Tex. R. Civ. P. 736.9.

If no response to the application is filed by the due date, the petitioner may file a motion and proposed order to obtain a default order. A default order must be granted by the court no later than thirty days after a motion is filed and served in accordance with the rules. The return of service must be on file with the clerk of the court for at least ten days before the court may grant the application. Tex. R. Civ. P. 736.7. The granting or denial of the application is not an appealable order. Tex. R. Civ. P. 736.8(c).

An order (see form 14-37) granting an application that allows a lender to proceed with foreclosure of a home equity loan lien must describe—

1. the material facts establishing the basis for foreclosure,
2. the property to be foreclosed by commonly known mailing address and legal description,

3. the name and last known address of each respondent subject to the order, and
4. the recording or indexing information of each lien to be foreclosed.

Tex. R. Civ. P. 736.8(b).

A proceeding under rule 736 is automatically stayed if a respondent files a separate, original proceeding in a court of competent jurisdiction that puts in issue any matter relating to the foreclosure before 5:00 P.M. on the Monday before the scheduled foreclosure sale. Tex. R. Civ. P. 736.11(a). A stayed proceeding is to be dismissed if no order has been granted. If an order has been signed, the court must vacate the rule 736 order. Tex. R. Civ. P. 736.11(c).

§ 14.2:10 Property Owned by Military Servicemember

Property Code section 51.015 (1) prohibits any nonjudicial foreclosure of a dwelling owned by military personnel on active duty or within nine months after their active duty concludes; (2) provides that a court may, during the same active duty period and the nine months subsequent, either (a) stay a proceeding to judicially foreclose or enforce a mortgage lien or (b) modify the terms of any such mortgage, as necessary to preserve the interests of the parties; (3) authorizes the court to also issue similar orders of stay or take other actions to protect dependents of active duty personnel and third-party guarantors of the loan obligation; and (4) imposes a criminal penalty (class A misdemeanor) on any person who knowingly causes a foreclosure or seizure of property protected as set forth above. A borrower or guarantor may voluntarily waive these protections by written agreement contained in an instrument separate from the loan obligation. Tex. Prop. Code § 51.015. Property Code section 51.015 includes many of the same protections for military servicemembers as does the federal Servicemember's Civil Relief Act.

§ 14.3 Personal Property Foreclosures

The foreclosure rules for personal property secured transactions are found at Tex. Bus. & Com. Code §§ 9.601–.628. There are four ways to foreclose a security interest in personal property collateral: as part of a real property foreclosure; by public disposition; by private disposition; and through strict foreclosure, accepting the property with or without a claim for a deficiency. Without foreclosing, a secured party may also collect amounts owed on collateral and enforce obligations of persons obligated on collateral.

A detailed discussion of the rules of personal property foreclosure is beyond the scope of this manual. Attorneys are encouraged to review the relevant provisions of chapter 9 of the Texas Business and Commerce Code and applicable case law before foreclosing a security interest in personal property.

A disposition of personal property collateral must be commercially reasonable, whether the disposition is public or private. Tex. Bus. & Com. Code § 9.610(b). This requirement cannot be waived or varied. Tex. Bus. & Com. Code § 9.602(7). The term *commercially reasonable* is a term of art, the meaning of which has been heavily litigated. The attorney should review the relevant case law on the particular type of personal property being disposed of to properly advise the client. Section 9.627 of the Code also gives guidelines for determining if conduct was commercially reasonable. Tex. Bus. & Com. Code § 9.627.

§ 14.3:1 Real Estate Foreclosure

If the security agreement covers both real and personal property, the secured party may elect to foreclose both under the real property laws. In that event, chapter 9 rules do not apply. Tex. Bus. & Com. Code § 9.604(a). For a discussion

of the real property foreclosure rules, see section 14.2 above.

§ 14.3:2 Public Disposition vs. Private Disposition

The law of public and private foreclosure disposition of personal property collateral is found at Tex. Bus. & Com. Code §§ 9.610–.619, 9.623–.628. A disposition includes a sale, lease, or license of personal property collateral. A public disposition is not defined in the Texas Uniform Commercial Code. The official comment to section 9.610 states that although “public disposition” is not defined, it is one at which the price is determined after the public has had a meaningful opportunity for competitive bidding. In other words, a “public disposition” is a disposition at an auction open to the public. “Meaningful opportunity” is meant to imply that some form of advertisement or public notice must precede the sale (or other disposition) and that the public must have access to the sale or disposition. Tex. Bus. & Com. Code § 9.610 cmt. 7.

Conversely, although a private disposition also is not defined in the Texas UCC, some commentators believe that a “private disposition” is any disposition that is not a “public disposition.”

A public-sale foreclosure or other public disposition of personal property collateral is more difficult for the secured party because every aspect of the disposition must be commercially reasonable. Tex. Bus. & Com. Code § 9.610(b). Unlike a real estate foreclosure, for which a courthouse public auction is authorized, a public auction disposition of personal property collateral is appropriate only if that method of disposition is commercially reasonable for the collateral involved. With the existence of Internet auction sites, many types of personal property are sold at an Internet public auction. However, there may be some types of personal property for which a public auction disposition is not commercially reasonable. The manner of disposition must be

commercially reasonable. A public auction disposition must be conducted fairly. Adequate advertising should precede the disposition to solicit potential bidders. Merely advertising in a local newspaper may not be “commercially reasonable,” particularly if a potential buyer for the property would ordinarily look elsewhere for advertisements offering that type of property for sale. The time and place of the public auction must be commercially reasonable. If there is a usual place or market for a public auction disposition of property of the type involved that is reasonably available, the collateral should be disposed of there. Tex. Bus. & Com. Code § 2.706(d)(2). “[I]f such ‘usual’ place or market is not reasonably available, a duly advertised public [disposition] may be held at another place if it is one which prospective bidders may reasonably be expected to attend, as distinguished from a place where there is no demand whatsoever for [property] of the kind.” Tex. Bus. & Com. Code § 2.706 cmt. 9. The collateral should be available for reasonable inspection by prospective bidders, either at the public auction disposition or at another place made known to the bidders. Tex. Bus. & Com. Code § 2.706(d)(3). In a transaction, other than a consumer transaction, if a secured party’s compliance with the provisions of chapter 9 is placed in issue, the secured party has the burden of establishing that its collection, enforcement, or disposition of the collateral complied with the statutory requirements. Tex. Bus. & Com. Code § 9.626(a)(2). A secured party should consider how it will establish that all aspects of its public auction disposition of collateral meet the commercially reasonable requirement before deciding to proceed in that manner. A secured party may elect to conduct a private disposition. A private disposition may offer lower transaction costs to the secured party. A private disposition must be an arm’s-length transaction.

There are two primary distinctions between a public disposition and a private disposition of personal property collateral. First, the secured

party may purchase the collateral at a public disposition but generally may not do so at a private disposition. Tex. Bus. & Com. Code § 9.610(c). Second, the debtor is entitled to notification of ‘the time and place’ of a public disposition but is merely entitled to notification of “the time after which’ a private disposition is to be made. Tex. Bus. & Com. Code § 9.613(1)(E).

§ 14.3:3 Rules for Foreclosure

The property may be sold or otherwise disposed of as a unit or in parcels and at any time and place and on any terms. Tex. Bus. & Com. Code § 9.610(b). However, every aspect of the disposition must be commercially reasonable. Tex. Bus. & Com. Code § 9.610(b). The obligation of the secured party to proceed in a commercially reasonable manner may not be waived by the debtor. Tex. Bus. & Com. Code § 9.602(7).

Except as described below, the secured party must send a proper notification of disposition of collateral to the debtor and to any secondary obligor. Additionally, if the collateral is other than consumer goods, notice must be sent to any other person from whom the secured party has received, before the notification date, notification of a claim of an interest in the collateral and to any other secured party that has filed a financing statement that meets the requirements set out in section 9.611(c)(3)(B) or that has complied with certificate of title or other title registration laws. Tex. Bus. & Com. Code § 9.611(c). Thus, for a disposition of collateral other than consumer goods, the foreclosing secured party has the duty of conducting a Uniform Commercial Code financing statement search to discover other potential secured parties and to notify any that are discovered. The attorney advising the secured party should carefully review section 9.611 and its comments to determine the filing offices to search and the period within which the search should be conducted. In a transaction other than a consumer transaction, a proper notification sent after default and ten or more days

before the earliest time of disposition is deemed to be reasonable. Tex. Bus. & Com. Code § 9.612(b). The secured party need not give notice of disposition of the collateral if the property is perishable, threatens to decline speedily in value, or sells on a recognized market (such as a publicly listed stock). Tex. Bus. & Com. Code § 9.611(d). The debtor or a secondary obligor may waive its rights, but not the rights of other parties, to receive a notice of disposition of collateral by written waiver signed after default. Tex. Bus. & Com. Code § 9.624.

The contents of a proper notice of disposition of collateral are set forth in section 9.613 for collateral other than consumer goods and in section 9.614 for consumer goods collateral. Those sections also include model forms, which when completed are deemed to provide sufficient information concerning the disposition. The debtor may not waive, or agree that the secured party may vary from, the notification requirements of those sections. *See* Tex. Bus. & Com. Code § 9.602(7). Notices to consumers must also comply with the federal Fair Debt Collection Practices Act (15 U.S.C. §§ 1692–1692p) and the Texas Debt Collection Act (Tex. Fin. Code §§ 392.001–.404).

The secured party may buy personal property collateral at a public disposition. Tex. Bus. & Com. Code § 9.610(c)(1). The secured party may buy personal property collateral at a private disposition only if the property is of a kind that is customarily sold on a recognized market or is the subject of widely distributed standard price quotations. Tex. Bus. & Com. Code § 9.610(c)(2).

If a foreclosing secured party does not comply with section 9.601 *et seq.*, a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions. Tex. Bus. & Com. Code § 9.625(a). This section also sets out the damages for which a secured party may be liable, including minimum

penalties in consumer transactions and nonconsumer transactions. *See* Tex. Bus. & Com. Code § 9.625(b)–(g).

A contract for sale, lease, license, or other disposition of personal property as a result of a foreclosure includes the warranties relating to title, possession, quiet enjoyment, and the like that by operation of law accompany a voluntary disposition of like-kind property. Tex. Bus. & Com. Code § 9.610(d). These warranties may be disclaimed or modified. The manner and the approved language for disclaiming or modifying warranties are set out in Tex. Bus. & Com. Code § 9.610(e), (f).

§ 14.3:4 Strict Foreclosure

The law of strict foreclosure is found at Tex. Bus. & Com. Code §§ 9.620–.622. The secured party may accept personal property collateral in full or partial satisfaction of the secured obligation only under the circumstances set forth in section 9.620. A secured party may not accept collateral in partial satisfaction of a secured obligation in a consumer transaction. Tex. Bus. & Com. Code § 9.620(g).

A secured party that wants to accept personal property collateral in full or partial satisfaction of a secured obligation in a nonconsumer transaction must obtain the debtor's consent. The secured party must send its proposal to do so to any person from whom the secured party has received, before the debtor consented to the acceptance, a notice of a claim of interest in the collateral and to any other secured party or lienholder that has a perfected security interest in the collateral either because of a filed financing statement that meets the requirements of section 9.621(a)(2) or because of compliance with certificate of title or other title registration laws. Tex. Bus. & Com. Code § 9.621(a). If the secured party proposes to accept the collateral in partial satisfaction of the secured obligation, the secured party must also notify any secondary

obligor. Tex. Bus. & Com. Code § 9.621(b). A secured party that proposes to accept personal property collateral in full or partial satisfaction of a secured obligation thus has a duty to conduct a UCC financing statement search to discover other potential secured parties and to notify those that have filed a proper financing statement of the secured party's proposal. Moreover, a secured party that accepts personal property collateral is liable to another secured party that should have been notified, but was not, for any loss resulting from the failure of the enforcing secured party to notify the other secured party. Tex. Bus. & Com. Code § 9.625(b). The debtor may consent to the acceptance of collateral in partial satisfaction of the secured obligation only by a record authenticated after default. The debtor may consent to acceptance of collateral in full satisfaction of the secured obligation by authenticating a record (for example, signing a writing) after default or by failing to object to a properly sent proposal within twenty days after the proposal is sent. Tex. Bus. & Com. Code § 9.620(c)(2).

