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Model Closing Opinion Letter (Annotated)

(For Opinion Letter of Borrower's Counsel Relating  
Primarily to Unsecured Bank Credit Agreement)

Business Law Section  
of the  
Pennsylvania Bar Association



## Introduction

The Model Closing Opinion Letter that follows is intended to be used as an exemplar for Pennsylvania lawyers in drafting or reviewing an Opinion Letter.<sup>1</sup>

Section 95 of the Restatement (Third) of the Law Governing Lawyers (the Restatement) affirms the importance of “customary practice” in the preparation and interpretation of third-party legal opinions. See also the ABA Legal Opinion Principles, ¶1B. The Reporter’s Note to comment b. to section 95 of the Restatement indicates that one looks to treatises and state bar reports on opinions for sources of customary practice. The Legal Opinion Committee concurs, and has placed heavy reliance, as more fully described throughout this Model Opinion Letter, upon a number of bar association reports reflecting customary practice as followed by Pennsylvania lawyers.

In addition to the Bar Association reports referred to above, Glazer contains detailed and comprehensive analyses of all aspects of third-party legal opinions, including descriptions of customary practice among knowledgeable lawyers who regularly give and regularly receive (on behalf of their clients) third-party legal opinions.

As is the case with the TriBar Opinion Committee,<sup>2</sup> the mission of the Steering Committee has been to attempt to describe customary practice among knowledgeable Pennsylvania lawyers and to provide guidance as to how to proceed in those areas where custom remains unclear.

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1. The Model Closing Opinion Letter stands on its own and does not incorporate the Accord. The Accord was published as part of the Third-Party Legal Opinion Report by the Section of Business Law of the American Bar Association, in 47 Bus. Law. 167 (1991) (the ABA Opinion Report). Except as an educational tool and for the Guidelines, which now stand alone, the Accord has not been widely accepted.
  2. TriBar Report, “Conclusion,” 53 Bus. Law. at 666.

### **Matters Dealt with in the Model Opinion Letter**

The Model Opinion Letter is an opinion letter of Borrower's counsel relating to an unsecured bank credit agreement, but much of the introductory language and the qualifications and assumptions are usable in closing opinions in a number of other types of transactions. The Model Opinion Letter is annotated to describe what the Committee believes is customary practice in giving and receiving third-party legal Opinions.

The Model Opinion Letter should be read in conjunction with applicable commentary in the Pennsylvania Third-Party Legal Opinion Report. The Committee believes that the Model Opinion Letter and its annotations accurately describe customary practice in third-party legal Opinions by knowledgeable Pennsylvania lawyers.

It is assumed that the Opinion Giver, a Pennsylvania lawyer or firm of lawyers, will not feel competent to express substantive opinions on matters of New York law. Many Pennsylvania lawyers or firms feel sufficiently competent to be able to express an opinion on Delaware corporate, limited liability company or partnership law, usually limited to (i) matters of organizational status (due incorporation or organization, valid existence, good standing, and the like) and authorization of transaction documents, and (ii) an Opinion as to whether the transaction documents violate the Delaware General Corporation Law or the specific Delaware statute regarding limited liability companies or partnerships, as applicable. It is therefore assumed in the Model Opinion Letter that the Opinion Giver is competent to give an Opinion on such matters under the laws of Delaware.<sup>3</sup>

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3. See TriBar, *Third-Party Closing Opinions: Limited Liability Companies*, 61 Bus. Law. 679 (2006), for a description of customary practice in giving opinions on Delaware limited liability companies. As is the case when opining on Delaware corporations under the Delaware General Corporation Law, a reference to the Delaware Limited Liability Company Act means that the Opinion Preparer has reviewed the statute, any applicable constitutional provisions, and cases interpreting the statute.

