

# Commercial Mortgage Lending **Law Society Approved Forms**

(2010 Edition)



*Law Society of Ireland*

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*Law Society of Ireland*

**To all practising solicitors:**

4th November 2010

**New Approved Forms and Guidelines for Commercial Mortgage Lending (2010 Edition)**

Dear Colleague

I am pleased to launch the Law Society's new approved forms and guidelines for commercial mortgage lending. This is the culmination of a year's work by the Society since solicitors' undertakings in commercial property transactions became a significant issue in the context of solicitors' PII cover at the end of 2009.

Following extensive consultation with the profession and other stakeholders, new law was enacted in July this year – Solicitors (Professional Practice, Conduct and Discipline – Commercial Property Transactions) Regulations 2010 – prohibiting certain undertakings by solicitors to lenders and prohibiting solicitors from acting for both lender and borrower in commercial property transactions. The genesis of the prohibition on solicitors' undertakings to lenders in commercial property transactions is in the identification by the insurance industry of commercial undertakings as the reason for a significant surge in claims on solicitors' professional indemnity insurance. The prohibition on acting for both borrower and lender in the same commercial property transaction has its origins in previous practice recommendations by the Society to the profession and in various judicial pronouncements on conflicts of interest: the new statutory prohibition in this regard is in addition to, and is not a substitute for, the usual full consideration of conflict of interest issues that should be undertaken by a solicitor in any given transaction. These twin prohibitions, which will operate from 1st December 2010, mean that these issues are now matters of conduct for solicitors.

It was a necessary follow-on from the enactment of the new regulations that the Society would provide guidance and assistance to its members on how they might best implement and incorporate the new regulations in practice. I am enclosing a booklet containing precedent forms and guidelines drafted by the Commercial Undertakings Task Force set up by me last year to deal with this matter. I urge you to carefully read the new documents and to fully familiarise yourself with the contents of this booklet. **No alternative documentation should be used after 1st December 2010.** I hope you will find the booklet to be of assistance in navigating the changed practice environment that is a necessary consequence of the new regulations. It is the view of the Law Society that adherence to the guidelines will help to reduce the cost of PII cover to solicitors, and it will also help to minimise the risk of complaints against solicitors.

The new forms and guidelines are now also available in the members' area of the Society's website. In addition, the Society will make the precedent documents available to the IBF and its members in order that they may be printed for inclusion by lenders in solicitors' packs in appropriate cases. If the appropriate forms for a particular transaction are not supplied by a lender, solicitors can always access the forms on the Society's website.

I would like to sincerely thank the members of the profession who took part in the consultation process leading to the new regulations - both the regulations themselves and the enclosed booklet are all the better for them. I would also like to thank the members of the Commercial Undertakings Task Force for the considerable work and time they invested for the benefit of the profession as a whole.

Yours sincerely

**Gerard Doherty**  
**President**

This is a true copy of the form of Undertaking approved by the Law Society of Ireland named in the Society's Guidelines for Borrowers' Solicitors re Limited Application of Law Society Approved 2010 Edition Commercial Certificate of Title Documentation.

This Undertaking, IF UNAMENDED, complies, in the view of the Law Society, with the provisions of S.I. No. 366 of 2010. The Law Society will not review any other proposed form of wording or indicate a view as to whether any such amended form complies with the statutory instrument.



**COMMERCIAL MORTGAGE LENDING  
SOLICITOR'S UNDERTAKING PERMITTED UNDER "DE MINIMIS" PROVISIONS OF  
PARAGRAPH 4(b)(i) OF S.I. NO. 366 OF 2010**

**LAW SOCIETY APPROVED FORM (2010 EDITION)**

To: \_\_\_\_\_  
("the Lender" its transferees, successors and assigns)

**MY/OUR CLIENT(S)** \_\_\_\_\_  
("the Borrower")

**ADDRESS(ES)** \_\_\_\_\_  
\_\_\_\_\_

**PROPERTY** (Note (i)) \_\_\_\_\_  
\_\_\_\_\_ ("the Property")

**BEING**

**Registered Title**

- All of the lands in Folio \_\_\_\_\_ County \_\_\_\_\_
- Part of the lands in Folio \_\_\_\_\_ County \_\_\_\_\_

**Unregistered Title**

- All of the lands described in Deed dated \_\_\_\_\_ made in favour of \_\_\_\_\_  
(e.g. the current owner) registered in the Registry of Deeds on \_\_\_\_\_
- Part of the lands described in Deed dated \_\_\_\_\_ made in favour of \_\_\_\_\_  
(e.g. the current owner) registered in the Registry of Deeds on \_\_\_\_\_

**YOUR REF/ACCOUNT NO.** \_\_\_\_\_

**LOAN AMOUNT** € \_\_\_\_\_  
("the Loan Amount")

In consideration of the Lender agreeing to the drawdown of a loan facility in respect of the Property before the Lender's mortgage security has been registered and subject to the payment through me/us of the loan cheque(s) or the loan proceeds I/we, the undersigned solicitor(s) for the Borrower, HEREBY UNDERTAKE with the Lender as follows:

## **1. Good Title**

Save for any qualification on title as agreed in writing with the Lender as set out in the Schedule hereto, to ensure, where the Borrower is acquiring the Property, that the Borrower will acquire good marketable title to it, or, where the Borrower already owns the Property, to satisfy myself/ourselves that such Borrower has good marketable title to it. (Note (ii)).