The secured party may not use strict foreclosure if—

1. the debtor does not consent (Tex. Bus. & Com. Code § 9.620(a)(1));
2. the secured party timely receives objection in writing from a party entitled to notice of the proposed strict foreclosure (Tex. Bus. & Com. Code § 9.620(a)(2));
3. the secured party is foreclosing a security interest in consumer goods and the debtor is in possession of the goods (Tex. Bus. & Com. Code § 9.620(a)(3));
4. the secured party is foreclosing a security interest in consumer goods and the debtor has paid more than 60 percent of the principal amount of the obliga-

tion (Tex. Bus. & Com. Code § 9.620(e)); or

5. in a consumer transaction, the secured party does not propose to satisfy the secured obligation in full (Tex. Bus. & Com. Code § 9.620(g)).

After default, the debtor may waive or modify limitations 1., 3., and 4. by an authenticated agreement. Tex. Bus. & Com. Code §§ 9.620(a)(4), 9.624(b).

§ 14.3:5 Suit for Deficiency—Personal Property

The procedure for determining a deficiency or surplus is found in Tex. Bus. & Com. Code §§ 9.615, 9.626.

In a consumer goods transaction in which either the debtor is entitled to a surplus or a consumer obligor is liable for a deficiency, the secured party must send a written explanation of the surplus or deficiency. If a surplus exists, the secured party must send an explanation of the surplus before or when the secured party accounts to the debtor and pays any surplus or within fourteen days of the debtor's request for an explanation, whichever comes first. If a deficiency exists, the secured party must send an explanation of the deficiency when the secured party first makes written demand for the deficiency or within fourteen days of the debtor's request for an explanation, whichever comes first. Tex. Bus. & Com. Code § 9.616(b). A debtor or consumer obligor is entitled without charge to one response to a request for an explanation of the surplus or deficiency during any six-month period in which the secured party does not send one. The secured party may require payment of a charge not exceeding \$25 for each additional response. Tex. Bus. & Com. Code § 9.616(e).

The rules for an action to collect a deficiency other than in a consumer transaction are set forth

in section 9.626. This section provides for the determination of the deficiency when the secured party fails to comply with the procedures set forth in section 9.601 *et seq.* Under this section, the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the sum of the secured obligation, expenses, and attorney's fees exceeds the greater of the proceeds the secured party realized or the amount the proceeds would have been if the secured party had proceeded in compliance with those provisions. Tex. Bus. & Com. Code § 9.626(a). A court may not infer from section 9.626 the nature of the proper rule in consumer transactions and may continue to apply existing principles. Tex. Bus. & Com. Code § 9.626(b). *See Greathouse v. Charter National Bank—Southwest*, 851 S.W.2d 173 (Tex. 1992); *Tanenbaum v. Economics Laboratory, Inc.*, 628 S.W.2d 769 (Tex. 1982).

§ 14.3:6 Cautions

The lender's rights are governed by subchapter F of article 9 of the Uniform Commercial Code (Tex. Bus. & Com. Code §§ 9.601–628) and the security agreement. Certain provisions, noted in Tex. Bus. & Com. Code § 9.602, cannot be altered by the parties. Before exercising any contractual right under the security agreement, the attorney should review these subchapters.

§ 14.3:7 Secured Party's Collection Rights—Accounts, Intangibles, and Instruments

After default, or earlier if agreed, the secured party may notify an account debtor or other person obligated on collateral, such as the maker of a Business and Commerce Code chapter 3 negotiable instrument, to make payment or otherwise render performance directly to the secured party. Tex. Bus. & Com. Code § 9.607(a). This remedy may enhance the secured party's recovery because payments on the collateral would otherwise be paid to the debtor. This procedure

requires no prior notice to the debtor. *Cullen Frost Bank v. Dallas Sportswear Co.* 730 S.W.2d 668, 669–70 (Tex. 1987). If a debtor or secondary obligor will be liable for a deficiency, a secured party must proceed in a commercially reasonable manner in collecting or enforcing the obligation of an account debtor or other person obligated on collateral. Tex. Bus. & Com. Code § 9.607(c).

§ 14.3:8 Right of Possession

After default, unless otherwise agreed, the secured party may take possession of tangible personal property collateral. Tex. Bus. & Com. Code § 9.609. The repossession must not breach the peace. This nonjudicial self-help remedy is useful in allowing the secured party to obtain possession without delay.

§ 14.3:9 Right of Redemption

A debtor, any secondary obligor, or any junior secured party or lienholder may redeem the collateral from the secured party at any time before (1) the secured party has collected the collateral under section 9.607, (2) the secured party has disposed of the collateral or entered into a contract to dispose of the collateral under section 9.610; or (3) the secured party has accepted the collateral in full or partial satisfaction of the obligation under section 9.622. *See* Tex. Bus. & Com. Code §§ 9.607, 9.610, 9.622. To redeem the collateral, a person must fulfill all obligations secured by the collateral and pay certain expenses and attorney's fees. Tex. Bus. & Com. Code § 9.623(b).

§ 14.3:10 Secured Party's Liability

If a secured party has not complied with section 9.601 *et seq.*, a court may order or restrain collection, enforcement, or disposition of collateral. Tex. Bus. & Com. Code § 9.625(a). Further, a secured party is liable for damages in the amount of any loss caused by a failure to com-

ply with Texas Business and Commerce Code chapter 9. Tex. Bus. & Com. Code § 9.625(b). In addition, certain violations of chapter 9 render a noncomplying secured party liable for statutory minimum penalties. Tex. Bus. & Com. Code § 9.625(e), (f).

Chapter 9 requires the secured party's collection and enforcement rights to be exercised in a commercially reasonable manner. Evidence that a better price could have been obtained under a different foreclosure proceeding does not of itself establish that the sale was commercially unreasonable. A sale under judicial approval is deemed to be commercially reasonable, but the UCC does not require a secured party to seek such approval. *See* Tex. Bus. & Com. Code § 9.627.

§ 14.4 Foreclosure Documents

§ 14.4:1 Foreclosure Documents Applicable to Real Property and Personal Property

The appropriate forms to use in any foreclosure depend on the facts of the specific situation. The forms in this chapter are examples of foreclosure documents to be used with the forms in this manual, without modification of their principal terms. Use of modified State Bar forms or other forms could significantly change the foreclosure document requirements.

Sections 14.4:2 through 14.10 below provide a chronological analysis of the foreclosure process and references to forms for compliance.

§ 14.4:2 Document Review

The attorney should review with the client all the loan documents for the transaction. In transactions that cover long time periods, there may be modification agreements that would affect the foreclosure process. For example, a subordi-

nate creditor may have obtained an agreement from the first secured creditor to receive a special notice of default or foreclosure. The attorney should verify with the client that no such agreements exist.

§ 14.4:3 Statute of Limitations

The attorney should confirm that the statute of limitations has not barred any right to relief. A sale of real property under a power of sale contained in a deed of trust must be made not later than four years after the day the cause of action accrues. Tex. Civ. Prac. & Rem. Code § 16.035(b). However, a mortgage servicer may foreclose a security interest in personal property collateral notwithstanding that there is a limitations defense to the debt. *Miller, Hiersche, Martens & Hayward, P.C. v. Bent Tree National Bank*, 894 S.W.2d 828, 830 (Tex. App.—Dallas 1995, no writ).

§ 14.4:4 Current Title, Abstract, and Tax Searches

The attorney should verify current information about the collateral and its ownership. Because tax liens are accorded priority over most other claims, the client must know the amounts of any delinquent taxes to be able to decide if the foreclosure is economically feasible. *See* Tex. Tax Code § 32.05.

The attorney should advise the client that title insurance coverage may be available. The limited preforeclosure policy (form T-98) is issued in connection with a mortgage in default to the named mortgagee or its assignee, a loan servicer, a trustee, or an attorney and insures as to matters recorded since the mortgage, including involuntary liens such as federal tax liens. *See* Procedural Rule P-43, *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas*, available at www.tdi.texas.gov/title/titlem4g.html#P-43.

§ 14.4:5 Consumer Transactions

Fair Debt Collection Practices Act Notice:

The forms in this chapter are drafted for use in nonconsumer transactions, to which federal and state fair-debt collection acts do not apply. The Texas Property Code provides that a trustee or a substitute trustee is not a debt collector under Texas law. Tex. Prop. Code § 51.0075(b). If, however, the attorney wishes to try to adapt these forms for a consumer transaction, the notice contained in clause 14-7-1 in this chapter should be incorporated in the first correspondence the attorney has with the consumer. Additional modifications to the forms also may be required. Case law is unclear, and there is no Fifth Circuit authority on what additional collection efforts, if any, may be made during the thirty-day period during which the consumer may request debt verification. Nothing may be included with the notice that negates the notice or would lead an unsophisticated person to misunderstand the right to contest the debt.

Chauncey v. JDR Recovery Corp., 118 F.3d 516, 519 (7th Cir. 1997) (demand that payment be received within thirty days or “a decision to pursue other avenues to collect the amount due will be made” found to contradict notice); *Terran v. Kaplan*, 109 F.3d 1428, 1434 (9th Cir. 1997) (statement that “[u]nless an immediate telephone call is made we may find it necessary to recommend to our client that they proceed with legal action” held not a demand for payment and thus not contradictory or overshadowing). The safest course of action would be to send only the notice found in clause 14-7-1 and wait thirty days before making any other collection efforts. The attorney, as a debt collector under the federal and state acts, can be personally liable to the consumer for failure to comply with the acts and should review this area of the law with care. See the section titled ‘Fair Debt Collection Practices’ in chapter 2 of this manual and the materials in “Additional Resources” at the end of these practice notes.

Fair Credit Reporting Act: Any financial institution that extends credit to an individual and regularly and in the ordinary course of business reports negative information to a credit bureau must give its individual customers a clear and conspicuous written notice about reporting negative information. A financial institution complies with the notice requirement if the institution uses a model notice promulgated by the Board of Governors of the Federal Reserve System. There are two model notices, one that may be used before reporting negative information to a credit bureau and one that may be used after reporting negative information to a credit bureau. If the financial institution did not include the notice in its initial loan documentation or related communication, the notice should be given with the first correspondence concerning the foreclosure. 15 U.S.C. § 1681s-2(a)(7); 12 C.F.R. pt. 222. The model forms of notice are found in clauses 14-7-2 and 14-7-3. See the section titled “Fair Credit Reporting Act” in chapter 2.

§ 14.5 Notices

All foreclosure notices must be sent by certified mail and should be sent return receipt requested. For real estate foreclosures, the notice must be addressed to the debtor at the debtor’s last known address. Tex. Prop. Code § 51.002(e). For personal property foreclosures, the notice should be sent to the address specified in the security agreement or other agreement or, if none, to any address reasonable under the circumstances. Tex. Bus. & Com. Code § 1.201(b)(36). For foreclosure of a debt secured by a debtor’s residence there is a presumption that the residential address is to be used for notice unless the debtor notifies the mortgage servicer otherwise. Tex. Prop. Code § 51.0001(2)(A). For all other debts the notices are sent to the last known address of the debtor as shown by the records of the mortgage servicer. Tex. Prop. Code § 51.0001(2)(B). If there is doubt about the proper address, it is good

practice to send the notice to each address in the file. If two borrowers reside at the same address, the attorney may wish to send the letter separately to each person at the address. Some attorneys also send a copy of the letter to each party by first-class mail to attempt actual delivery if the certified mail is not accepted by the borrower. That attempt should be noted on the letter.

The mortgage servicer must give at least twenty days' notice of default before posting the property for foreclosure if the property is the debtor's residence. Tex. Prop. Code § 51.002(d). See the notice of default and intent to accelerate, form 14-4 in this chapter.

A debtor is required to inform the mortgage servicer of any change of address of the debtor. Tex. Prop. Code § 51.0021. Form 14-2 is a "Notice of Change of Debtor's Address" to comply with this requirement.

§ 14.5:1 Letter to Reinstate Default Provisions

If the mortgagee has not insisted on strict performance of the loan documents in the past, the mortgagee should advise the borrower of its decision to strictly enforce the agreements in the future. *Dhanani Investments, Inc. v. Second Master Bilt Homes, Inc.*, 650 S.W.2d 220, 222 (Tex. App.—Fort Worth 1983, no writ). See form 14-1 in this chapter.

§ 14.5:2 Notice of Maturity and Demand for Payment

If the note has matured by its own terms, the mortgagee or mortgage servicer should demand payment. See form 14-3 in this chapter.

§ 14.5:3 Notice of Default and Intent to Accelerate

The notices of default and of intent to accelerate are waived in the promissory note form (see form 6-1 in this manual). However, Texas courts deem acceleration a harsh remedy. *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 892–93 (Tex. 1991). Even if notices of default and of intent to accelerate have been expressly waived, many attorneys elect to send this notice, viewing the waiver more as a safeguard to protect the mortgagee from the complications of minor technicalities than as a license to foreclose on borrowers without notice or demand. See form 14-4 in this chapter.

