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Guidelines for the Preparation of Closing Opinions

By The Committee on Legal Opinions*

The Section of Business Law of the American Bar Association has adopted the following *Guidelines* for preparing legal opinions delivered at the closing of a business transaction by counsel for one party to another party (or parties) ("closing opinions").¹ These *Guidelines* replace the *Guidelines* included in the Section's 1991 *Third-Party Legal Opinion Report*² and reflect developments in customary practice in the decade since 1991.³ These *Guidelines* complement and are intended to be read and applied with the Section's *Legal Opinion Principles*⁴ adopted in 1998 for closing opinions that do not adopt the *Legal Opinion Accord* included in the Section's 1991 *Report*.⁵ Like the *Legal Opinion Principles*, these *Guidelines* provide guidance⁶ regarding closing opinions whether or not referred to in an opinion letter.

1. PURPOSE, SCOPE, AND RELIANCE

1.1 PURPOSE

The agreement for a business transaction will often condition a party's obligation to close on its receipt of a closing opinion covering specified legal matters from counsel for another party. When received, the closing opinion serves as a part of the recipient's diligence, providing the recipient with the opinion giver's professional judgment on legal issues concerning the opinion giver's client, the transaction, or both, that the recipient has determined to be important in connection with the transaction.

* Donald W. Glazer, Chair. Steven O. Weise, Reporter. These *Guidelines* were first printed in the November 2001 issue. This printing contains corrections to footnotes 1, 2, and 20 that accurately represent the intent of the authors.

1. These *Guidelines* use "closing opinion" and "opinion letter" interchangeably. "Opinion" refers to a legal conclusion expressed in a closing opinion.

2. Committee on Legal Opinions, *Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 47 BUS. LAW. 167 (1991).

3. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 51(2), 95 (2000) [hereinafter RESTATEMENT]; TriBar Opinion Committee, *Third-Party "Closing" Opinions*, 53 BUS. LAW. 591 (1998) [hereinafter 1998 TriBar Report].

4. Committee on Legal Opinions, *Legal Opinion Principles*, 53 BUS. LAW. 831 (1998). A copy of the *Legal Opinion Principles* is included with these *Guidelines* as Appendix A.

5. These *Guidelines* also apply to opinions that adopt the *Accord*. In the event of any inconsistencies between these *Guidelines* and the *Accord*, the *Accord* controls for opinions that adopt it. The adoption of the *Legal Opinion Principles* and these *Guidelines* is not intended to discourage use of the *Accord*.

6. In appropriate circumstances opinion givers and opinion recipients (or their counsel) may together decide not to follow these *Guidelines* in particular respects.

1.2 COVERAGE

The opinions included in a closing opinion should be limited to reasonably specific and determinable matters that involve the exercise of professional judgment by the opinion giver. The benefit of an opinion to the recipient should warrant the time and expense required to prepare it.⁷

1.3 RELEVANCE

Opinion requests should be limited to matters that are reasonably related to the transaction. Closing opinions should not include assumptions, exceptions, and limitations that do not relate to the transaction and the opinions given.

1.4 PROFESSIONAL COMPETENCE

Opinion givers should not be asked for opinions that are beyond the professional competence of lawyers. To the extent a matter such as financial statement analysis, economic forecasting, or valuation is relevant to an opinion, an opinion giver may properly rely on a factual certificate or assumption.

1.5 MISLEADING OPINIONS

An opinion giver should not render an opinion that the opinion giver recognizes will mislead the recipient with regard to the matters addressed by the opinions given.⁸

1.6 “MARKET” OPINIONS

An assertion that a specific opinion is “market”—i.e., that lawyers are rendering it in other transactions—does not make it appropriate to request or render such an opinion if it is inconsistent with these *Guidelines*.

1.7 RELIANCE

An opinion giver is entitled to assume, without so stating, that in relying on a closing opinion the opinion recipient (alone or with its counsel) is familiar with customary practice concerning the preparation and interpretation of closing opinions. On occasion, a closing opinion expressly authorizes persons to whom it is not addressed (for example, assignees of notes) to rely on it. Those persons are

7. When the benefit of an opinion to the recipient is not sufficient, depending on the circumstances, the scope of the particular opinion could be limited (e.g., the opinion on an agreement could be limited to due authorization, execution and delivery) or the opinion could be omitted entirely (see *infra* § 4.2 (opinion on all of a company's outstanding equity securities may not be cost justified)).