### **Definitions Used in the Notes to the Model Opinion Letter**

In addition to the terms defined in the opening paragraph of the Model Opinion Letter (“Company,” “Credit Agreement,” “Note,” and “Loan Documents”), the following terms, in accordance with customary practice, are used in the Opinions and in the notes thereto with the following meanings:

“Transaction Documents” means the contract setting forth the principal terms of the Transaction, and other contracts ancillary thereto addressed by the Opinion.

“Court Orders” means court and administrative orders, writs, judgments and decrees that name the client and are specifically directed to it or its property.

“Law” includes statutes, rules and regulations, as well as the decisions of judicial and administrative bodies, at the state and federal (but not the local) level that are customarily understood to be covered by the Opinion given and that are reasonably available to lawyers generally or actually known to them. “Local Law” is that of counties, towns, municipalities and special political subdivisions (whether created or enabled through legislative action at the Federal, state or regional level).

“Opining Jurisdiction” is a jurisdiction whose applicable law is addressed in the Opinion Letter. Thus, in the Model Opinion Letter the term refers collectively to the United States and the Commonwealth of Pennsylvania and, in certain matters of corporate law, to Delaware.

“Opinion” means a third-party legal opinion, i.e., one provided by counsel of one of the parties to one or more of the other parties to a business transaction. An “Opinion Letter” is the letter setting forth one or more Opinions. A straightforward Opinion Letter is likely to cover at least three separate Opinions, as follows:

A “Remedies Opinion” (often referred to as an “Enforceability Opinion”) in the customary form is an Opinion that a specified Transaction Document “is legal, valid and binding, and enforceable against the Company”—with or without the phrase that customarily follows, “in accordance with its terms.”

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A “No Breach or Default Opinion” (sometimes referred to as a “No Conflict Opinion”) is an Opinion that execution and delivery of the Transaction Documents by the Company do not, and performance by the Company of its agreements in the Transaction Documents will not, (A) breach or result in a default under an Other Agreement, or (B) breach or otherwise violate a Court Order. Frequently the Opinion will also cover violation of the Company’s Charter and Bylaws.

A “No Violation of Law Opinion” is an Opinion that execution and delivery by the Company of the Transaction Documents do not and performance by the Company of the Transaction Documents will not violate an existing Law.

“Other Agreements” means contracts other than the Transaction Documents.

“Other Counsel” means counsel providing a legal opinion pertaining to particular matters concerning the client, the Transaction Documents or the Transaction (i) directly to the Opinion Recipient or (ii) to the Opinion Giver in support of an Opinion provided by the Opinion Giver.

“Public Authority Documents” includes all certificates issued by any government official, office or agency concerning a person’s property or status.

The terms “Opinion Giver” and “Opinion Recipient,” whose meanings are clear enough, are also used. The term “Opinion Preparers” refers to lawyers in a law firm (the Opinion Giver) who take on the responsibility to prepare an Opinion Letter.

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**Annotated Text of Model Closing Opinion Letter  
(Opinion Text in Bold-Face)**

**Introductory Note.** Several of the ABA Guidelines should be emphasized before the Opinion Preparer commences to draft the Opinion Letter:

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. (Guideline 2.1).

In addition, Guideline 3.1 sets forth a “golden rule,” to the effect that an Opinion should not be requested that the Opinion Recipient’s counsel would not give if it were the Opinion Giver and had the requisite expertise. Moreover, as pointed out in Guideline 1.2, 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.”<sup>4</sup>

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4. See the California Remedies Report, which is a thoughtful report on the cost/benefit analysis involved in opinion giving. State Bar of California Business Law Section, *Report on Third-party Remedies Opinions* (September 2004).