§ 14.5:4 Notice of Acceleration

The notice of acceleration is used if the mortgagee or mortgage servicer gives notice of intent to accelerate and the borrower fails to cure the default. See form 14-5 in this chapter.

§ 14.5:5 Reinstatement Agreement

Sometimes the mortgagee and the borrower will agree to continue the payment terms of the note after acceleration. However, once the maturity of a note is accelerated, limitations on the entire debt will begin to run. A reinstatement agreement should rescind the acceleration and reinstate the payment provisions in the note. See form 14-6 in this chapter.

§ 14.5:6 Affidavit of Posting and Filing

The affidavit of posting and filing is not required by law, but it serves to document where and when the notice was distributed and will normally be required by title companies. See form 14-8 in this chapter. If a newspaper or other public advertisement is used, the company publishing the notice should provide an affidavit of the publication, and the attorney should pro-

vide a copy of the page for the client's file. Some attorneys prefer to use a certificate form instead of an affidavit.

§ 14.5:7 Affidavit of Mailing

The affidavit of mailing is not required by law, but it serves to document legal notice mailing compliance and will normally be required by title companies. See form 14-9 in this chapter. Such an affidavit, completed and signed by a person knowledgeable of the facts, is prima facie evidence of service. Tex. Prop. Code § 51.002(e). Some attorneys prefer to use a certificate form instead of an affidavit.

§ 14.6 Foreclosure Documents Unique to Real Property

§ 14.6:1 Appointment of Substitute Trustee

Forms 14-10 and 14-11 in this chapter may be used if the mortgagee or mortgage servicer wishes for someone other than the trustee named in the deed of trust to act. The appointment may also be made in the notice of trustee's sale. See section 14.6:2 below. If required by the deed of trust, the appointment of substitute trustee must be recorded in the real property records before posting the notice of foreclosure.

§ 14.6:2 Notice of Trustee's Sale

Form 14-12 in this chapter has been adapted to include personal property that may be covered by the deed of trust and that the mortgagee may wish to foreclose on with the foreclosure of the real property. See section 14.2:7 above. Note that, once appointed, the substitute trustee is the trustee under the deed of trust and is referred to as such rather than as the substitute trustee.

The appointment or authorization of a trustee or substitute trustee made in a notice of sale is

effective as of the date of the notice if the notice—

1. complies with sections 51.002 and 51.0075(e) of the Texas Property Code;
2. is signed by an attorney or agent of the mortgagee or mortgage servicer; and
3. contains a statement in all capital letters, bold-faced type, to read as follows:

THIS INSTRUMENT APPOINTS THE SUBSTITUTE TRUSTEE(S) IDENTIFIED TO SELL THE PROPERTY DESCRIBED IN THE SECURITY INSTRUMENT IDENTIFIED IN THIS NOTICE OF SALE. THE PERSON SIGNING THIS NOTICE IS THE ATTORNEY OR AUTHORIZED AGENT OF THE MORTGAGEE OR MORTGAGE SERVICER.

See Tex. Prop. Code § 51.0076. Form 14-13 allows a mortgage servicer to administer a foreclosure under Tex. Prop. Code § 51.0025.

§ 14.6:3 Agenda of Public Sale

Form 14-14 in this chapter, although not required by law, serves to document the sale.

§ 14.6:4 Trustee's Deed

Form 14-15 in this chapter has been adapted to include personal property that may be covered by the deed of trust and that the mortgagee may wish to foreclose on with the foreclosure of the real property. See section 14.2:7 above. Note that, once appointed, the substitute trustee is the trustee under the deed of trust and is referred to as such rather than as the substitute trustee.

Deeds transferring an interest to or from an individual, including a trustee, must contain the con-

fiduciary notice required by Tex. Prop. Code § 11.008. See section 3.16 in this manual.

§ 14.6:5 Foreclosure Affidavit

Form 14-16 in this chapter, although not required by law, serves to document the legal requirements of the sale. Title companies will normally require an affidavit from the trustee attesting to these matters. This form may be used as a stand-alone document or may be attached to the trustee's deed. It may also be used in conjunction with the affidavit of posting and filing (form 14-8) and the affidavit of mailing (form 14-9) with the appropriate modifications.

§ 14.6:6 Notice and Affidavit of Advancement

If the mortgagee advances funds to cure a default under the deed of trust to secure assumption or a similar form used to secure performance, the mortgagee should use the notice of advancement (form 14-17 in this chapter) and the affidavit of advancement (form 14-18) to protect its rights and put parties on notice of the payment.

§ 14.6:7 IRS Notice Letter

If the property is subject to an Internal Revenue Service lien, the notification letter at form 14-19 in this chapter may be used. See section 14.2:5 above for information about the IRS lien.

§ 14.6:8 Rescission of Nonjudicial Foreclosure Sale

Texas Property Code section 51.016 provides a nonexclusive method for rescission of a nonjudicial foreclosure sale of residential real property, as defined in section 51.016(a). See Tex. Prop. Code § 51.016. Not later than the fifteenth day after the date of a foreclosure sale, a mort-

gagee, trustee, or substitute trustee may rescind the sale if one or more of these statutory reasons listed in section 51.016(b) exists:

1. the statutory requirements for the sale were not satisfied;
2. the default leading to the sale was cured before the sale;
3. a receivership or dependent probate administration involving the property was pending at the time of sale;
4. a condition specified in the conditions of sale prescribed by the trustee or substitute trustee before the sale and made available in writing to prospective bidders at the sale was not met;
5. the mortgagee or mortgage servicer and the debtor agreed before the sale to cancel the sale based on an enforceable written agreement by the debtor to cure the default; or
6. at the time of the sale, a court-ordered or automatic stay of the sale imposed in a bankruptcy case filed by a person with an interest in the property was in effect.

Tex. Prop. Code § 51.016(b).

The party rescinding the sale must serve written notice of rescission on the purchaser and each debtor obligated to pay the debt that describes the reason for the rescission and includes recording information for any affected trustee's deed. Tex. Prop. Code § 51.016(c)(1). See form 14-39 in this chapter. This notice must be served by certified mail in the county where all or a part of the property is located. Tex. Prop. Code § 51.016(c)(2), (d). The rescinding mortgagee, trustee, or substitute trustee shall record in the real property records of the county in which the written notice of rescission is filed an affidavit stating the date the bid amount was returned together with the certified mail, electronic or wire transfer, or courier service delivery track-

ing information. Tex. Prop. Code § 51.016(f). See form 14-40. This affidavit is prima facie evidence of the return of the bid amount. Tex. Prop. Code § 51.016(g). A completed rescission restores the mortgagee and debtor to their respective title, rights, and obligations under the instrument relating to the foreclosed property that existed immediately prior to the sale. Tex. Prop. Code § 51.016(h). No action challenging the effectiveness of a rescission under this section may be commenced, unless filed on or before the thirtieth calendar day after the notices of rescission are filed for recording. Tex. Prop. Code § 51.016(j). A rescission under this section is not effective as to a creditor or subsequent good-faith purchaser for value. Tex. Prop. Code § 51.016(i). Damages in a suit challenging the effectiveness of the rescission or resulting from the rescission are substantially limited to the amount of the bid price. *See* Tex. Prop. Code § 51.016(k), (l). Specific performance is not available. Tex. Prop. Code § 51.016(k).

§ 14.7 Foreclosure Documents for Public Disposition of Personal Property

§ 14.7:1 Waiver of Right to Notice after Default

A debtor or secondary obligor may waive its rights (but not the rights of other parties) to notice of a public disposition of personal property collateral, but the waiver must be signed after the default has occurred. Tex. Bus. & Com. Code § 9.624(a). See form 14-20 in this chapter for a waiver.

§ 14.7:2 Notice of Public Disposition

The posted notice of public sale can be used for public posting and advertisement of the sale. The attorney should consider advising the client

about the requirements of a commercially reasonable sale and the risks associated with it. See form 14-22 in this chapter for a notice of public sale.

Texas Business and Commerce Code section 9.613 sets forth an approved form for notice of public or private disposition of personal property collateral other than consumer goods. *See* Tex. Bus. & Com. Code § 9.613. The approved form for notification of public or private disposition of personal property collateral that consists of consumer goods is set out in section 9.614. *See* Tex. Bus. & Com. Code § 9.614. Notice must be sent to the debtor, any secondary obligor, and, if the collateral is other than consumer goods, any other person from whom the secured party has received, before the notification date, an authenticated claim of interest in the collateral, and any other secured party or lienholder described in section 9.611(c)(3)(B), (C). *See* Tex. Bus. & Com. Code § 9.611(c). See form 14-27 for a notice if the collateral is consumer goods and form 14-28 for a notice if the collateral is not consumer goods.

§ 14.7:3 Agenda of Public Sale

The agenda of public sale is not required by the Uniform Commercial Code, but it serves to document that the sale was completed. See form 14-23 in this chapter.

§ 14.7:4 Bill of Sale

The bill of sale evidences the transfer of ownership of the personal property to the successful bidder. See form 14-24 in this chapter. If applicable, a disclaimer of warranties should be included. To disclaim warranties, the attorney must use language similar to that provided in Tex. Bus. & Com. Code § 9.610(f).

§ 14.8 Strict Foreclosure of Personal Property

§ 14.8:1 Notice of Strict Foreclosure

The notice of strict foreclosure notifies the debtor and others required to be notified of the secured party's proposal to accept personal property collateral in satisfaction of the debt. *See* Tex. Bus. & Com. Code §§ 9.620–.622. *See* form 14-25 in this chapter for a notice of strict foreclosure.

§ 14.8:2 Consent to Strict Foreclosure

The debtor must consent to the secured party's proposal to accept the collateral in satisfaction of the debt. Tex. Bus. & Com. Code § 9.620(a)(1), (c). The consent may be an express consent made by the debtor agreeing to the secured party's proposal in a writing signed after default. Tex. Bus. & Com. Code § 9.620(c)(1), (2). *See* form 14-21 in this chapter for a consent form.

§ 14.8:3 Objection to Strict Foreclosure

A letter of objection notifies the secured party of a person's objection to the secured party's proposal to accept the collateral in satisfaction of the debt. *See* form 14-26 in this chapter. The letter may be sent by any person to whom the secured party sent its proposal to accept the collateral. To be effective, the objection letter must be received by the secured party within twenty days after the date the secured party sends its proposal. Tex. Bus. & Com. Code § 9.620(c)(2)(C), (d)(1), (d)(2)(A).

§ 14.9 Private Disposition of Personal Property

§ 14.9:1 Waiver of Notice after Default

A debtor or secondary obligor may waive its rights (but not the rights of other parties) to notice of a private disposition of personal property collateral, but the waiver must be signed after the default has occurred. Tex. Bus. & Com. Code § 9.624(a). *See* form 14-20 in this chapter for a waiver.

§ 14.9:2 Notice of Private Disposition

Texas Business and Commerce Code section 9.613 sets forth an approved form for notice of public or private disposition of personal property collateral other than consumer goods. *See* Tex. Bus. & Com. Code § 9.613. The approved form for notification of public or private disposition of personal property collateral that consists of consumer goods is set out in Tex. Bus. & Com. Code § 9.614. Notice must be sent to the debtor, any secondary obligor, and, if the collateral is other than consumer goods, any other person from whom the secured party has received, before the notification date, an authenticated claim of interest in the collateral, and any other secured party or lienholder described in section 9.611(c)(3)(B), (C). Tex. Bus. & Com. Code § 9.611(c). *See* form 14-27 in this chapter for a notice if the collateral is consumer goods and form 14-28 for a notice if the collateral is not consumer goods.

§ 14.9:3 Memorandum of Private Sale

The agenda of private sale is not required by the Uniform Commercial Code, but it serves to document that the sale was completed. *See* form 14-29 in this chapter.

§ 14.9:4 Bill of Sale

The bill of sale evidences the transfer of ownership of the personal property to the buyer at the private foreclosure sale. See form 14-24 in this chapter. If applicable, a disclaimer of warranties should be included. To disclaim warranties, the attorney must use language similar to that provided in Tex. Bus. & Com. Code § 9.610(f).

§ 14.10 Security Interest Included in Deed of Trust

If the deed of trust contains the security interest covering personal property, the lienholder may foreclose the personal property lien with the real property foreclosure. Tex. Bus. & Com. Code § 9.604(a).