8. For a general discussion of this subject (including the role of disclosure), see 1998 TriBar Report, *supra* note 3 at 602-03, 607. This *Guideline* does not preclude limiting the matters addressed by an opinion through the use of specific language if the limitation itself will not mislead the recipient. See *Legal Opinion Principles* §§ I.B, I.C. For an opinion giver's ethical obligations to its client, see *infra* § 2.4.

permitted to rely on the closing opinion to the same extent as—but to no greater extent than—the addressee.

2. PROCESS

2.1 OPINION REQUEST AND RESPONSE

Early in the negotiation of the transaction documents, counsel for the opinion recipient should specify the opinions the opinion recipient wishes to receive. The opinion giver should respond promptly with any concerns or proposed exceptions, providing, to the extent practicable, the form of its proposed opinions. Both sides should work in good faith to agree on a final form of opinion letter. Discussion of opinion issues while the transaction documents are being prepared can produce constructive adjustments in the documents and the transaction structure and help to avoid delays in closing the transaction. Should a problem be identified that might prevent delivery of an opinion in the form discussed, the opinion giver should promptly alert counsel for the opinion recipient.

2.2 OTHER COUNSEL'S OPINION

When the opinion giver lacks the legal expertise to render a requested opinion, consideration should be given to whether that opinion should be sought from other counsel. An opinion of other counsel should be sought by the opinion recipient only when the opinion's benefits justify its costs. A primary opinion giver normally should not be asked to express its concurrence in the substance of an opinion of other counsel.

2.3 FINANCIAL INTEREST IN OR OTHER RELATIONSHIP WITH CLIENT

Lawyers preparing a closing opinion do not normally attempt to determine whether others in their firm have a financial interest (including an equity or prospective equity interest) in, or other relationship with, the client nor do they ordinarily disclose in an opinion letter any such interest or relationship that they or others in the firm may have. Although some lawyers may choose to make such disclosures, disclosure does not excuse those preparing a closing opinion from considering whether a financial interest in, or relationship with, the client that is known to them will compromise their professional judgment in delivering the closing opinion.

2.4 CLIENT CONSENT AND CONFIDENTIAL INFORMATION

When the client's consent to the delivery of a closing opinion is required by applicable rules of professional conduct, that consent normally may be inferred from a provision in the agreement that makes delivery of a closing opinion a condition to closing. The opinions contained in a closing opinion ordinarily do

not disclose information the client would wish to keep confidential. If, however, an opinion would require disclosure of information that the lawyers preparing the opinion are aware the client would wish to keep confidential, the implications should be discussed with the client and the opinion should not be rendered unless the client consents to the disclosure.

3. CONTENT

3.1 GOLDEN RULE

An opinion giver should not be asked to render an opinion that counsel for the opinion recipient would not render if it were the opinion giver and possessed the requisite expertise. Similarly, an opinion giver should not refuse to render an opinion that lawyers experienced in the matters under consideration would commonly render in comparable situations, assuming that the requested opinion is otherwise consistent with these *Guidelines* and the opinion giver has the requisite expertise and in its professional judgment is able to render the opinion. Opinion givers and counsel for opinion recipients should be guided by a sense of professionalism and not treat opinions simply as if they were terms in a business negotiation.

3.2 MATERIALITY

When possible, an opinion giver should avoid use of a materiality standard by using objective criteria (for example, a particular dollar amount, a specific category, or inclusion on a specified list) when limiting the matters addressed by an opinion.