## **2. Execution of Security Documents**

To ensure, prior to submitting this Undertaking to the Lender that:

- a) the Borrower has executed a mortgage deed/charge in the Lender's standard form as produced by the Lender (the "Mortgage") over the Property (and, if required by the Lender, that any non-owning Borrower has joined in the Mortgage),
- b) a deed of confirmation is executed by all necessary parties where the circumstances render such a deed appropriate, and
- c) all the provisions of the Family Home Protection Act, 1976 and any Act amending, extending or replacing that Act are complied with in respect of the Mortgage and any such deed of confirmation,

so that on completion of registration the Mortgage ranks as a first / second / other (specify) \_\_\_\_\_ legal mortgage/charge on the Property (Note (iii)).

## **3. In Funds**

To ensure, prior to submitting this Undertaking to the Lender that I am/we are in funds to discharge all stamp duty and registration fees.

## **4. Loan Proceeds in Trust**

Pending compliance with Clauses 1, 2 and 3 above, subject to the payment through me/us of the loan cheque(s) or the loan proceeds, to hold the loan proceeds in trust for the Lender.

## **5. Stamping, Registration & Furnishing Deeds to the Lender**

### **A. Stamping**

Within the time prescribed by law to lodge the purchase deed/transfer for stamping and to deal expeditiously with all related queries and issues raised by the Revenue Commissioners.

## **B. Registration**

As soon as practicable to lodge the purchase deed/transfer and the Mortgage in the appropriate Registry so as to ensure that the Lender obtains a first / second / other (specify) \_\_\_\_\_ legal mortgage/ charge on the Property.

## **C. Furnishing Deeds to the Lender**

As soon as practicable following registration to furnish to the Lender the following:

- (i) my/our Certificate of Title in the Law Society's standard form for commercial mortgage lending (2010 edition) permitted by the "de minimis" provisions of paragraph 4 (b) (i) of S.I. No. 366 of 2010,
- (ii) all deeds and documents to the Property, stamped and registered as appropriate,
- (iii) the original Mortgage or, if Land Registry title, the counterpart Mortgage (if available) and an up-to-date copy folio of the Property showing the Mortgage registered as a burden thereon, and
- (iv) any deed of confirmation which I/we have had executed pursuant to Clause 2 hereof.

To the extent to which the Lender has indicated that it will attend to stamping and registration or any work referred to above this part of the Undertaking shall be deemed to be amended accordingly.

## **6. Holding Documents in Trust**

Pending compliance with Clause 5 to hold all title documents of the Property in trust for the Lender.

### **Authority**

I/We confirm that I/we have the Borrower's irrevocable authority to give this Undertaking and, where applicable, the Borrower's spouse's prior consent to give this Undertaking.

### **Extent of Undertaking**

My/Our liability whether direct indirect or consequential and howsoever arising under this Undertaking shall not exceed €75,000.

This Undertaking is given by me/us in my/our sole capacity as solicitor(s) for the Borrower. I/We do not act as solicitor(s) for or as agent/quasi agent of the Lender in the commercial property transaction the subject of the loan to the Borrower in respect of which this Undertaking is given. It relates to Matters of Title and represents the sum of my/our obligations to the Lender in relation to this loan transaction. I/We have no responsibility for any matter of a non-title nature except insofar as any of the matters set out in this Undertaking may be deemed to be matters of a non-title nature.

**SCHEDULE**

**Qualifications on Title (if any) agreed in writing with the Lender**

Dated this \_\_\_\_\_ day of \_\_\_\_\_

SIGNATURE \_\_\_\_\_

NAME OF SOLICITOR SIGNING \_\_\_\_\_

(Note (iv))

STATE WHETHER PRINCIPAL/PARTNER  
OR AUTHORISED SOLICITOR \_\_\_\_\_

NAME OF FIRM \_\_\_\_\_

ADDRESS OF FIRM \_\_\_\_\_

\* Where it has been specifically agreed with the Lender that the funds shall issue by way of electronic funds transfer direct to the client account of the Borrower's solicitor(s), please tick (and initial) the boxes and insert the details of that account

Tick
------

Initial
---------

Name & Address of Bank \_\_\_\_\_

Bank Sort Code \_\_\_\_\_

Solicitor's Client Account Name \_\_\_\_\_

Solicitor's Client Account Number \_\_\_\_\_

My/Our agreement to electronic funds transfer is subject to the Lender providing to my/our Bank sufficient detail and information to allow me/us to identify the Borrower.