§ 14.11 Collateral Transfer of Note and Lien Foreclosure

The collateral transfer of note and lien form creates a security interest in an instrument, the collateral promissory note. The foreclosure of the collateral note under a collateral transfer is governed by the Texas Business and Commerce Code rather than by the Texas Property Code. See Tex. Bus. & Com. Code §§ 9.601-.628. The secured party may select any procedure applicable to the situation: strict foreclosure, public disposition, or private disposition. Without foreclosing on the collateral note, the secured party may collect and enforce the collateral note, including, if the collateral note is in default, accelerating the collateral note and exercising any foreclosure remedy contained in the underlying deed of trust. See the collateral transfer of note and lien, form 9-8 in this manual.

Additional Resources

- Austin, Judd A., Jr. "HOA Collections and Foreclosures: New Statutes & New Rules." In *Advanced Real Estate Drafting Course, 2012*. Austin: State Bar of Texas, 2012.
- Ayers, R. Glen. "Mortgage Foreclosure in an Age of Securitization: Missing Original Notes and Other Problems for Creditors." In *Advanced Real Estate Law Course, 2009*. Austin: State Bar of Texas, 2009.
- Bastian, G. Tommy. "Expedited Foreclosure Home Equity, Home Equity Line of Credit, Reverse Mortgage, and Tax Lien Transfer and Property Tax Loan Forms for the New Supreme Court Rules." In *Advanced Real Estate Drafting Course, 2012*. Austin: State Bar of Texas, 2012.
- . "Foreclosure of Farm and Ranch Real Property." In *Advanced Real Estate Strategies Course, 2008*. Austin: State Bar of Texas, 2008.
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- . "Rule 735 and 736 Foreclosures: Tax Lien Transfers." In *Advanced Real Estate Law Course, 2009*. Austin: State Bar of Texas, 2009.
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- . "Texas Foreclosures: Myths and Reality." In *Advanced Real Estate Law Course, 2011*. Austin: State Bar of Texas, 2011.
- Baucum, Michael. "Alternatives to Foreclosure—Ideas and Forms." In *Advanced Real Estate Drafting Course, 2015*. Austin: State Bar of Texas, 2015.
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- . "Servicing, Foreclosing, and Re-Selling Non-Securitized Single Family Residential Real Estate Secured Notes." In *Advanced Real Estate Law Course, 2011*. Austin: State Bar of Texas, 2011.
- . "UCC Related Foreclosure Matters—Commercial Reasonableness and Its Impact on Deficiency and Surplus Claims under Chapter 9." In *Advanced Real Estate Law Course, 2013*. Austin: State Bar of Texas, 2013.
- Burns, Randolph L. "Looking at a Receivership Issue? Here's What You Need to Know." In *Advanced Real Estate Law Course, 2012*. Austin: State Bar of Texas, 2012.
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- Dysart, Sara E. "Attorney Acting as Substitute Trustee in a Non-Judicial Foreclosure Sale." In *Advanced Real Estate Strategies Course, 2008*. Austin: State Bar of Texas, 2008.
- . "Planning for Defaults, Workouts, and Foreclosures." In *Advanced Real Estate Strategies Course, 2010*. Austin: State Bar of Texas, 2010.

———. “Workouts, Deeds in Lieu and Foreclosure. In *State Bar College ‘Summer School’ Course, 2010*. Austin: State Bar of Texas, 2010.

Grantham, Terry L. “The Trustee’s Role in Foreclosures: ‘Ten Things Every Foreclosure Trustee Needs to Know.’ In *Advanced Real Estate Law Course, 2009*. Austin: State Bar of Texas, 2009.

Guzman, Leann D. “Sales, Purchases, and Redemption of Tax-Foreclosed Property.” In *Advanced Real Estate Law Course, 2012*. Austin: State Bar of Texas, 2012.

Howard, C. Elaine. “Problems with Foreclosures: A Legal Analysis of Current Events.” In *7th Annual John Huffaker*

Agricultural Law Course, 2013. Austin: State Bar of Texas, 2013.

Locke, William H., Jr., Ralph Martin Novak, Jr., and G. Tommy Bastian, eds. *Texas Foreclosure Manual*. 3rd ed. Austin: State Bar of Texas, 2014. Supplement 2015.

Tomek, David W. “Real Property Foreclosures: Legal Considerations, Documentation, and Notable Recent Developments. In *5th Annual John Huffaker Agricultural Law Course, 2011*. Austin: State Bar of Texas, 2011.

Wilbanks, Erwin. “Common Errors in Foreclosure.” In *Advanced Real Estate Law Course, 2010*. Austin: State Bar of Texas, 2010.

[Reserved]

Form 14-1

Letter to Reinstate Default Provisions

[Date]

[Name and address of borrower]

See section 14.5 in this chapter.

Re: [describe note and loan documents]

[Salutation]

In the past, you have been delinquent in your monthly payments, and the mortgagee has accepted the late payments without assessing a penalty. Please be advised, however, that all future payments must be received by the due date, or the mortgagee will exercise its rights under the loan documents.

Include clause 14-7-1 if this is the first correspondence from the attorney to a debtor who is a consumer. See section 14.4:5.

If you have any questions, please consult your legal counsel.

Sincerely yours,

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested
c: [name of borrower], by first-class mail

[Reserved]

Form 14-2

Notice of Change of Debtor's Address

Date:

Debtor:

Debtor's Old Mailing Address:

Debtor's New Mailing Address:

Trustee:

Trustee's Mailing Address:

Mortgagee:

Mortgagee's Mailing Address:

Obligation

Note

Date:

Original principal amount:

Debtor:

Grantor: (if different)

Lender:

Maturity date:

Property (including any improvements):

This is notice to Lender and its mortgage servicers of the change in Debtor's mailing address.

[Name of [grantor/debtor]]

Form 14-3

Notice of Maturity and Demand for Payment

[Date]

[Name and address of borrower]

See section 14.5 in this chapter.

Re: [describe note and loan documents]

[Salutation]

The referenced note matured on [date] and remains unpaid.

Select one of the following.

Demand is made for the immediate payment of all unpaid principal and all accrued but unpaid interest. Please contact [name] for the current payoff information.

Or

Demand is made for the immediate payment of \$[amount] principal and \$[amount] accrued but unpaid interest through [date], together with additional interest at the rate of \$[amount] per day until paid.

Continue with the following.

Please be advised that if the payment is not received by [date], the mortgagee will exercise its rights under the loan documents.

Include clause 14-7-1 if this is the first correspondence from the attorney to a debtor who is a consumer. See section 14.4:5.

If you have any questions, please consult your legal counsel.

Sincerely yours,

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested
c: [name of borrower], by first-class mail

Form 14-4

Notice of Default and Intent to Accelerate

[Date]

[Name and address of borrower]

See section 14.5 in this chapter.

Re: [describe note and loan documents]

[Salutation]

This letter is to give you notice of default under the referenced loan documents. This default consists of [describe default].

Select one of the following. Use the first paragraph if the property is not the debtor's principal residence. Use the second paragraph if the property is the debtor's principal residence; see section 14.2:4.

Unless the default is cured by [date], the mortgagee intends to enforce its rights and remedies under the loan documents. Specifically, the mortgagee intends to accelerate the maturity of the note and demand payment for the full unpaid principal balance, together with accrued but unpaid interest and all fees and expenses, as allowed by law. If the amount due is not timely paid, the mortgagee intends to foreclose the lien under the loan documents. [Include if applicable: In addition, the mortgagee demands that you pay to the mortgagee the proceeds of all accrued but unpaid rent as of the date you receive this letter and all rent that accrues after you receive this letter. Payment of the proceeds should be made to [name of mortgagee and address for payments]. The tenant[s] will be instructed to pay all rents to the mortgagee until further notice, in accordance with [the deed of trust/[specify instrument]] and the Texas Property Code.]

Or

You are notified that if the default is not cured within twenty days from the date of posting of this letter, the mortgagee intends to enforce its rights under the loan documents. Specifically, the mortgagee intends to accelerate the maturity of the note and demand payment for the full unpaid principal balance, together with accrued but unpaid interest and all fees and expenses, as allowed by law. If the amount due is not timely paid, the mortgagee intends to foreclose the lien under the loan documents.

Continue with the following.

Include clause 14-7-1 if this is the first correspondence from the attorney to a debtor who is a consumer. See section 14.4:5.

If you have any questions, please consult your legal counsel.

Sincerely yours,

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested
c: [name of borrower], by first-class mail

Form 14-5

Notice of Acceleration

[Date]

[Name and address of borrower]

See section 14.5 in this chapter.

Re: [describe note and loan documents]

[Salutation]

Because of the failure to cure the default under the referenced loan documents, the mortgagee has accelerated the maturity of the note.

Select one of the following.

Demand is made for the payment of all unpaid principal and all accrued but unpaid interest. Please contact [name] for the current payoff information.

Or

Demand is made for the payment of \$[amount] principal and \$[amount] accrued but unpaid interest through [date], together with additional interest at the rate of \$[amount] per day until paid.

Continue with the following.

If the amount due is not paid, the mortgagee intends to foreclose the lien under the loan documents in accordance with the enclosed notice of sale.

[Include if applicable: The mortgagee demands that you pay to the mortgagee the proceeds of all accrued but unpaid rent as of the date you receive this letter and all rent that accrues after you receive this letter in accordance with the loan documents and the Texas

Property Code. Payment of the proceeds should be made to [**name of mortgagee and address for payments**]. The tenant[s] will be instructed to pay all rents to the mortgagee until further notice, in accordance with [the deed of trust/[**specify instrument**]] and the Texas Property Code.]

Include clause 14-7-1 if this is the first correspondence from the attorney to a debtor who is a consumer. See section 14.4:5.

If you have any questions, please consult your legal counsel.

Sincerely yours,

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested
c: [name of borrower], by first-class mail

Form 14-6

Reinstatement Agreement

Date:

Deed of Trust

Date:

Grantor:

Mortgagee:

Recording information:

Property:

Note

Date:

Principal amount:

Mortgagee:

Borrower:

[Include if the owner is different from the borrower: Owner of Property:]

[Guarantor:]

Borrower has defaulted in payment of the Note, and Mortgagee has accelerated the maturity of the Note. At Borrower's request and for valuable consideration, Mortgagee

rescinds the acceleration, and Mortgagee and Borrower reinstate the payment terms of the Note.

Borrower agrees to pay the Note according to its terms and to comply with all provisions of the Deed of Trust. This agreement does not replace the Note or the Deed of Trust. It only reinstates those documents as written.

Borrower and Mortgagee agree that the unpaid principal balance of the Note is \$[amount] and the interest is paid through [date].

Include the following if applicable.

Guarantor consents to the reinstatement of the Note under the terms of this agreement.

And/Or

Owner of Property consents to the reinstatement of the Note under the terms of this agreement.

Continue with the following.

Mortgagee's acceptance of this agreement and rescission of the acceleration will not prejudice Mortgagee's rights regarding future defaults under the Note or the Deed of Trust.

As a material inducement to Mortgagee to execute this agreement, Borrower [include either or both if applicable: and Guarantor/and Owner of Property] acknowledge[s] that:

1. The current principal balance of the Note is \$[amount], and the interest is paid through [date].
2. The liens and security interests of the Deed of Trust are valid and subsisting liens against the Property and are renewed to secure the payment of the Note and the obligations of the Deed of Trust.

3. There are no claims or offsets against or defenses or counterclaims to the Note and the obligations secured by the Deed of Trust.

[Name of borrower]

[Name of mortgagee]

Include signature lines for the guarantor and the owner if applicable. Include acknowledgments.

[Reserved]

Form 14-7

Additional Clauses for Foreclosure Documents*Fair Debt Collection Act Notice*

If this notice is sent in a letter as suggested in section 14.4:5 in this chapter, a sentence describing the debt should be included following the internal address.

Clause 14-7-1

In accordance with federal and Texas laws regarding fair debt collections, unless you, within thirty days after receipt of this notice, dispute the validity of the debt set forth above, or any portion thereof, the indebtedness will be assumed to be valid. If you notify the undersigned in writing within the thirty-day period that the indebtedness, or any portion thereof, is disputed, I will obtain a verification of the indebtedness and will mail that verification to you. On my receipt of your written request within the thirty-day period, I will forward to you the name and address of the original creditor, if different from the current creditor.

I am attempting to collect this indebtedness, and any information obtained will be used for that purpose. This letter is being sent to your attention in accordance with federal law.

*Fair Credit Reporting Act Notices***Clause 14-7-2**

We may report information about your account to credit bureaus. Late payments, missed payments, or other defaults on your account may be reflected in your credit report.