3.3 PRESUMPTION OF REGULARITY

An opinion giver may rely upon the presumption of regularity⁹ for matters relating to its client, such as actions taken at meetings during the period covered by a missing minute book, that are not verifiable from the client's records (assuming the matters are not inconsistent with those records). Opinion givers ordinarily need not disclose their reliance on the presumption.¹⁰

3.4 USE OF THE PHRASE "TO OUR KNOWLEDGE"

Certain factually-oriented opinions, such as the opinions on the existence of legal proceedings,¹¹ ordinarily are expressed as being to the opinion giver's knowl-

9. See *Rogers v. Hill*, 289 U.S. 582, 591 (1933).

10. An exception is when, based on the available facts, the lawyers preparing the opinion conclude that the deficiency in company records is likely to be significant.

11. Because these opinions lack legal analysis, some lawyers prefer to refer to them as "confirmations."

edge.¹² To avoid a possible misunderstanding over the meaning of “knowledge,” the opinion preparers should consider describing in the opinion letter the factual inquiry they have conducted (for example, by stating what they intend “to our knowledge” to mean or by indicating that they are rendering the opinion based solely on their personal knowledge without making any inquiry).¹³

3.5 EXPLAINED OPINIONS; “WOULD/SHOULD”

Although closing opinions ordinarily do not set forth any legal analysis, opinion givers may include their legal analysis in an opinion when they believe it involves a difficult or uncertain question of professional judgment and have decided that the conclusions expressed should not be stated without setting forth the underlying reasoning. Such an opinion, which is commonly referred to as an “explained” or “reasoned” opinion, may be unqualified or qualified (i.e., subject to exceptions that are not customary for opinions of the type involved).

Opinions have the same meaning whether stated as “would” or “should.”¹⁴ Either way they express the opinion giver’s professional judgment in the circumstances.

4. SPECIFIC OPINIONS

4.1 FOREIGN QUALIFICATION AND GOOD STANDING

An opinion giver should not be asked for an opinion that the opinion giver’s client is qualified to do business as a foreign corporation in all jurisdictions in which its property or activities require qualification or in which the failure to qualify would have a material adverse effect on the client. Analysis of the “doing business” requirements of each jurisdiction in which the client has property or conducts activities would require an extensive factual inquiry and a review of the law of jurisdictions as to which the opinion giver cannot reasonably be expected to have expertise. This analysis rarely would be cost-justified.

Because an opinion on qualification to do business or good standing in foreign jurisdictions is based solely on certificates of public officials, delivery of those certificates without an opinion ordinarily should be sufficient to satisfy the needs of the opinion recipient.

12. “To our knowledge” is also sometimes used in opinions that address other factual matters, such as the no breach or default opinion. The trend today in many types of transactions is away from using “to our knowledge” to limit the scope of the opinion. Instead, for example, when giving a no breach or default opinion, lawyers often prefer to identify the contracts covered by referring expressly in the opinion to an existing list or a list prepared specifically for opinion purposes.

13. Such a description would not be required if the opinion preparers have conducted the inquiry described in the 1998 TriBar Report, *supra* note 3, at 618-19, 659, 664-65, or there otherwise is no risk of misunderstanding.

14. See TriBar Opinion Committee, *Opinions in the Bankruptcy Context: Rating Agency, Structured Financing, and Chapter 11 Transactions*, 46 BUS. LAW. 717, 733 (1991); 1998 TriBar Report, *supra* note 3, at 607 n.37. Closing opinions may be different in this regard from tax opinions.

4.2 OUTSTANDING EQUITY SECURITIES

An opinion that all outstanding equity securities of the client are duly authorized, validly issued, fully-paid, and non-assessable can require an extensive legal and factual inquiry (for example, when the client has been in existence for a long time and has had many stock issuances). Consideration should be given to whether the benefit of the opinion to the opinion recipient justifies the cost and time required to support it.

4.3 COMPREHENSIVE LEGAL OR CONTRACTUAL COMPLIANCE

An opinion giver should not be asked for an opinion that its client possesses all necessary licenses and permits or has obtained all approvals and made all filings required for the conduct of the client's business. Similarly, an opinion giver should not be asked for an opinion that its client is not in violation of any applicable laws or regulations or that its client is not in default under any of the client's contractual obligations.¹⁵ Neither a materiality exception nor a knowledge limitation makes these opinions appropriate.