## NOTES :

- (i) The description of the Property should be taken from the Letter of Offer and must accurately identify the Property to enable the Lender to identify it by reference to the description in the Letter of Offer.
  
- (ii) In this Undertaking “**good marketable title**” means a title of a quality commensurate with prudent standards of current conveyancing practice in Ireland. The latter entails, where the Property is being acquired, that the purchase was effected on foot of the current Law Society’s Conditions of Sale and/or Building Agreement. It also entails that the investigation of the title to the Property was made in accordance with the current Law Society Requisitions on Title together with any additional Requisitions appropriate to the Property and that satisfactory replies have been received. When the Property is already owned by the Borrower, the title shall be so investigated that if the said Requisitions had been raised, satisfactory replies would have been obtained.

In this Undertaking “**Matters of Title**” means only such matters as relate to the title to the Property in the context of a conveyancing transaction and does not include any matters relating to the condition of the Property, the suitability or otherwise of the Borrower or any other matter (including the form or efficacy of the Mortgage).

Any dispute as to the quality of any title or as to whether or not any matter constitutes a Matter of Title (within the foregoing definitions) may be referred for a ruling to the Conveyancing Committee of the Law Society of Ireland, but without prejudice to the right of either party to seek a determination by the Court on the issue.

- (iii) Where the Lender is a Building Society within the meaning of the Building Societies Act, 1989 and any Act amending, extending or replacing that Act, any prior mortgage or charge must be redeemed prior to or contemporaneously with the creation of the Mortgage.
  
- (iv) The Undertaking must be signed by a **Partner** or, in the case of a sole practitioner, by the **Principal** or other solicitor duly authorised in writing on behalf of the firm by either of the foregoing. (**Note :** Where signed by the latter, the original of the written authority in question **MUST** be attached to this Undertaking or a copy certified by a solicitor other than the solicitor so authorised).

## CLIENT(S) RETAINER AND AUTHORITY

To \_\_\_\_\_ Solicitor(s)

of \_\_\_\_\_

I/We irrevocably authorise and direct you to give an undertaking in the form and containing the information set out overleaf (including an undertaking to lodge with the Lender the title deeds of the Property) to

(Name of Lender) \_\_\_\_\_

and in consideration of your giving the foregoing undertaking, I/we hereby undertake that I/we will not discharge your retainer as my/our solicitor(s) in connection with the foregoing matter unless and until I/we have procured from the Lender your effective release from the obligations imposed by such undertaking and I/we hereby indemnify you and all your partners and your and their executors, administrators and assigns against any loss arising from my/our act or default. I/we irrevocably authorise the Lender to make my/our loan cheque payable to you or to transfer the proceeds of this loan to you by electronic funds transfer.

**Dated the** \_\_\_\_\_ **day of** \_\_\_\_\_

**Signed by the Borrower** \_\_\_\_\_

**in the presence of** \_\_\_\_\_

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## FAMILY HOME PROTECTION ACT CONSENT

I, \_\_\_\_\_ the lawful spouse of the above named Borrower

**DO HEREBY GIVE MY PRIOR IRREVOCABLE CONSENT** for the purposes of the Family Home Protection Act, 1976 (as amended) to the foregoing retainer and authority of my said spouse and to the within undertaking to be given by my spouse's solicitor(s).

I acknowledge that it has been recommended to me that I should obtain independent legal advice with regard to the legal implications of giving this irrevocable consent. Where I have chosen not to take such advice, I declare that I did so voluntarily.

The Property is not adversely affected by section 5 of the Family Law Act, 1981, the provisions of the Judicial Separation and Family Law Reform Act, 1989, the Family Law Act, 1995 or the Family Law (Divorce) Act, 1996.

**Dated the** \_\_\_\_\_ **day of** \_\_\_\_\_

**Signature of Spouse** \_\_\_\_\_

**Spouse's name in BLOCK CAPITALS** \_\_\_\_\_

**Witness** \_\_\_\_\_

**(Solicitor)**

**Address of Witness** \_\_\_\_\_

**COMMERCIAL MORTGAGE LENDING  
CERTIFICATE OF TITLE PERMITTED UNDER "DE MINIMIS"  
PROVISIONS OF PARAGRAPH 4(b)(i) OF S.I. NO. 366 OF 2010**

**LAW SOCIETY APPROVED FORM (2010 Edition)**

To: \_\_\_\_\_  
("the Lender", its transferees, successors and assigns)