**[Date of Closing]**

**Note:** *The Opinion Letter should be dated the closing date (generally the date the money passes). The Opinion Giver generally has no duty to update for changes in the Law or fact that occur after the date of the Opinion Letter;<sup>5</sup> however, the Opinion Letter should take into account facts and circumstances that will necessarily arise in the future, and address any required future performance based on the relevant facts and law that exist on the date of the Opinion Letter. Thus if future obligatory action requires the future discretionary approval of a governmental authority, that fact should be disclosed in the Opinion Letter.*

**To the parties identified in Schedule A hereto:**

**Ladies and Gentlemen:**

**We have acted as Counsel for [Name of BORROWER] (the “Company”), a Pennsylvania [Delaware] corporation, in connection with (i) [the preparation, execution and delivery of] the Revolving Credit and Term Loan Agreement dated [date] (the “Credit Agreement”) among the Company, the Banks parties thereto and [name of AGENT] as Agent for the Banks [, and (ii) the initial borrowing(s) made thereunder evidenced by the Revolving Credit Notes dated [date] (the “Notes”) of the Company in favor of the Banks]. (The Credit Agreement and the Notes are hereinafter collectively referred to as the “Loan Documents.”)**

**Note:** *An Opinion Letter should set forth the Opinion Giver’s relationship with the client (identifying the client as such) and its role in the Transaction. The Comment to Rule 2.3 of the Pennsylvania Rules of Professional Conduct states that in connection with a third-party legal opinion,*

*“... it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.”*

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5. See ABA Principles, par. IV. Where performance of the Transaction will take place over a period of time (e.g., supply contracts) or in stages with serial closings (e.g., loan takedowns or conversions of shares), the Opinion Giver usually provides the Opinion Letter only at the outset, and the Opinion Giver addresses the required future performance based on the relevant facts and law that exist on the date of the Opinion Letter.

#### Purpose of Opinion Letter; Definitions

*One purpose of the first sentence is to make clear that the Opinion Recipient is not the client of the Opinion Giver and is not entitled to rely on the Opinion Giver as if it were. It is generally accepted that the Opinion Recipient may not rely on the Opinion Giver for any legal or other analysis beyond that set forth in the Opinion Letter, such as the broader guidance and counsel that the Opinion Giver might provide to its client.*

*In its consideration of legal issue coverage (as well as other Opinion issues), the Opinion Recipient will normally be assisted by its own legal counsel, who will be responsible, for example, for advising the Opinion Recipient on the adequacy of the Opinion Letter, the acceptability of exceptions and limitations, and the meaning of particular Opinion clauses. The first sentence of the Opinion Letter makes clear that no quasi-attorney/client relationship between the Opinion Giver and the Opinion Recipient is intended.*

#### **Purpose of Opinion Letter; Definitions**

**We are delivering this opinion letter to you [at the request of the Company] pursuant to [Section \_\_\_ of] the Credit Agreement. Unless otherwise defined herein, capitalized terms shall have the respective meanings set forth in the Credit Agreement.**

**Note as to Purpose; Consent of Client.** *As provided in Opinion paragraph (I)(4) (page 106, below), the Opinion Letter should limit reliance upon the Opinion to the purpose contemplated by the Transaction Documents, and the sentence in the Model Opinion to the effect that the Opinion Letter is provided pursuant to a particular section of one of the Transaction Documents is intended to clarify the Opinion's purpose. The bracketed words, "at the request of the Company," are not necessary if the Opinion is given pursuant to a provision in a Transaction Document; otherwise, it may be desirable to use the bracketed words and make sure the client is given a copy of the Opinion Letter with advice that it is understood to be given at the request of the client and that the client waives Counsel's duty of confidentiality to the extent required to give the Opinion.*

*Rule 2.3 of the Pennsylvania Rules of Professional Conduct provides:*

- (a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.*

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*(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interest materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.*

*(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.*

*Comment [5] to Pennsylvania R.P.C. 2.3 indicates when the lawyer providing the evaluation may disclose confidential information and when consent of the client must be expressly obtained.*

*[5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. See Rule 1.6(a) and Rule 1.0(e) (Informed Consent).*

## OPINION PARAGRAPHS

**Note:** *The Opinion Giver may choose to move the paragraphs on the “Basis for Opinion—Qualifications, Limitations” (Sections A and B, pp. 90–92, below) and the paragraph on the Opining Jurisdiction (paragraph (C), p. 97, below) to precede the Opinion Paragraphs.*