4.4 LACK OF KNOWLEDGE OF PARTICULAR FACTUAL MATTERS

An opinion giver normally should not be asked to state that it lacks knowledge of particular factual matters.¹⁶ Matters such as the absence of prior security interests or the accuracy of the representations and warranties in an agreement or the information in a disclosure document (subject to section 4.5 below) do not require the exercise of professional judgment and are inappropriate subjects for a legal opinion even when the opinion is limited by a broadly worded disclaimer.

4.5 NEGATIVE ASSURANCE

Opinion recipients sometimes seek negative assurance from the opinion giver regarding the adequacy of the disclosure in the prospectus or other disclosure documents furnished to investors in connection with a sale of securities. Such negative assurance is not an opinion in the traditional sense. Rather, the practice of providing negative assurance is unique to securities offerings and is intended to assist the opinion recipient in establishing a due diligence or similar defense. A request for negative assurance is appropriate only when it is requested for that purpose in connection with a registered securities offering or, depending on the nature of the disclosure document and the process by which it was prepared, an offering of securities exempt from registration.¹⁷

15. This *Guideline* is not intended to preclude a request for an opinion, otherwise appropriate, on a specific matter, for example, on whether specified activities of the client comply with the requirements of a specific statute.

16. The principal exception is the "confirmation" often included in closing opinions regarding the opinion giver's knowledge of legal proceedings to which the client is a party. *See supra* § 3.4.

17. A request for negative assurance will be appropriate, for example, in many Rule 144A and Regulation S offerings.

4.6 FRAUDULENT TRANSFER

An opinion on the enforceability of an agreement does not address the effect of fraudulent transfer laws on the other party's rights under the agreement.¹⁸ Although a party to a transaction may be concerned about the effect of fraudulent transfer laws, an opinion giver could not render an opinion on those laws without relying heavily on assumed facts. Because opinions on the effect of fraudulent transfer laws are of limited value, they should not be requested absent a compelling justification.

4.7 LITIGATION EVALUATION

The opinion giver ordinarily should not be asked to express an opinion on the expected outcome of pending or threatened litigation.¹⁹

4.8 MATTERS OF PUBLIC POLICY

Because public policy is a principal basis for invalidating contractual provisions, opinion givers should not qualify their opinions as a whole with a general exception for "matters of public policy."²⁰ When appropriate, however, an opinion giver may include an exception for matters of public policy with respect to a particular provision (such as a provision releasing the other party from liability without excluding liability for willful misconduct or fraud).

4.9 WHEN LAW COVERED BY OPINION AND LAW SELECTED TO GOVERN AGREEMENT ARE DIFFERENT

When a closing opinion does not cover the law of a jurisdiction whose law is selected as the governing law in an agreement, the opinion giver should explore with counsel for the opinion recipient how best to respond to a request for an opinion on the agreement's enforceability. When an opinion of local counsel is not cost justified, an acceptable alternative may be an opinion of the opinion giver that is limited to the enforceability of the governing law clause under the law covered by the opinion. Another acceptable alternative (which might be combined with the first) may be an opinion that the entire agreement would be enforceable if the law covered by the opinion were to apply (notwithstanding the governing law clause).

18. The "bankruptcy exception" (which is implied even when not stated) excludes the effect of fraudulent transfer laws from the enforceability opinion. See 1998 TriBar Report, *supra* note 3, at 624.

19. See generally American Bar Association, *Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information*, 31 BUS. LAW. 1709 (1976).

20. See *supra* note 6.

APPENDIX

Legal Opinion Principles

By *The Committee on Legal Opinions**

In the Committee's 1991 *Third Party Legal Opinion Report*¹ the Committee undertook to monitor developments respecting the *Report* and the *Legal Opinion Accord* contained in the Report. It also undertook in due course to take such further action as might seem appropriate. These *Legal Opinion Principles* are a product of those undertakings.

The *Report* and the *Accord* have made an important contribution to the learning on legal opinions. While the *Accord* has not gained the national acceptance the Committee had hoped, the *Guidelines* in the *Report* are frequently looked to for guidance regarding customary legal opinion practice. In section 152 of the recently adopted *Restatement (Third) of the Law Governing Lawyers*, the American Law Institute affirmed the importance of customary practice in the preparation and interpretation of legal opinions. The Committee has prepared these Principles to provide further guidance regarding the application of customary practice to third-party "closing" opinions that do not adopt the *Accord*. The Committee hopes that these *Principles* will prove useful both to lawyers and their clients and to courts that from time to time are called upon to address legal opinion issues.