**NAME(S) OF BORROWER(S)** \_\_\_\_\_  
\_\_\_\_\_  
("the Borrower")

**ADDRESS OF PROPERTY** \_\_\_\_\_  
\_\_\_\_\_  
("the Property")

**YOUR REF/ACCOUNT NO.** \_\_\_\_\_

**LOAN AMOUNT** € \_\_\_\_\_  
("the Loan Amount")

As solicitor(s) for the Borrower, I/we have investigated the title to the Property and I/we hereby certify that the Borrower has good marketable title to the Property (save as set out in the **First Schedule** hereto), the description of which agrees with that stated in the Lender's Letter of Offer for the tenure specified in the **Second Schedule** hereto, free from any mortgage, charge, lien or incumbrance and any lease or tenancy, except for your mortgage/charge which is in the form prescribed by you (the "Mortgage") other than (list any existing charges or burdens) \_\_\_\_\_

I/We hereby certify that the Mortgage ranks as a first / second / other (specify) \_\_\_\_\_ legal mortgage/charge over the Property.

All the documents evidencing the Borrower's title to the Property including the Mortgage are properly listed in the **Third Schedule** hereto and are furnished herewith.

My/Our Firm currently maintains in place qualifying insurance with a qualified insurer as required by Statutory Instrument No. 617 of 2007 (as amended).

I/We as solicitor(s) for the Borrower, am/are giving this Certificate for the benefit of the Lender, having regard to the current conveyancing recommendations of the Law Society.



My/Our liability whether direct indirect or consequential and howsoever arising under this Certificate shall not exceed €75,000.

This Certificate is being given by me/us in my/our sole capacity as solicitor(s) for the Borrower and (other than as specifically set out herein) it relates only to Matters of Title. I/We do not act and have not acted as solicitor(s) for or as agent/quasi agent of the Lender in the commercial property transaction the subject of the loan to the Borrower in respect of which this Certificate is given.

This Certificate does not purport to certify anything in relation to the standard contents of the Mortgage executed by the Borrower. In particular, it does not certify that the Mortgage or any other document produced by the Lender in connection with the loan complies with the requirements of the Consumer Credit Act 1995 or the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995.

**Signature:** \_\_\_\_\_

**Name of Solicitor signing:** \_\_\_\_\_

**State whether Principal/Partner:** \_\_\_\_\_

**Name of Firm:** \_\_\_\_\_

**Address of Firm:** \_\_\_\_\_

\_\_\_\_\_

**Dated this** \_\_\_\_\_ **day of** \_\_\_\_\_ **20**\_\_\_\_\_

In this Certificate of Title “**good marketable title**” shall mean a title of a quality commensurate with prudent standards of current conveyancing practice in Ireland. The latter entails, where the Property is being acquired, that the purchase was effected on foot of the current Law Society’s Conditions of Sale and/or Building Agreement. It also entails that the investigation of the title to the Property was made in accordance with the current Law Society Requisitions on Title, together with any additional requisitions appropriate to the Property and that satisfactory replies have been received. When the Property is already owned by the Borrower, the title shall be so investigated that, if the said requisitions had been raised, satisfactory replies would have been obtained.

In this Certificate, “**Matters of Title**” means only such matters as relate to the title to the Property in the context of a conveyancing transaction and does not include any matters relating to the condition of the Property, the suitability or otherwise of the Borrower or any other matter (including the form or efficacy of the Mortgage).

Any dispute as to the quality of any title or as to whether or not any matter constitutes a Matter of Title (within the foregoing definition) may be referred for a ruling to the Conveyancing Committee of the Law Society of Ireland but without prejudice to the right of either party to seek a determination by the Court on the issue.

**FIRST SCHEDULE**  
**Qualifications on Title (if any)**  
**(as previously agreed in writing with the Lender)**

**SECOND SCHEDULE**  
**Tenure**

**THIRD SCHEDULE**  
**See Schedule of Documents attached hereto.**

## COMMERCIAL MORTGAGE LENDING

**CERTIFICATE OF TITLE ("HYBRID" CASES)  
WHERE THE BORROWER'S SOLICITOR'S LIABILITY DOES NOT EXCEED  
THE CURRENT MANDATORY MINIMUM LEVEL OF COVER OF  
PROFESSIONAL INDEMNITY INSURANCE FOR SOLICITORS IN IRELAND  
AND  
THE BORROWER'S SOLICITOR HAS NOT PROVIDED AN UNDERTAKING TO  
THE LENDER IN RELATION TO THE COMMERCIAL MORTGAGE  
TRANSACTION THE SUBJECT OF THE LOAN**

### LAW SOCIETY APPROVED FORM (2010 Edition)

To: \_\_\_\_\_  
(“the Lender”, its transferees, successors and assigns)