Clause 14-7-3

We have told a credit bureau about a late payment, missed payment, or other default on your account. This information may be reflected in your credit report.

Form 14-8

Affidavit of Posting and Filing

Date:

Affiant:

If the affidavit is to be attached to the trustee's deed and has been incorporated by reference, the following may be omitted.

Deed of Trust

Date:

Grantor:

Mortgagee:

Recording information:

Property: [Insert property description and include the following if applicable: , including all personal property secured by the security agreement included in the Deed of Trust.]

Continue with the following.

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. This affidavit is made with respect to the foreclosure of the Deed of Trust that occurred on [date].

2. Attached to this affidavit is a copy of the Notice of Trustee's Sale, file-stamped by the county clerk's office.

3. Affiant posted a copy of the Notice of Trustee's Sale on [date] at the place at [the/each] courthouse designated in the notice [include if applicable: , being the area designated by the county commissioner's court for foreclosure sales,] and filed the Notice of Trustee's Sale in the office of the county clerk for [the/each] county in which the property is located.

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on _____ by [name of affiant].

Notary Public, State of Texas

Form 14-9

Affidavit of Mailing

Date:

Affiant:

If the affidavit is to be attached to the trustee's deed and has been incorporated by reference, the following may be omitted.

Deed of Trust

Date:

Grantor:

Mortgagee:

Recording information:

Property: [Insert property description and include the following if applicable: , including all personal property secured by the security agreement included in the Deed of Trust.]

Continue with the following.

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. This affidavit is made with respect to the foreclosure of the Deed of Trust that occurred on [date].

Select one of the following.

2. Attached to this affidavit is a copy of the letter sent to each debtor obligated to pay the debt at the address required by the Deed of Trust and the Texas Property Code.

Or

2. At least twenty-one days before the trustee's sale, Affiant, either personally or by agent, served notice of the sale on [date] on each debtor, at the address for that debtor as shown by Mortgagee's records, who [is/are]: [list name[s] and address[es]].

Continue with the following.

Each notice was served by certified mail, postage prepaid, properly addressed to each debtor listed above at the address[es] stated.

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on _____ by [name of affiant].

Notary Public, State of Texas

Form 14-10

Appointment of Substitute Trustee[s]
[Mortgagee]

Date:

Borrower:

Borrower's Address:

Mortgagee:

Mortgagee's Address:

Mortgage Servicer:

Mortgage Servicer's Address:

Substitute Trustee:

Substitute Trustee's Address:

Repeat as necessary for multiple trustees.

Deed of Trust

Date:

Grantor:

Mortgagee:

Recording information:

Property: [Insert property description and include the following if applicable: , including all personal property secured by the security agreement included in the Deed of Trust.]

The Deed of Trust and section 51.0075 of the Texas Property Code allow Mortgagee to remove the trustee[s] and appoint [a] substitute trustee[s]. Mortgagee removes the present trustee[s] and appoints Substitute Trustee[s] as the trustee[s] under the Deed of Trust. Mortgagee directs Substitute Trustee[s] to foreclose the lien of the Deed of Trust in accordance with its terms and the laws of the state of Texas.

[Name of mortgagee]

Include acknowledgment.

Form 14-11

Appointment of Substitute Trustee[s]
[Mortgage Servicer]

Date:

Borrower:

Borrower's Address:

Mortgagee:

Mortgagee's Address:

Mortgage Servicer:

Mortgage Servicer's Address:

Substitute Trustee:

Substitute Trustee's Address:

Repeat as necessary for multiple trustees.

Deed of Trust

Date:

Grantor:

Mortgagee:

Recording information:

Property: [Insert property description and include the following if applicable: , including all personal property secured by the security agreement included in the Deed of Trust.]

Sections 51.0001(7) and 51.0075 of the Texas Property Code allow a mortgage servicer to remove the trustee[s] and appoint [a] substitute trustee[s]. Mortgage Servicer removes the present trustee[s] and appoints Substitute Trustee[s] as the trustee[s] under the Deed of Trust. Mortgage Servicer directs Substitute Trustee[s] to foreclose the lien of the Deed of Trust in accordance with its terms and the laws of the state of Texas.

[Name of mortgage servicer]

Include acknowledgment.

Form 14-12

Notice of Trustee's Sale
[Mortgagee]

Date:

[Trustee/Substitute Trustee]:

[Trustee/Substitute Trustee]'s Address:

Repeat as necessary for multiple trustees.

Mortgagee:

Note:

Deed of Trust

Date:

Grantor:

Mortgagee:

Recording information:

Property: **[Insert property description and include the following if applicable: , including all personal property secured by the security agreement included in the Deed of Trust.]**

County:

Date of Sale (first Tuesday of month):

Time of Sale:

Place of Sale: [Designate county location where sale will take place (may be other than court-house)]

ASSERT AND PROTECT YOUR RIGHTS AS A MEMBER OF THE ARMED FORCES OF THE UNITED STATES. IF YOU ARE OR YOUR SPOUSE IS SERVING ON ACTIVE MILITARY DUTY, INCLUDING ACTIVE MILITARY DUTY AS A MEMBER OF THE TEXAS NATIONAL GUARD OR THE NATIONAL GUARD OF ANOTHER STATE OR AS A MEMBER OF A RESERVE COMPONENT OF THE ARMED FORCES OF THE UNITED STATES, PLEASE SEND WRITTEN NOTICE OF THE ACTIVE DUTY MILITARY SERVICE TO THE SENDER OF THIS NOTICE IMMEDIATELY

[[Name[s] of trustee[s]] [is/are] Trustee[s] under the Deed of Trust/Mortgagee has appointed [name[s] of trustee[s]] as Trustee[s] under the Deed of Trust]. Mortgagee has instructed Trustee[s] to offer the Property for sale toward the satisfaction of the Note.

Include the following if appointing a substitute trustee in this notice.

THIS INSTRUMENT APPOINTS THE SUBSTITUTE TRUSTEE(S) IDENTIFIED TO SELL THE PROPERTY DESCRIBED IN THE SECURITY INSTRUMENT IDENTIFIED IN THIS NOTICE OF SALE. THE PERSON SIGNING THIS NOTICE IS THE ATTORNEY OR AUTHORIZED AGENT OF THE MORTGAGEE OR MORTGAGE SERVICER.

Continue with the following.

Notice is given that on the Date of Sale, Trustee[s] will offer the Property for sale at public auction at the Place of Sale, to the highest bidder for cash, "AS IS." [Include if applicable: THERE WILL BE NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE FOR THE PERSONAL PROPERTY IN THIS DISPOSITION.] The sale will begin at the Time of Sale or not later than three hours thereafter. This sale will be conducted subject to the right of rescission contained in section 51.016 of the Texas Property Code.

[Name of trustee]

Repeat signature line as necessary.

[Reserved]

Form 14-13

Notice of Trustee's Sale
[Mortgage Servicer]

Date:

[Trustee/Substitute Trustee]:

[Trustee/Substitute Trustee]'s Address:

Repeat as necessary for multiple trustees.

Mortgagee:

Mortgagee's Address:

Mortgage Servicer:

Mortgage Servicer's Address:

Note:

Deed of Trust

Date:

Grantor:

Mortgagee:

Recording information:

Property: **[Insert property description and include the following if applicable: , including all personal property secured by the security agreement included in the Deed of Trust.]**

County:

Date of Sale (first Tuesday of month):

Time of Sale:

Place of Sale: [Designate county location where sale will take place (may be other than court-house)]

ASSERT AND PROTECT YOUR RIGHTS AS A MEMBER OF THE ARMED FORCES OF THE UNITED STATES. IF YOU ARE OR YOUR SPOUSE IS SERVING ON ACTIVE MILITARY DUTY, INCLUDING ACTIVE MILITARY DUTY AS A MEMBER OF THE TEXAS NATIONAL GUARD OR THE NATIONAL GUARD OF ANOTHER STATE OR AS A MEMBER OF A RESERVE COMPONENT OF THE ARMED FORCES OF THE UNITED STATES, PLEASE SEND WRITTEN NOTICE OF THE ACTIVE DUTY MILITARY SERVICE TO THE SENDER OF THIS NOTICE IMMEDIATELY

[[Name[s] of trustee[s]] [is/are] Trustee[s] under the Deed of Trust/[Mortgagee/Mortgage Servicer] has appointed [name[s] of trustee[s]] as Trustee[s] under the Deed of Trust]. [Mortgagee/Mortgage Servicer] has instructed Trustee[s] to offer the Property for sale toward the satisfaction of the Note. This foreclosure is being administered by Mortgage Servicer. Mortgage Servicer is representing Mortgagee under a servicing agreement.

Include the following if appointing a substitute trustee in this notice.

THIS INSTRUMENT APPOINTS THE SUBSTITUTE TRUSTEE(S) IDENTIFIED TO SELL THE PROPERTY DESCRIBED IN THE SECURITY INSTRUMENT IDENTIFIED IN THIS NOTICE OF SALE. THE PERSON SIGNING THIS NOTICE IS THE ATTORNEY OR AUTHORIZED AGENT OF THE MORTGAGEE OR MORTGAGE SERVICER.

Continue with the following.

Notice is given that on the Date of Sale, Trustee[s] will offer the Property for sale at public auction at the Place of Sale, to the highest bidder for cash, "AS IS." [Include if applicable: THERE WILL BE NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE FOR THE PERSONAL PROPERTY IN THIS DISPOSITION.] The sale will begin at the Time of Sale or not later than three hours thereafter. This sale will be conducted subject to the right of rescission contained in section 51.016 of the Texas Property Code.

[Name of trustee]

Repeat signature line as necessary.

[Reserved]

Form 14-14

Note: On the first sale of the day by a trustee or a substitute trustee an announcement of the reasonable conditions for conducting the public sale may be made pursuant to Tex. Prop. Code § 51.0075(a). Tex. Prop. Code § 51.0075(f) was amended in 2009 to allow the foreclosure purchaser and the trustee or substitute trustee to agree on a reasonable time after acceptance of the bid within which to deliver the purchase price; otherwise, the purchase price is payable without delay after acceptance of the bid.

Agenda of Public Foreclosure Sale

[county] County, Texas, [date]

I am [name of trustee], Trustee under the Deed of Trust recorded in [recording data] of the real property records of [county] County, Texas. [Name of mortgagee or mortgage servicer] has instructed me to sell, at public auction, the property described in the Deed of Trust,

Include one or both of the following.

together with the personal property that is subject to the security interest granted in the Deed of Trust[.]

And/Or

but not including any property previously released from the Deed of Trust, including but not limited to the property described in Exhibit [exhibit letter/number] attached hereto.

Continue with the following.

This is to be an "AS IS" sale. This sale will be conducted subject to the right of rescission contained in section 51.016 of the Texas Property Code.

The property is [read legal description or offer a copy for review. If appropriate, provide beachfront notice. See TREC form no. 33-2 at <https://www.trec.texas.gov/forms/addendum-coastal-area-property>].

[Include if applicable: THERE WILL BE NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE FOR THE PERSONAL PROPERTY IN THIS DISPOSITION.]

I now call for cash bids on the property. Each bidder will please state his or her name, for whom the bid is being made, and the amount of each bid made. [Include if applicable: All bidders must execute an acknowledgment of receipt of the beachfront notice in order to bid.]

Bids in the order made:

1. Name:

Representing:

Amount bid:

Repeat above information as needed.

Are there any further bids?

When there are no further bids, select one of the following.

If the bidder has requested, and the trustee agrees to grant the bidder, a reasonable time to obtain the amount of the bid, select the following.

Hearing no further bids, this sale is adjourned until _____, at which time this sale will reconvene at this location if the bidder has not delivered cash to me, as Trustee, in the amount of the bidder's bid; provided, however, that if the bidder delivers the cash bid, the property will be sold to the bidder without further notice, and this sale will be concluded.

The time for reconvening the sale must allow time to complete the sale by 4:00 P.M. and bidding on behalf of the beneficiary should commence at its minimum bid. If the sale is reconvened, this agenda should be reread in full.

If the bidder has not requested time to obtain the amount of the bid, select the following.

Hearing no further bids, the property is sold to _____, who made the highest and best bid.

This concludes the sale.

Continue with the following.

[Name of trustee]

[Reserved]

Form 14-15

Trustee's Deed [with Bill of Sale]

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

Trustee:

Deed of Trust

Date:

Grantor:

Mortgagee:

Recording information:

Property: [Insert property description and include the following if applicable: , including all personal property secured by the security agreement included in the Deed of Trust.]