The Committee intends to consider the possible extension of these *Principles* to issues they do not now address. The Committee would welcome the assistance of all who are interested in participating in that effort.

I. GENERAL

- A. At the closing of many business transactions legal counsel for one party delivers legal opinion letter(s) to one or more other parties. Those opinion letters, often referred to as third party opinion letters, are the subject of these *Legal Opinion Principles*.
- B. The matters usually addressed in opinion letters, the meaning of the language normally used, and the scope and nature of the work counsel is expected to perform are based (whether or not so stated) on the customary practice of lawyers who regularly give, and lawyers who regularly advise opinion recipients regarding, opinions of the kind involved. These *Legal Opinion Principles* are intended to provide a ready reference to selected aspects of customary practice.

* Thomas L. Ambro, Chair. Donald W. Glazer and Steven O. Weise, Co-Reporters.

1. Committee on Legal Opinions, *Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 47 BUS. LAW. 167 (1991).

- C. An opinion giver may vary the customary meaning of an opinion or the scope and nature of the work customarily required to support it by including an express statement in the opinion letter or by reaching an express understanding with the opinion recipient or its counsel.
- D. The opinions contained in an opinion letter are expressions of professional judgment regarding the legal matters addressed and not guarantees that a court will reach any particular result.
- E. In accepting an opinion letter, an opinion recipient ordinarily need not take any action to verify the opinions it contains.
- F. The lawyer or lawyers preparing an opinion letter and the opinion recipient and its legal counsel are each entitled to assume that the others are acting in good faith with respect to the opinion letter.

II. LAW

- A. Opinion letters customarily specify the jurisdiction(s) whose law they are intended to cover and sometimes limit their coverage to specified statutes or regulations of the named jurisdiction(s). When that is done, an opinion letter should not be read to cover the substance or effect of the law of other jurisdiction(s) or other statutes or regulations.
- B. An opinion letter covers only law that a lawyer in the jurisdiction(s) whose law is being covered by the opinion letter² exercising customary professional diligence would reasonably be expected to recognize as being applicable to the entity, transaction, or agreement to which the opinion letter relates.
- C. An opinion letter should not be read to cover municipal or other local laws unless it does so expressly.
- D. Even when they are generally recognized as being directly applicable, some laws (such as securities, tax, and insolvency laws) are understood as a matter of customary practice to be covered only when an opinion refers to them expressly.

III. FACTS

- A. The lawyers who are responsible for preparing an opinion letter do not ordinarily have personal knowledge of all of the factual information needed to support the opinions it contains. Thus, those lawyers necessarily rely in large measure on factual information obtained from others, particularly company officials. Customary practice permits such reliance unless the factual information on which the lawyers preparing the opinion letter are relying appears irregular on its face or has been provided by an inappropriate source.
- B. As a matter of customary practice the lawyers preparing an opinion letter are not expected to conduct a factual inquiry of the other lawyers in their firm or a review of the firm's files, except to the extent the lawyers preparing the opinion letter have identified a particular lawyer or file as being reasonably

2. See § II.A.

- likely to have or contain information not otherwise known to them that they need to support an opinion.
- C. An opinion should not be based on a factual representation that is tantamount to the legal conclusion being expressed. An opinion ordinarily may be based, however, on legal conclusions contained in a certificate of a government official.
 - D. Opinions customarily are based in part on factual assumptions. Some factual assumptions need to be stated expressly. Others ordinarily do not. Examples of factual assumptions that ordinarily do not need to be stated expressly are assumptions of general application that apply regardless of the type of transaction or the nature of the parties. These include assumptions that copies of documents are identical to the originals, signatures are genuine and the parties other than the opinion giver's client have the power to enter into the transaction.

IV. DATE

An opinion letter speaks as of its date. An opinion giver has no obligation to update an opinion letter for subsequent events or legal developments.