NAME(S) OF BORROWER(S) \_\_\_\_\_  
\_\_\_\_\_  
(“the Borrower”)

ADDRESS OF PROPERTY \_\_\_\_\_  
\_\_\_\_\_  
(“the Property”)

YOUR REF/ACCOUNT NO. \_\_\_\_\_

LOAN AMOUNT € \_\_\_\_\_  
(“the Loan Amount”)

As solicitor(s) for the Borrower, I/we have investigated the title to the Property and I/we hereby certify that the Borrower has good marketable title to the Property (save as set out in the **First Schedule** hereto), the description of which agrees with that stated in the Lender's Letter of Offer for the tenure specified in the **Second Schedule** hereto, free from any mortgage, charge, lien or incumbrance and any lease or tenancy other than (list any existing charges or burdens) \_\_\_\_\_

All the documents evidencing the Borrower's title to the Property are properly listed in the **Third Schedule** hereto and are furnished herewith.

My/Our Firm currently maintains in place qualifying insurance with a qualified insurer as required by Statutory Instrument No. 617 of 2007 (as amended).

I/We as solicitor(s) for the Borrower, am/are giving this Certificate for the benefit of the Lender, having regard to the current conveyancing recommendations of the Law Society.

My/Our liability under this Certificate is limited to the current mandatory minimum level of cover of professional indemnity insurance for solicitors in Ireland.

This Certificate is being given by me/us in my/our sole capacity as solicitor(s) for the Borrower and (other than as specifically set out herein) it relates only to Matters of Title. I/We do not act and have not acted as solicitor(s) for or as agent/quasi agent of the Lender in the commercial property transaction the subject of the loan to the Borrower in respect of which this Certificate is given.

This Certificate does not purport to certify anything in relation to the standard contents of the Mortgage executed by the Borrower. In particular, it does not certify that the Mortgage or any other document produced by the Lender in connection with the loan complies with the requirements of the Consumer Credit Act 1995 or the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995.

**Signature:** \_\_\_\_\_

**Name of Solicitor signing:** \_\_\_\_\_

**State whether Principal/Partner:** \_\_\_\_\_

**Name of Firm:** \_\_\_\_\_

**Address of Firm:** \_\_\_\_\_

**Dated this** \_\_\_\_\_ **day of** \_\_\_\_\_ **20**\_\_\_\_\_

In this Certificate of Title “**good marketable title**” shall mean a title of a quality commensurate with prudent standards of current conveyancing practice in Ireland. The latter entails, where the Property is being acquired, that the purchase was effected on foot of the current Law Society’s Conditions of Sale and/or Building Agreement. It also entails that the investigation of the title to the Property was made in accordance with the current Law Society Requisitions on Title, together with any additional requisitions appropriate to the Property and that satisfactory replies have been received. When the Property is already owned by the Borrower, the title shall be so investigated that, if the said requisitions had been raised, satisfactory replies would have been obtained.

In this Certificate, “**Matters of Title**” means only such matters as relate to the title to the Property in the context of a conveyancing transaction and does not include any matters relating to the condition of the Property, the suitability or otherwise of the Borrower or any other matter (including the form or efficacy of any mortgage).

Any dispute as to the quality of any title or as to whether or not any matter constitutes a Matter of Title (within the foregoing definition) may be referred for a ruling to the Conveyancing Committee of the Law Society of Ireland but without prejudice to the right of either party to seek a determination by the Court on the issue.



**FIRST SCHEDULE**  
**Qualifications on Title (if any)**  
**(as previously agreed in writing with the Lender)**

**SECOND SCHEDULE**  
**Tenure**

**THIRD SCHEDULE**  
**See Schedule of Documents attached hereto.**

## Guidelines for Solicitors re Limited Application of Law Society Approved 2010 Commercial Certificate of Title Documentation

From 1st December, 2010, certain ad hoc practices regarding commercial mortgages and commercial undertakings will be prohibited by law - by virtue of regulations set out in S.I. 366 of 2010. Any reference to "undertaking" in these guidelines should be read as "relevant undertaking" as defined in the regulations.

From that date –

1. Borrowers' solicitors will be **prohibited by law from giving undertakings** to lenders in commercial property transactions. The only exception to this is in relation to "de minimis" loan transactions where undertakings may be given provided the liability of the solicitor does not exceed a figure of €75,000. Therefore undertakings given by borrowers' solicitors to lenders in relation to commercial loan transactions in this category are not prohibited by the statutory instrument.
2. Solicitors will be **prohibited by law from acting for both borrower and lender in the same commercial property transaction**. There is no exception to this.
3. It is intended that in non de minimis loan transactions, where the liability of the solicitor is limited to the mandatory minimum level of professional indemnity insurance cover for solicitors in Ireland current at the time of giving the certificate of title, it will be acceptable for a solicitor to furnish a certificate of title (but not an undertaking). This is called the "hybrid scenario". In cases where liability is not so limited, there should be a full examination of title by the bank's solicitor and no certificate of title should be furnished.

