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A Checklist for Commercial Loans

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A CHECKLIST FOR COMMERCIAL LOANS

I pick up the details that drive the organization insane.
But sweating the details is more important than anything else.

Indra Nooyi
Chair and CEO of PepsiCo

SECTION 1
INTRODUCTION

Preparing a checklist is work for a legal assistant, correct? Doesn't everyone use them? Sadly, the answer to both of those inquiries is an emphatic NO! The truth is that a complete and accurate closing checklist can ensure that a loan transaction, or any transaction for that matter, closes properly. A complete and accurate closing checklist guides all status conference calls with the necessary parties. More importantly, it can ensure that the attorney in charge is paying attention to detail which can prevent oversight down the road. Detail? As Indra Nooyi stated, "sweating the details is more important than anything else." As transactional attorneys, we are supposed to sweat the details.

Every loan, large or small, should revolve around a checklist just as every real estate conveyance should revolve around a schedule of critical dates. Every transaction requires a closing checklist. Likely, lender's counsel will be documenting multiple transactions at any given time for different clients. Transactions can be delayed or intentionally postponed, sometimes for months at a time. Recalling the particulars about a loan can be time consuming and all but impossible without an up to date closing checklist. Attached as Appendix A-1 and Appendix A-2 are two separate forms of closing checklists that can be used as starting points for most construction or development loans. Often, a simpler form of checklist can and should be used. Each loan will have different requirements and, accordingly, different checklists.

SECTION 2
CHECKLISTS – THE BASICS

A. Contact Information and Legend.

Most closing checklists are distributed among all parties to the transaction so it is vitally important to have current contact information and a clear legend indicating responsibilities for drafting. Admittedly, it can be difficult for the person in charge of the checklist to keep up with the changing landscape of the status of the documentation and requirements.

B. Preliminary Items.

In order to begin processing a loan transaction, lender's counsel will usually receive a term sheet (preliminary or otherwise), an executed commitment letter or a complete credit memorandum evidencing loan committee approval. Instructions to counsel must always be in writing. Moreover, financial institutions will generally have policies and procedures in place with regard to formally documenting any modification of terms. Private lenders, however, may not have approval policies in place so it is vitally important that counsel always receive written instructions. Communication is key to make sure that any revisions to the previously approved terms are accurately translated to counsel.

Lenders should also provide any special requirements that they may have at the term sheet stage of the loan. Examples would include:

Special purpose entity requirements;
Opinion letter requirements;
Specific survey requirements;
Insurance requirements.

Providing this information at the beginning of the transaction assists not only the borrower, but also the lender's counsel.

C. Itemization of Loan Documentation.

The itemization of the loan documents is likely the most logical aspect of the closing checklist. Clearly different lenders often have different requirements for real estate transactions. Some lenders prefer a separate assignment of rents and leases instrument. Others rely on the deed of trust. Some lenders prefer to file a financing statement at the county level to perfect fixtures. Others rely solely on the deed of trust. Some lenders require a subordination, non-disturbance and attornment instrument with regard to *all* leases affecting the collateral. Others do not. Some lenders use their own required form of documents. Aside from any particular nuances that a lender may provide, the description of the documents on the checklist is always driven by the type of loan and the type of collateral for such loan.

The key, of course, is to make sure that the lender achieves both ***attachment*** and ***perfection*** in the collateral. It is up to lender's counsel to investigate the collateral to verify who has rights in the collateral and who is required to sign an effective pledge of such collateral. With real estate, we clearly look to a commitment for title insurance. Often, lenders will require additional collateral which may be in the form of brokerage accounts or securities. Or, there may be additional real property taken as "abundance of caution" collateral. Perhaps there is a ground lease which may or may not be affected by a franchise agreement. Each and every document required in order to achieve attachment and perfection should be listed on the closing checklist. All ancillary documents must be reviewed.

With every item of collateral that is owned by an entity, the checklist must include appropriate resolutions i) authorizing the entity to pledge such collateral, ii) stating that such entity will derive benefit from pledging such collateral and iii) further stating that pledging such collateral is in the best interest of the entity.

The lender will identify what it will require as collateral for the loan. Counsel for the lender must identify what is necessary in order to achieve attachment and perfection.

Title search: A Checklist for Commercial Loans

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