Note

Date:

Principal amount:

Borrower:

Mortgagee:

Date of Sale (first Tuesday of month):

Time of Sale:

Place of Sale:

Buyer:

Buyer's Mailing Address:

[Amount of Sale:]

A default existed under the Deed of Trust and Mortgagee or its agent directed Trustee to enforce the trust.

Notices stating the time, place, and terms of sale of the Property were posted and filed and [**include if applicable:** as shown by the affidavit attached to this deed and incorporated in it by this reference] Mortgagee either personally or by agent served notice of the sale to each debtor, as required by section 51.002 of the Texas Property Code. In accordance with that statute and the Deed of Trust, Trustee sold the Property to Buyer, who was the highest bidder at the public auction [**include if the amount of sale is completed:** , for the Amount of Sale]. The sale was made on the Date of Sale, began at the Time of Sale or not later than three hours thereafter, and was concluded by 4:00 P.M.

Trustee, subject to any prior liens, the right of rescission contained in section 51.016 of the Texas Property Code, and other exceptions to conveyance and warranty in the Deed of Trust and for the [bid price/Amount of Sale] paid by Buyer as consideration, grants, sells, and conveys the Property to Buyer, "AS IS," together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Buyer and Buyer's heirs, successors, and assigns forever. Trustee binds Grantor and Grantor's heirs and successors to warrant and forever defend all and singular the Property to Buyer and Buyer's heirs, succes-

sors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the prior liens and other exceptions to conveyance and warranty in the Deed of Trust.

Include the following if applicable.

TRUSTEE HAS NOT MADE, AND DOES NOT MAKE, ANY REPRESENTATION, EXPRESS OR IMPLIED, WITH RESPECT TO THE PERSONAL PROPERTY, AND THE PERSONAL PROPERTY IS SOLD TO BUYER "AS IS, WHERE IS, AND WITH ALL FAULTS." THERE IS NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE IN THIS DISPOSITION OF PERSONAL PROPERTY.

Continue with the following.

[Name of trustee]

Include acknowledgment.

[Reserved]

Form 14-16

Foreclosure Affidavit

Date:

Affiant:

If the affidavit is to be attached to the trustee's deed and has been incorporated by reference, the following may be omitted.

Deed of Trust

Date:

Grantor:

Mortgagee:

Recording information:

Property: [Insert property description and include the following if applicable: , including all personal property secured by the security agreement included in the Deed of Trust.]

Continue with the following.

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. This affidavit is made with respect to the foreclosure of the Deed of Trust that occurred on [date].

2. Attached to this affidavit is a copy of the Notice of Trustee's Sale, file-stamped by the county clerk's office.

3. The trustee's sale took place on [date] at approximately [time] at the place at the courthouse designated in the notice [include if applicable: , being the area designated by the county commissioner's court for foreclosure sales].

Select one of the following.

4. Attached to this affidavit is a copy of the letter sent to each debtor obligated to pay the debt at the address required under the Texas Property Code.

Or

4. At least twenty-one days before the trustee's sale, Affiant, either personally or by agent, served notice of the sale on each debtor, at the address for that debtor as shown by Mortgagee's records, who [is/are]: [list name[s] and address[es]].

Continue with the following.

The [notice[s]/letter[s]] [was/were] served on [date] by certified mail, postage prepaid, properly addressed to each debtor listed above at the address[es] stated.

5. To the best of Affiant's knowledge, the debtor[s] [was/were] alive on the date of the trustee's sale.

Select one of the following.

6. [Name of grantor] is a servicemember in military service, as those terms are defined in 50 U.S.C. § 3911, however, the obligation described in the mortgage originated after [name] began military service on [date].

Or

6. [Name of grantor] is a servicemember in military service, as those terms are defined in 50 U.S.C. § 3911, and the obligation described in the mortgage originated before [name] began military service on [date]. However, [name], during [his/her] military service,

executed and delivered a written waiver of rights and protections provided by 50 U.S.C. §§ 3901–4043, and a copy of the waiver is attached to this affidavit.

Or

6. [Name of grantor] was not a servicemember in military service, as those terms are defined in 50 U.S.C. § 3911, or at any time within ninety days preceding the date of the trustee’s sale.

Include the following if applicable.

7. Attached to this affidavit is a copy of the notice sent to the Internal Revenue Service regarding the tax liens described therein.

Continue with the following.

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on _____ by [name of affiant].

Notary Public, State of Texas

[Reserved]

Form 14-17

Notice of Advancement and Demand for Payment

[Date]

[Name and address of borrower]

See section 14.5 in this chapter.

Re: [describe note and loan documents]

[Salutation]

This letter is to give you notice of default under the referenced loan documents. This default consists of your failure to pay the loan that you assumed and agreed to pay. The mortgagee has paid \$[amount] to [name of mortgage company].

Demand is made for the immediate payment of \$[amount], with interest as allowed by the deed of trust. Unless the default is cured by [date], the mortgagee intends to foreclose its lien under the loan documents.

Include clause 14-7-1 if this is the first correspondence from the attorney to a debtor who is a consumer. See section 14.4.5.

If you have any questions, please consult your legal counsel.

Sincerely yours,

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested
c: [name of borrower], by first-class mail

[Reserved]

Form 14-18

Affidavit of Advancement

Date:

Affiant:

Deed of Trust to Secure Assumption

Date:

Grantor:

Grantor's address:

Mortgagee:

Mortgagee's address:

Trustee:

Trustee's address:

Recording information:

Property:

Amount Advanced:

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

Affiant is Mortgagee in the Deed of Trust to Secure Assumption. Grantor has defaulted in the performance of the loan assumed, and Affiant has advanced the Amount Advanced to

cure the default. Affiant has given notice of the advancement to Grantor and has demanded to be reimbursed.

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on _____ by [name of affiant].

Notary Public, State of Texas

Form 14-19

IRS Notice Letter

[Date]

District Director
Internal Revenue Service
[Address]
Attention: Technical Support Group Manager

Re: Notice of nonjudicial foreclosure sale on property
Taxpayer:

[Salutation]

This letter is notice as required under section 7425 of the Internal Revenue Code and Treasury Regulations section 301.7425-3(a) that property encumbered by a deed-of-trust lien granted by [name of borrower] is being nonjudicially foreclosed pursuant to the authority granted in the deed of trust. [Name of mortgagee], holder of the deed-of-trust lien, gives notice of the proposed nonjudicial sale of the property.

1. *Name and Address of Creditor.* The name and address of the person for whom this notice is submitted is [name of mortgagee]. This creditor is the current owner and holder of the deed of trust and the promissory note[s] secured by it, which are described as follows:
[describe deed of trust and promissory note[s]].

2. *Tax Lien Descriptions.* A copy of each of the following notices of federal tax lien potentially affecting the property to be sold is enclosed:

Place filed: [county] County, Texas

Date filed:

Recording data:

Tax amount:

Taxpayer:

Repeat above information as needed.

3. *Description and Location of Property.* A detailed description, including location of the property affected by this notice, is [**include property description and any other relevant data**].

The street address of the property is [**address**].

4. *Date, Time, and Place of Foreclosure Sale.* The date, time, place, and terms of the proposed sale are as follows:

Date:

Time: Between the hours of 10:00 A.M. and 4:00 P.M. and to begin no earlier than [**time**] and no later than three hours thereafter.

Place:

Terms: To the highest bidder for cash.

5. *Debt.* The approximate amount of the principal obligation, including interest, secured by the lien sought to be enforced and a description of the other expenses (such as legal expenses and selling costs) that may be charged against the sale proceeds are as follows:

Principal balance:

Interest through [**date**]:

Daily accrual:

Legal and sale expenses: Estimated range of expenses is from \$[**amount**] to \$[**amount**].

Include the following if applicable.

6. *Property within District.* The property within your district is referred to in the mortgagee title policy held by **[name of mortgagee]**, which covers the tract and related improvements and which has been included if available.

Continue with the following.

7. *Acknowledgment of Notice Requested.* Please acknowledge receipt of this notice by returning a file-stamped copy of this letter in the enclosed envelope. If you have any questions, please do not hesitate to call.

Sincerely yours,

[Name of attorney]

c: **[name of client]**

[Reserved]

Form 14-20

Waiver of Rights after Default

Date:

Security Agreement

Date:

Lender (Secured Party):

Debtor:

Collateral:

Note

Date:

Amount:

Borrower (Obligor):

[Secondary Obligor:]

[Debtor/Secondary Obligor] acknowledges that a default exists under the Note and the Security Agreement. [Debtor/Secondary Obligor] waives all further notices of disposition of the collateral, pursuant to section 9.624(a) of the Texas Business and Commerce Code.

Include the following if a waiver of disposition of consumer goods collateral is desired. See section 14.3:4 in this chapter for requirements for using a waiver.

Further, [Debtor/Secondary Obligor] waives the right to require Secured Party to dispose of the collateral within ninety days pursuant to section 9.620(e) of the Texas Business and Commerce Code.

Include the following if a waiver of the right to redeem the collateral is desired. Note: This waiver may not be used in a consumer goods transaction.

[Debtor/Secondary Obligor] acknowledges that the collateral is not consumer goods and waives its right to redeem the collateral.

Continue with the following.

[Name of debtor or secondary obligor]

Form 14-21

Debtor's Consent to Acceptance of Collateral

Date:

Security Agreement

Date:

Lender (Secured Party):

Debtor:

Collateral:

Note

Date:

Amount:

Borrower (Obligor):

[Secondary Obligor:]

[Debtor/Secondary Obligor] acknowledges receipt of a proposal from Lender to accept the collateral in [full/partial] satisfaction of the obligation. [Debtor/Secondary Obligor] consents to the acceptance of the collateral as proposed by Lender.

[Debtor/Secondary Obligor] acknowledges that a default has occurred under the Note and the Security Agreement [./and/,] [**include if the collateral is consumer goods:** that Debtor is not in possession of the collateral at this time[./, and]] [**include if applicable:** that 60 percent of the cash price has not been paid in a consumer purchase-money transaction or 60 percent of

the principal amount of the obligation has not been paid in a consumer non-purchase-money transaction]. [If 60 percent of the cash price has been paid in a consumer purchase-money transaction or 60 percent of the principal amount of the obligation has been paid in a consumer non-purchase-money transaction, include: Further, [Debtor/Secondary Obligor] waives its right to require disposition of the collateral within ninety days pursuant to section 9.620(e) of the Texas Business and Commerce Code.]

[Name of debtor or secondary obligor]

Form 14-22

[Posted] Notice of Public Sale

Date:

Security Agreement

Date:

Debtor:

Lender (Secured Party):

Collateral:

Note

Date:

Amount:

Borrower (Obligor):

Lender (Secured Party):

[Secondary Obligor:]

Date of Sale:

Place of Sale:

Time of Sale:

A default exists under the Security Agreement. Secured Party will sell the Collateral at public auction to the highest bidder for cash at the Place of Sale on the Date of Sale to satisfy the debt secured by the Security Agreement. The sale will begin at the Time of Sale.

[**Include if applicable:** THERE WILL BE NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE FOR THE PERSONAL PROPERTY IN THIS DISPOSITION.]

[Name of lender]

Form 14-23

**Agenda of Public Foreclosure Sale
Held on [date]
[Personal Property]**

I am [name], [title]. [Name of debtor] signed a security agreement in favor of [name of lender], the lender, granting a security interest in [describe collateral], the property in this sale. The lender has authorized me to sell the property at public auction. The property is [read itemized list of property or offer a copy for review]. [Include if applicable: THERE WILL BE NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE FOR THE PERSONAL PROPERTY IN THIS DISPOSITION.]

I now call for cash bids on the property. Each bidder will please state his or her name, for whom the bid is being made, and the amount of each bid made.

Bids in the order made:

1. Name:

Representing:

Amount bid:

Repeat above information as needed.

Are there any further bids?

If the successful bidder is not the lender, continue with the following.

Does the bidder require time to obtain cash in the amount of its bid?

If the answer is "yes, continue with the following.

Hearing no further bids, this sale is adjourned until _____, at which time this sale will reconvene at this location if the bidder has not delivered cash to me in the amount of the bidder's bid; provided, however, that if the bidder delivers the cash bid, the property will be sold to the bidder without further notice, and this sale will be concluded.

If the sale is reconvened, this agenda should be reread in full.

If the answer is "no" or if the successful bidder is the lender, continue with the following.

Hearing no further bids, the property is sold to _____, who made the highest and best bid.

This concludes the sale.

Continue with the following.