The expected result of the statutory instrument is that lenders will appoint their own solicitors to act for them in relation to all commercial loan transactions other than de minimis loans. Bank of Ireland and AIB have already appointed their panels and it is anticipated that the other lenders will establish a panel of solicitors to act for them by 1st December 2010. In most cases, therefore, the borrower's solicitor will deal with the panel solicitor by way of a three-way closing for any commercial loan transaction.

To avoid a separate full investigation of title by the panel solicitor, the lending institution may elect to seek a certificate of title from the borrower's solicitor. The Law Society has drafted a certificate of title to cover this instance (called for convenience the "hybrid scenario") but it **strongly recommends** its use only where the borrower's solicitor's liability does not exceed the mandatory minimum level of cover of professional indemnity insurance for solicitors in Ireland current at the time of giving the certificate of title.

The Law Society's Commercial Undertakings Task Force has drafted precedent documentation to assist practitioners in complying with the above statutory instrument. The precedents are largely based on the existing forms for residential mortgage lending and, therefore, the general format should be familiar to most practitioners. These precedents are Law Society precedents and they are recommended by the Society on the basis that, in the view of the Society:

- they comply with the provisions of the above statutory instrument, and
- they are designed to facilitate the certification of title in certain commercial loan transactions appropriate to the size of the loan, the nature of the property, and the straightforward nature of the title to the property offered as security.

The Law Society approved precedent documentation is drafted on the basis that there is no solicitor / client relationship between the borrower's solicitor and the lender. The Law Society **strongly recommends** to solicitors that in appropriate cases they use only the Law Society approved precedent documents and that they do not use any additional or alternative documents provided by the lenders.

The Society is also of the view that where the lender engages its own panel solicitor to carry out a full investigation of title it is not appropriate to request the borrower's solicitor to provide a certificate of title to the lending institution in addition to acting for the borrower in the investigation of the title.

The Society will provide the lenders with the precedents to facilitate their printing and inclusion by the lenders in their documentation packs for borrowers' solicitors.

The Law Society will not review any alternative precedents provided by or on behalf of lenders or indicate a view either to lenders or to members of the Society as to whether any such amended format complies with the statutory instrument.

### "De minimis" loans scenario:

- From 1st December 2010 borrowers' solicitors will be prohibited by law from giving undertakings to lenders in commercial property transactions. Solicitors will also be prohibited from acting for both borrower and lender in the same commercial property transaction.

- There is one exception to the above prohibition on giving undertakings whereby a borrower's solicitor may give the lender an undertaking (and a certificate of title) where the borrower's solicitor's liability does not exceed the amount of €75,000 and also provided that there is no solicitor / client relationship between the solicitor and the lender.
- It should be noted that there is no obligation on borrowers' solicitors or on lenders to participate in the giving or acceptance of undertakings or certificates of title in these de minimis loans, and it is open to both parties to agree to an alternative procedure for loans in this category i.e. on the basis that the lender appoints its own solicitor to act for it in the matter and that an undertaking and/or a certificate of title will not be sought from the borrower's solicitor.
- The Law Society has approved a form of undertaking and a form of certificate of title for use in de minimis loans which precedent documentation, if un-amended, in the view of the Society, would comply with the provisions of the statutory instrument.
- These documents are deemed to be suitable for use in simple loan transactions where the loan is small, the nature of the security to be mortgaged is un-complicated and the title to the property is straightforward. If a solicitor finds that complications arise, it is likely that the documentation would not be suited to the transaction in question, and the lender should be asked to appoint its own solicitor to act on its behalf.
- The undertaking and the certificate of title relate only to the title of the property and to the execution and registration of the mortgage deed.
- It should be noted that the commercial loan in the de minimis scenario may not always be paid to or through the borrower's solicitor e.g. overdraft facility, stocking facility, etc. For this reason, the undertaking should not be sent to the lender (even if being sent without a request to issue the loan funds) until such time as the borrower has signed all the mortgage documentation and necessary declarations and put the solicitor in funds to complete the stamping of the borrower's title (if necessary) and registration of the lender's mortgage.
- If a lender is not prepared to proceed with the loan on foot of the Law Society approved forms of undertaking (which applies in the de minimis scenario only) and certificate of title, the borrower's solicitor should request the lender to appoint its own solicitor to act on its behalf.

#### **"Hybrid" loans scenario:**

- From 1st December 2010 borrowers' solicitors are prohibited by law (S.I. 366 of 2010) from giving undertakings to lenders in any commercial property loan transaction (subject to the €75,000 de minimis scenario above).
- From 1st December 2010 borrower's solicitors are prohibited by law (S.I. 366 of 2010) from also acting for the lender in relation to the commercial property transaction the subject matter of the loan.
- It is conceivable that a borrower's solicitor would be requested after 1 December 2010 to provide a lender with a certificate as to the borrower's title to the property being mortgaged, including in a three-way closing case i.e. where the lender has appointed its own solicitor to act for it in relation to the perfection of the bank's security i.e. a "hybrid" situation lying between the de minimis scenario and the scenario where the bank appoints its own solicitor to do a full investigation of title and act for it in the perfection of its security.
- While the giving of undertakings by borrowers' solicitors to lenders in commercial property transactions will be prohibited from 1st December 2010 by the above statutory instrument, the giving of a certificate of title is not so prohibited.
- It should be noted that there is no obligation on borrowers' solicitors or on lenders or their solicitors to participate in the giving or acceptance of certificates of title in these hybrid cases, and it is open to both parties to agree to an alternative procedure for such loans i.e. on the basis that the lender appoints its own solicitor to act for it in the matter and that a certificate of title will not be sought from the borrower's solicitor.
- The Law Society **strongly recommends** that solicitors should only give hybrid commercial certificates of title in commercial loan transactions where the solicitor's liability on foot of the certificate of title does not exceed the mandatory minimum level of cover of professional indemnity insurance for solicitors in Ireland current at the time of giving the certificate of title.
- The Society has approved a form of "hybrid" certificate of title which, if un-amended, in the view of the Society, would comply with the provisions of the statutory instrument.
- The certificate of title relates only to the title of the property. It does not extend to perfection of the lender's mortgage or to any other security for the loan, such matters to be attended to by the lender or the lender's own solicitor appointed to act on its behalf.

## Common to both the “de minimis” scenario and the “hybrid” scenario:

The Law Society approved documentation takes account of the following:

- As most commercial loan transactions will now require input from a solicitor for the borrower’s lending institution, it is expected that the said solicitor will split the loan cheque so as to ensure any existing charge is redeemed. Given that the redemption of the mortgage may be effected in different ways, it is a matter for the parties to make appropriate arrangements. However, as it is likely that the formal discharge of the existing mortgage will still issue to the vendor’s solicitor it is in order for the vendor’s solicitor to provide an undertaking to the solicitor for the new lender to forward a discharge (or confirmation of eDischarge) when to hand. The borrower’s solicitor cannot give this undertaking. Such an undertaking will not be in breach of the regulations as it is being given by the vendor’s solicitor to the solicitor for the borrower’s lending institution who will in any event have arranged for the payment of the existing mortgage. Where re-financing with the same lending institution, the panel solicitor for the lender will be attending to the registration of the vacate and an undertaking is not required from the borrower’s solicitor (and in any case cannot be given). Where re-financing with a new lender, it will be necessary for the two lenders to liaise in order to agree on how production of the vacate is to be managed between them: the borrower’s solicitor cannot give an undertaking for production of a vacate.
- The Law Society approved precedent documentation is drafted on the basis that there is no solicitor/client relationship between the borrower’s solicitor and the lender. The undertaking (which applies in the “de minimis” scenario only) and the two certificates of title all state that the basis for giving the relevant document is that the solicitor does not and has not acted for or as agent/quasi agent of the lender in the commercial property transaction the subject of the loan and the subject of the document given. In order to ensure that S.I. 366 of 2010 is not breached, the borrower’s solicitor should avoid doing anything or taking on any additional responsibility for doing any matter for the lender that would tend to suggest that the solicitor is also acting for the lender.
- The borrower’s solicitor should not deal with any other security for the loan such as guarantees, life policy assignments, etc, which are all matters to be dealt with by the lender directly with the borrower.
- The conditions of the commercial mortgage loan will not always require that a first legal charge be obtained by a lender, and the documentation has been drafted to allow the solicitor to select the appropriate option. Solicitors should note that this is different to the undertaking/certificate of title for residential mortgage lending.
- The Society does not recommend that solicitors would advise their clients as a matter of course to have the lender’s mortgage registered in advance of the lender advancing the loan funds because:
  - a. The client is placing a burden on the title at a time when s/he has not received any benefit in the form of loan funds for doing so.
  - b. If for any reason the loan approval is withdrawn by the lender prior to drawdown, but after the lender’s mortgage has been registered, the client’s title will be encumbered until the lender vacates the mortgage. The Society is not aware of any arrangement with lenders whereby they will issue releases/discharges in cases where no funds have been advanced.
- The Society recommends that solicitors download the Law Society approved documentation from the members’ area of the Law Society website on each occasion that they are required, if it has not been provided by the lender in the solicitor’s pack. This ensures that solicitors use the latest version of the documentation every time.
- Solicitors should use only the Law Society approved documents, and, other than filling in details in the sections of the documents left blank for this purpose, should not agree to use them in any amended format. The Law Society will not review any other proposed form of wording of these documents and will not indicate a view as to whether or not any such amended format complies with the statutory instrument.