[Name of trustee]

Form 14-24

Bill of Sale

Date:

Security Agreement

Date:

Debtor:

Lender (Secured Party):

Property:

Note

Date:

Amount:

Borrower (Obligor):

Lender (Secured Party):

Date of Sale:

Place of Sale:

Time of Sale:

Buyer:

A default occurred under the Security Agreement. Notices stating the time, place, and terms of sale of the property were sent to Debtor, any secondary obligor, and other persons to whom Lender is required to send such notice by the laws of the state of Texas. At the foreclosure sale for the Property, Lender accepted Buyer's bid, which was the highest bid.

Lender, subject to the prior liens and other exceptions to conveyance and warranty in the Security Agreement and for the amount of sale paid by Buyer as consideration, sells and conveys the Property to Buyer.

Include the following if applicable.

LENDER HAS NOT MADE, AND DOES NOT MAKE, ANY REPRESENTATION, EXPRESS OR IMPLIED, WITH RESPECT TO THE PROPERTY, AND THE PROPERTY IS SOLD TO BUYER "AS IS, WHERE IS, AND WITH ALL FAULTS." [Include if applicable: THERE IS NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE IN THIS DISPOSITION OF PERSONAL PROPERTY.]

Continue with the following.

[Name of lender]

Form 14-25

Notice of Strict Foreclosure

[Date]

[Name and address of borrower]

Re: [describe property, note, and loan documents]

[Salutation]

This letter is to give you notice that [name of lender], the lender, proposes to accept the Property described above in [full/partial] satisfaction of the obligations under the note and security agreement, as provided in sections 9.620 through 9.622 of the Texas Business and Commerce Code. This proposal is [unconditional/subject only to the condition that any property not in the possession of the lender be preserved and maintained].

If the lender receives within twenty-one days from the date of this letter your written objection to this proposal, the lender will dispose of the Property at either a public or a private disposition or will undertake to collect from or enforce an obligation of any person obligated on the Property, as allowed by law.

Include the following if applicable.

A copy of this letter has been sent to the secured party[ies], lienholder[s], or other persons below, as required by law.

Continue with the following.

If you have any questions, please consult your legal counsel.

Sincerely yours,

[Name of attorney]

Certified Mail No. [number]

Return Receipt Requested

c: [name of borrower], by first-class mail

[c: [name[s] of secured party[ies] and other persons required by
Tex. Bus. & Com. Code §§ 9.620-.621]]

Form 14-26

**Objection to Proposal to Accept Collateral in [Full/Partial]
Satisfaction of Obligation**

[Date]

[Name and address of lender]

Security Agreement

Date:

Debtor:

Lender (Secured Party):

Collateral:

Note

Date:

Amount:

Borrower (Obligor):

[Secondary Obligor:]

Lender (Secured Party):

[Salutation]

This letter is to notify you of an objection to your proposal to accept the collateral dated
[date of lender's proposal].

[Name of debtor or person objecting]

Form 14-27

This form is for use in consumer goods transactions.

Notice of Our Plan to Sell Property

[Date]

[Name and address of borrower]

[Name and address of any obligor who is also a debtor]

Re: [describe property, note, and loan documents]

[Salutation]

We have your [describe collateral] because you broke promises in our agreement.

Select one of the following. Include the first paragraph for a public disposition. Include the second paragraph for a private disposition.

We will sell [describe collateral] at public sale. A sale could include a lease or license. The sale will be held on [date] at [time] at [place]. You may attend the sale and bring bidders if you want.

Or

We will sell [describe collateral] at private sale sometime after [date]. A sale could include a lease or license.

Continue with the following.

The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you [will/will not] still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

You can get the property back at any time before we sell it by paying us the full amount you owe (not just the past-due payments), including our expenses. To learn the exact amount you must pay, call us at **[telephone number]**. If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at **[telephone number]** **[include if applicable: or write us at [address of secured party]]** and request a written explanation. **[Include if applicable: We will charge you \$[amount] for the explanation if we sent you another written explanation of the amount you owe us within the last six months.]**

If you need more information about the sale, call us at **[telephone number]** or write us at **[address of secured party]**.

[Include if applicable: We are sending this notice to the following people who have an interest in [describe collateral] or who owe money under your agreement: [list names of all other debtors and obligors, if any].]

[Name of lender]

Form 14-28

This form is for use in transactions other than those for consumer goods.

Notification of Disposition of Collateral

[Date]

[Name and address of debtor, obligor, or other person to whom the notice is sent]

[Name, address, and telephone number of secured party]

[Include only if debtor is not an addressee: Name[s] of Debtor[s]: [name[s]]]

Select one of the following. Include the first paragraph for a public disposition. Include the second paragraph for a private disposition.

We will [sell/lease/license] the [describe collateral] [include if applicable: to the highest qualified bidder] in public on [date] at [time] at [place].

Or

We will [sell/lease/license] the [describe collateral] privately sometime after [date].

Continue with the following.

You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to [sell/lease/license] [include if applicable: for a charge of \$[amount]]. You may request an account by calling us at [telephone number].

[Name of lender]

Certified Mail No. [number]
Return Receipt Requested
c: [name of debtor], by first-class mail

[Reserved]

Form 14-29

**Memorandum of Private Foreclosure Sale
Held on [date]**

I am [name], [title]. [Name of debtor] signed a security agreement in favor of [name of lender], the lender, granting a security interest in [describe collateral], the property in this sale. The lender has given notice to Debtor and any secondary obligor that after [date] the property would be sold at a private sale. The property is [read itemized list of property or offer a copy for review]. [Include if applicable: THERE WILL BE NO WARRANTY RELATING TO TITLE, POSSESSION, QUIET ENJOYMENT, OR THE LIKE FOR THE PERSONAL PROPERTY IN THIS DISPOSITION.]

I now call for cash bids on the property. Each bidder will please state his or her name, for whom the bid is being made, and the amount of each bid made.

1. Name:

Representing:

Amount bid:

Repeat above information as needed.

Are there any further bids?

If the successful bidder is not the lender, continue with the following.

Does the bidder require time to obtain cash in the amount of its bid?

If the answer is "yes, continue with the following.

Hearing no further bids, this sale is adjourned until _____, at which time this sale will reconvene at this location if the bidder has not delivered cash to me in the amount of

the bidder's bid; provided, however, that if the bidder delivers the cash bid, the property will be sold to the bidder without further notice, and this sale will be concluded.

If the sale is reconvened, this agenda should be reread in full.

If the answer is "no" or if the successful bidder is the lender, continue with the following.

Hearing no further bids, the property is sold to _____, who made the highest and best bid.

This concludes the sale.

Continue with the following.

[Name of person conducting sale]

Form 14-30

Notice of Default
[Home Equity Loan]

[Date]

[Name and address of borrower]

Re: [describe note and loan documents]

[Salutation]

This letter is to give you notice of default under the referenced loan documents on your Texas Constitution article XVI, section 50(a)(6), home equity loan. This default consists of [describe default; if the default is monetary, include the amount in default and the name of the mortgagee.]. I am attempting to collect this indebtedness, and any information obtained will be used for that purpose. This letter is being sent to your attention in accordance with state and federal law.

You are notified that if the default is not cured within twenty days from the date of posting of this letter, the mortgagee will enforce its rights under the loan documents. Specifically, the mortgagee will accelerate the maturity of your home equity note and declare due and payable the unpaid principal balance, together with accrued but unpaid interest and fees and expenses allowed by law. If the amount due is not timely paid, the mortgagee will seek a court order allowing the mortgagee to foreclose the lien you granted on your homestead under the loan documents in accordance with Texas Constitution article XVI, section 50(a)(6), and rules 735 and 736 of the Texas Rules of Civil Procedure.

In accordance with federal laws regarding fair debt collections, unless you, within thirty days after receipt of this notice, dispute the validity of the debt set forth above, or any portion thereof, the indebtedness will be assumed to be valid. If you notify the undersigned in writing

within the thirty-day period that the indebtedness, or any portion thereof, is disputed, I will obtain a verification of the indebtedness, and I will mail you that verification. If within the same thirty-day period you request in writing the name and address of the original mortgagee, and if the original mortgagee is different from the current lender, I will furnish you with that information. Federal laws do not require that I wait until the end of the thirty-day period before taking action to collect the debt. If, however, you have requested verification of the debt or the name and address of the original mortgagee within the thirty-day period, I will cease collection activities until the requested information has been mailed to you.

If you have any questions, please consult your legal counsel.

Sincerely yours,

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested
c: [name of borrower], by first-class mail

Form 14-31

Notice of Acceleration
[Home Equity Loan]

[Date]

[Name and address of borrower]

Re: [describe note and loan documents]

[Salutation]

By letter dated [date of letter], I notified you of a default under the referenced loan documents on your Texas Constitution article XVI, section 50(a)(6), home equity loan. I am attempting to collect this indebtedness, and any information obtained will be used for that purpose.

Because the default on your home equity note has not been cured, the mortgagee has accelerated the maturity of your note, declaring all unpaid principal, together with accrued but unpaid interest and fees and expenses allowed by law, immediately due and payable. The mortgagee will now seek a court order allowing the mortgagee to foreclose the lien you granted on your homestead under the loan documents in accordance with Texas Constitution article XVI, section 50(a)(6), and rules 735 and 736 of the Texas Rules of Civil Procedure.

If you have any questions, please consult your legal counsel.

Sincerely yours,

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested
c: [name of borrower], by first-class mail

[Reserved]

Form 14-32

The Texas Supreme Court approved forms for expedited foreclosure proceedings on February 10, 2014. The forms may be found on the court's website, www.txcourts.gov/media/847145/expedited-foreclosure-forms-for-website.pdf. The form below is a reproduction of the form in the order.

Cause No. _____

In Re: Order for Foreclosure
Concerning _____
[property address] Under Tex. R. Civ. P.
736

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In the _____ [type of court, e.g.,
district, county, or probate] Court

Petitioner:

_____ County, Texas

Respondent(s):

_____ [court designation]

Application for an Expedited Order Under Rule 736 on a
Home Equity, Reverse Mortgage, or Home Equity Line of Credit Loan

- 1. Petitioner is _____, whose last known address is _____.
2. Respondent is _____, whose last known address is _____.
3. The property encumbered by the _____ [loan agreement, contract, or lien] sought to
be foreclosed is commonly known as _____ [street address of the
property] with the following legal description:

[legal description of the property]

- 4. Petitioner alleges:

- A. The type of lien sought to be foreclosed is a _____ [*see liens described in Texas Rule of Civil Procedure 735.1(a)*] under _____ [*state the statutory or constitutional authority for the lien*]. The lien is indexed at _____ [*volume/page, instrument number, or clerk's file number*] and recorded in the real property records of _____ County, Texas.
- B. Petitioner has authority to seek foreclosure of the lien because _____.
- C. The name of each Respondent obligated to pay the underlying debt or obligation evidenced by the _____ [*loan agreement, contract, or lien*] encumbering the property sought to be foreclosed is _____.
- D. The name of each Respondent who is a mortgagor of the lien instrument sought to be foreclosed, but who is not a maker or assumer of the underlying debt, is _____.
- E. As of _____ [*a date that is no more than sixty days prior to the date that the application is filed*]:
- (i) [*If the default is monetary.*] _____ [*number and frequency of payments (e.g. monthly)*] have not been paid. The amount required to cure the default is _____. According to Petitioner's records, all lawful offsets, payments, and credits have been applied to the account in default.

(ii) *[If the lien secures a reverse mortgage or the default is nonmonetary.]* The facts creating the default and Petitioner's authority to enforce the lien are _____.

(iii) The total amount to pay off the _____ *[loan agreement, contract, or lien]* is _____.

F. Notice to cure the default has been sent by certified mail to each Respondent who is obligated to pay the underlying debt or obligation. The opportunity to cure has expired.

G. Before this application was filed, any other action required to initiate a foreclosure proceeding by Texas law or the _____ *[loan agreement, contract, or lien]* sought to be foreclosed was performed.

5. **Legal action is not being sought against the occupant of the property unless the occupant is named as a Respondent in this application.**

6. **If Petitioner obtains a court order, Petitioner will proceed with foreclosure of the property in accordance with applicable law and the terms of the _____ *[loan agreement, contract, or lien]* sought to be foreclosed.**

7. The following documents are attached to this application:

A. An affidavit or declaration of material facts describing the basis for foreclosure.

B. The _____ *[note, original recorded lien, or other documentation]* establishing the lien.

- C. *[If the lien has been assigned.]* The current assignment of the lien recorded in the real property records of the county where the property is located.
- D. A copy of each default notice required to be mailed to any Respondent under Texas law and the _____ *[loan agreement, contract, or lien]* sought to be foreclosed, and the _____ *[USPS Tracking report, return receipt, or other proof]* demonstrating that a notice was sent by certified mail before this application was filed.
8. **Assert and protect your rights as a member of the armed forces of the United States. If you or your spouse is serving on active military duty, including active military duty as a member of the Texas National Guard or the National Guard of another state or as a member of a reserve component of the armed forces of the United States, please send written notice of the active duty military service to Petitioner or Petitioner's attorney immediately.**
9. *Prayer for Relief:* Petitioner seeks an expedited order under Rule 736 so that it may proceed with foreclosure in accordance with applicable law and terms of the _____ *[loan agreement, contract, or lien]* sought to be foreclosed.