## Summary

There are three tiers in relation to commercial transactions from 1 December 2010:

1 So-called “de minimis” transactions (where borrower’s solicitor’s liability does not exceed €75,000)	
<ul style="list-style-type: none"> <li>commercial undertaking permitted</li> <li>applies only where borrower’s solicitor’s liability will not exceed €75,000</li> <li>borrower’s solicitor prohibited by law from acting for lender</li> </ul>	<ul style="list-style-type: none"> <li>certificate of title not prohibited</li> <li>use only Law Society approved Undertaking and Certificate of Title documents (drafted on basis that there is no solicitor/client relationship between borrower’s solicitor and lender)</li> <li>operates in similar way to current residential system i.e. borrower’s solicitor registers title and/or mortgage</li> <li>no panel solicitor acting for lender</li> </ul>
2 So-called “hybrid” transactions (where borrower’s solicitor’s liability will be between €75,000 and, currently, €1.5m)	
<ul style="list-style-type: none"> <li>borrower’s solicitor prohibited by law from giving undertaking to lender</li> <li>borrower’s solicitor prohibited by law from acting for lender</li> </ul>	<ul style="list-style-type: none"> <li>certificate of title not prohibited</li> <li>use only where borrower’s solicitor’s liability will not exceed current level of compulsory minimum PII cover (currently €1.5m)</li> <li>use only Law Society approved Certificate of Title document (drafted on basis that there is no solicitor/client relationship between borrower’s solicitor and lender)</li> <li>lender/lender’s panel solicitor looks after registration of title and/or mortgage and all other security.</li> </ul>
3 All other transactions where borrower’s solicitor’s liability will exceed current level of compulsory minimum PII cover (currently €1.5m)	
<ul style="list-style-type: none"> <li>borrower’s solicitor prohibited by law from giving undertaking to lender</li> <li>borrower’s solicitor prohibited by law from acting for lender</li> </ul>	<ul style="list-style-type: none"> <li>full investigation of title by lender/lender’s panel solicitor</li> <li>no certificate of title to be given by borrower’s solicitor</li> <li>lender/lender’s panel solicitor looks after registration of title and/or mortgage and all other security</li> </ul>

**Always double-check the wording of the statutory instrument** to see whether it affects a particular transaction. Go through the wording of the definitions step-by-step. Extracts are provided here:-

- “Commercial Property Transaction” (... any transaction other than a Residential Property Transaction ...)
- “Residential Property” (...intended to be used as a private dwelling, including ... occupied or intended to be occupied as a private dwelling on an occasional basis, whether as a holiday home or otherwise; ...)
- “Residential Property Transactions” (...any transaction ... in connection with Residential Property for non-business purposes ... excludes any transaction whereby it is intended to use the Residential Property exclusively to earn rental income;)

### Remember:

**It is vital in all cases to take into consideration the purpose of the loan as well as the nature of the property being offered as security.**

A residential property used exclusively to earn rental income is subject to the regulations - this includes what are commonly referred to as “**buy-to-let**” residential properties and “**residential investment properties**”. Lenders should not issue residential mortgage lending packs to solicitors in such cases. Borrowers’ solicitors should not give undertakings to lenders in these cases.

A loan transaction in relation to a **private dwelling** (including what is often referred to as a “principal private dwelling”) is not normally subject to the commercial undertakings regulations but can be if, for example, the private dwelling forms part of the security for a commercial loan - no undertaking should be given by borrowers’ solicitors to lenders in the latter case.

A loan transaction in relation to a **holiday home** is not normally subject to the commercial undertakings regulations but can be if, for example, the holiday home forms part of the security for a commercial loan - no undertaking should be given by borrowers’ solicitors to lenders in the latter case.

“**Relevant undertakings**” means an undertaking to:-

- discharge or procure the discharge of a mortgage or other security over, or a loan advanced on the security of, any land or buildings the subject of a Commercial Property transaction; or
- furnish or procure the furnishing of a Certificate of Title relating to any land or buildings the subject of a Commercial Property Transaction to the relevant Financial Institution or to any of its Representatives; or
- furnish or to procure the furnishing of title deeds to any land or buildings the subject of a Commercial Property Transaction; or
- pay or procure the payment of any stamp duty accruing due in connection with any land or buildings the subject of a Commercial Property Transaction; or
- register or procure the registration of title to any land or buildings the subject of a Commercial Property Transaction; or
- register or procure the registration of a mortgage or other security over any land or buildings the subject of a Commercial Property Transaction,

but does not include an Accountable Trust Receipt

## Commercial Undertakings Task Force