[Petitioner's signature block]

administration for Petitioner) and the connection or role of the affiant or the affiant's employer with respect to the servicing or foreclosure of Obligor's account (e.g. mortgagee or mortgage servicer).]

3. I have read and understand the purpose of the application to which my affidavit is attached and adopt by reference the statements made in it. I am the authorized agent or representative of Petitioner with respect to Obligor's account, and in that capacity, I am authorized to make this affidavit on Petitioner's behalf. My testimony is based on my experience, my knowledge of the usual business practices of _____ [*affiant's employer*] and the servicing industry in general, my job responsibilities, and the servicing records for Obligor's account.
4. Through my job responsibilities, I have access to and have reviewed the servicing records and data for Obligor's account, including electronic and computer generated records and data compilations. The records attached to the application are the original records or exact duplicates of the original records kept in the servicing file for Obligor's account.
5. Based on the regular practices of _____ [*affiant's employer*] and the servicing industry in general, these records:
 - a. were made at or near the time of each act, event, or condition set forth in the records;
 - b. were made by, or from information transmitted by, a person engaged in the servicing of Obligor's account who had actual knowledge of the acts, events, or conditions recorded; and
 - c. are the kind of records that are kept in the regular course of servicing loan agreements.
6. It is the regular practice of businesses engaged in the servicing of loan agreements or other contracts requiring the collection of money to keep accurate records on debits and credits to an account, an account's balance, the collateral securing the right to the

lienholder's right to repayment, and efforts to enforce the underlying debt if the Obligor has defaulted. These records are relied upon for accuracy by all persons engaged in the servicing and enforcement of a loan agreement. There is no indication that the servicing records for Obligor's account are untrustworthy.

- 7. Based on the servicing records for Obligor's account, _____. *[State all facts demonstrating the basis for foreclosure, including, if applicable, the number of unpaid scheduled payments, the amounts required to cure the default and payoff the loan, and the credits and offsets that have been applied to Obligor's account. Describe proof (e.g. USPS Tracking report, return receipt, or other proof) that Obligor was given notice of the default by certified mail.]*
- 8. I sign this affidavit based on the personal knowledge that I have obtained by reviewing the servicing records for Obligor's account. The statements made in the application and my affidavit are true and correct as of the date stated.

Signed this _____ day of _____, 20__

[printed name and title of affiant]

[signature of affiant]

Signed under oath before me on _____, 20__.

[notary's seal]

Notary Public in and for the State of Texas

My commission expires: _____.

[Reserved]

3. I have read and understand the purpose of the application to which my declaration is attached and adopt by reference the statements made in it. I am the authorized agent or representative of Petitioner with respect to Obligor's account, and in that capacity, I am authorized to make this declaration on Petitioner's behalf. My testimony is based on my experience, my knowledge of the usual business practices of _____ [*declarant's employer*] and the servicing industry in general, my job responsibilities, and the servicing records for Obligor's account.
4. Through my job responsibilities, I have access to and have reviewed the servicing records and data for Obligor's account, including electronic and computer generated records and data compilations. The records attached to the application are the original records or exact duplicates of the original records kept in the servicing file for Obligor's account.
5. Based on the regular practices of _____ [*declarant's employer*] and the servicing industry in general, these records:
 - a. were made at or near the time of each act, event, or condition set forth in the records;
 - b. were made by, or from information transmitted by, a person engaged in the servicing of Obligor's account who had actual knowledge of the acts, events, or conditions recorded; and
 - c. are the kind of records that are kept in the regular course of servicing loan agreements.
6. It is the regular practice of businesses engaged in the servicing of loan agreements or other contracts requiring the collection of money to keep accurate records on debits and credits to an account, an account's balance, the collateral securing the right to the lienholder's right to repayment, and efforts to enforce the underlying debt if the Obligor has defaulted. These records are relied upon for accuracy by all persons engaged in the servicing and enforcement of a loan agreement. There is no indication that the servicing records for Obligor's account are untrustworthy.

- 7. Based on the servicing records for Obligor's account, _____. [State all facts demonstrating the basis for foreclosure, including, if applicable, the number of unpaid scheduled payments, the amounts required to cure the default and payoff the loan, and the credits and offsets that have been applied to Obligor's account. Describe proof (e.g. USPS Tracking report, return receipt, or other proof) that Obligor was given notice of the default by certified mail.]
- 8. I sign this declaration based on the personal knowledge that I have obtained by reviewing the servicing records for Obligor's account. The statements made in the application and my declaration are true and correct as of the date stated.

JURAT

My name is _____ [first, middle, and last], my date of birth is _____, and my address is _____ [street, city, state, zip code, and country]. I declare under penalty of perjury that the foregoing is true and correct.

Executed on the ____ day of _____ [month], _____ [year].

[signature of declarant]

[Reserved]

4. [Choose one]

- a. I know that Respondent is **not** currently in the military because I asked the U.S. Department of Defense to check its Defense Manpower Data Center (DMDC) database. DMDC notified me that Respondent is not on active duty in any of the armed forces. I attach a true copy of the DMDC verification. [You can print a copy of the DMDC verification from this web address: <https://www.dmdc.osd.mil/appj/scra/scraHome.do>.]
- b. I know that Respondent is **not** currently in the military because _____. [State facts that would render a person ineligible for military service, such as being in prison or having a serious disability.]
- c. I am unable to determine if Respondent is in military service.
- d. Respondent is in the military now.

5. [If Respondent was previously in the military.] Respondent's period of military service ended more than ____ months before this proceeding was filed.

[signature of affiant]

Signed under oath before me on _____, 20__.

[notary's seal]

Notary Public in and for the State of Texas

My commission expires: _____.

armed forces. I attach a true copy of the DMDC verification. [You can print a copy of the DMDC verification from this web address: <https://www.dmdc.osd.mil/appj/scra/scraHome.do>.]

- f. I know that Respondent is **not** currently in the military because _____. [State facts that would render a person ineligible for military service, such as being in prison or having a serious disability.]
 - g. I am unable to determine if Respondent is in military service.
 - h. Respondent is in the military now.
5. [If Respondent was previously in the military.] Respondent's period of military service ended more than ____ months before this proceeding was filed.

JURAT

My name is _____ [first, middle, and last], my date of birth is _____, and my address is _____ [street, city, state, zip code, and country]. I declare under penalty of perjury that the foregoing is true and correct.

Executed on the ____ day of _____ [month], _____ [year].

[signature of declarant]

Form 14-37

The Texas Supreme Court approved forms for expedited foreclosure proceedings on February 10, 2014. The forms may be found on the court's website, www.txcourts.gov/media/847145/expedited-foreclosure-forms-for-website.pdf. The form below is a reproduction of the form in the order.

Cause No. _____

In Re: Order for Foreclosure
Concerning _____
[property address] Under Tex. R. Civ. P.
736

In the _____ [type of court, e.g.,
district, county, or probate] Court

Petitioner:

_____ County, Texas

Respondent(s):

_____ [court designation]

Default Order

1. On this day, the Court considered Petitioner's motion for a default order granting its application for an expedited order under Rule 736. Petitioner's application complies with the requirements of Texas Rule of Civil Procedure 736.1.
2. The name and last known address of each Respondent subject to this order is _____. Each Respondent was properly served with the citation, but none filed a response within the time required by law. The return of service for each Respondent has been on file with the court for at least ten days.
3. The property that is the subject of this foreclosure proceeding is commonly known as _____ [street address of the property] with the following legal description:

[legal description of the property]

4. The lien to be foreclosed is indexed or recorded at _____ [volume/page, instrument number, or clerk's file number] and recorded in the real property records of _____ County, Texas.
5. The material facts establishing Respondent's default are alleged in Petitioner's application and the supporting _____ [affidavit or declaration]. Those facts are adopted by the court and incorporated by reference in this order.
6. Based on the _____ [affidavit or declaration] of Petitioner, no Respondent subject to this order is protected from foreclosure by the Servicemembers Civil Relief Act, 50 U.S.C. App. § 501 *et seq.*
7. Therefore, the Court grants Petitioner's motion for a default order under Texas Rules of Civil Procedure 736.7 and 736.8. Petitioner may proceed with foreclosure of the property described above in accordance with applicable law and the _____ [loan agreement, contract, or lien] sought to be foreclosed.
8. This order is not subject to a motion for rehearing, a new trial, a bill of review, or an appeal. Any challenge to this order must be made in a separate, original proceeding filed in accordance with Texas Rule of Civil Procedure 736.11.

SIGNED this _____ day of _____, 20__.

JUDGE PRESIDING

Form 14-38

Demand to Pay Proceeds of Rent

[Date]

[Name and address of borrower]

Re: [describe note and loan documents]

[Salutation]

A default exists under the referenced loan documents.

Demand is made for the payment of the proceeds of all accrued but unpaid rent as of the date you receive this letter and all rent that accrues after you receive this letter in accordance with the Texas Property Code. Payment of the proceeds should be made to [name of mortgagee and address for payments]. The tenant[s] will be instructed to pay all rents to the mortgagee until further notice, in accordance with [the deed of trust/[specify instrument]] and the Texas Property Code.

Include clause 14-7-1 in this chapter if this is the first correspondence from the attorney to a debtor who is a consumer. See section 14.4:5.

If you have any questions, please consult your legal counsel.

Sincerely yours,

[Name of attorney]

Certified Mail No. [number]
Return Receipt Requested
c: [name of borrower], by first-class mail

[Reserved]

Form 14-39

Notice of Rescission of Trustee's Sale

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

Date:

[Trustee/Substitute Trustee]:

[Trustee/Substitute Trustee]'s Address:

Repeat as necessary for multiple trustees.

Debtor[s]:

[Debtor's/Debtors'] Address[es]:

Buyer[s]:

[Buyer's/Buyers'] Address[es]:

Note

Date:

Principal amount:

Borrower:

Mortgagee:

Trustee's Deed

Date:

Trustee:

Buyer:

Recording information:

Property: **[Insert property description and include the following if applicable: , including all personal property secured by the security agreement included in the Deed of Trust.]**

County:

Date of Sale (first Tuesday of month):

Time of Sale:

Place of Sale: **[Designate county location where sale will take place (may be other than courthouse)]**

Notice is given that on the Date of Sale, Trustee[s] offered the Property for sale at public auction at the Place of Sale, to the highest bidder for cash, "AS IS." The sale was struck off at the Time of Sale to Buyer[s].

The foreclosure sale is rescinded by the Trustee[s] because one or more of the statutory reasons listed below exist:

1. the statutory requirements for the sale were not satisfied;
2. the default leading to the sale was cured before the sale;

3. a receivership or dependent probate administration involving the Property was pending at the Time of Sale;

4. a condition specified in the conditions of sale prescribed by the Trustee[s] or Substitute Trustee[s] before the sale and made available in writing to prospective bidders at the sale was not met;

5. the Mortgagee or mortgage servicer and the Debtor[s] agreed before the sale to cancel the sale based on an enforceable written agreement by the Debtor[s] to cure the default;
or

6. at the Time of Sale, a court-ordered or automatic stay of the sale imposed in a bankruptcy case filed by a person with an interest in the Property was in effect.

[Name of trustee]

Repeat signature line as necessary.

[Reserved]

Form 14-40

Affidavit of Return of Bid Amount

Date:

Affiant:

Trustee's Deed

Date:

Trustee:

Buyer:

Recording information:

Property: **[Insert property description and include the following if applicable: , including all personal property secured by the security agreement included in the Deed of Trust.]**

Tracking Information: **[certified mail, electronic or wire transfer, or delivery service tracking information]**

Affiant on oath swears that the following statements are true and are within the personal knowledge of Affiant:

1. This affidavit is made with respect to the rescission of a foreclosure sale evidenced by the Trustee's Deed.

2. On the date shown above, the bid amount for the Trustee's Deed was returned to the Buyer by the method shown in the Tracking Information.

[Name of affiant]

SUBSCRIBED AND SWORN TO before me on _____ by [name of affiant].

Notary Public, State of Texas