**On the basis of and subject to the assumptions, qualifications, exceptions and limitations set forth below, we express the following opinions:**

**1. Incorporation, Existence and Good Standing**

A. Assumption: Borrower is a Pennsylvania Corporation

**1A. The Company is a Pennsylvania [business] corporation [duly incorporated] [duly organized] and presently subsisting<sup>6</sup> under the laws of the Commonwealth of Pennsylvania.**

B. Assumption: Borrower is a Delaware Corporation

**1B. The Company is a corporation [duly incorporated] [duly organized], validly existing [and in good standing] under the General Corporation Law of the State of Delaware.**

**Note:** (a) *The Opinion in paragraph 1A or 1B may have four components:<sup>7</sup>*

(1) **Duly Incorporated:** *Although the word “duly” is not a precise term of art, it conveys the notion not only that the minimum filings and other action, if any, necessary at the time the entity was formed were taken, but also that the documents that were filed and other action taken conformed in all material respects to the applicable statutory requirements as to form and*

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6. The Opinion that a corporation is “validly existing” requires the same analysis as the Opinion that it is “presently existing” and to give both Opinions is technically redundant. The TriBar Report states that “subsisting” and “existing” are understood to be synonymous (§ 6.1.3 n.113). See Pa.Op.Report Part I, ¶¶1C.1, 1C.5.

7. This portion of the analysis is based upon the Pa.Op.Report Part I. See also the TriBar Report §§ 6.1 through 6.1.4.

*content of filings and as to other action in effect at the time of filing.*<sup>8</sup> See *Pa.Op.Report Part I, Section 1A*.

*When the corporate record is incomplete, the Opinion Giver may be able to rely upon the Presumption of Regularity and Continuity: TriBar Report § 6.1.1; ABA Guidelines ¶3.3. (See optional paragraph (E)(8), p. 108, below.)*

(2) **Duly Organized.** *The concept “duly organized” includes the idea that the corporation was “duly incorporated” and that it thereafter adopted bylaws, elected directors, and authorized the initial issuance of stock, if organized on a stock basis. These determinations will require that the Opinion Preparers examine the corporation’s records, including minute books. See Pa.Op.Report Part I, Section 1B.*

(3) **Existence as a Corporation; “Status” Opinion.** *To state that the corporation is validly<sup>9</sup> existing (or subsisting)<sup>10</sup> confirms that corporate existence has begun and that the corporation has not been dissolved, ceased to exist, or undergone any organic change that would affect its ability or authority to consummate a transaction. See Pa.Op.Report Part I, Section 1C.*

*In credit transactions, the short Opinion as to corporate existence should address the concerns of the Opinion Recipient, and is preferred as being precise and cost-efficient. In certain other*

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8. If the review to determine compliance in all material respects with statutory requirements reveals a discrepancy, it may not be possible to give the Opinion regarding due incorporation. See Glazer §§ 6.2 and 6.3. The Pennsylvania Business Corporation Law of 1988 (B.C.L.) § 1302 provides that a natural person must be “of full age” (defined in § 1103 to mean 18 years) to be an incorporator. In reliance upon the unstated assumption that natural persons have the required legal capacity (see item 1 of the note to Assumption (B)(4), page 96, below; TriBar Report § 2.3(a)), the Legal Opinion Committee believes that under customary practice in Pennsylvania, absent Actual Knowledge, it is not necessary in giving the Opinion to ascertain the ages of the incorporators.
  9. The TriBar Report states in section 6.1.3 note 113 that, as a matter of customary usage, the omission of the word “validly” is understood not to change the meaning of the Opinion.
  10. As noted in footnote 6, above, “existing” and “subsisting” are deemed to be synonymous.

*transactions, such as acquisitions and investments, Opinion Recipients may properly request the “duly incorporated” or “duly organized” Opinions.*

**(4) Good Standing.** *It is not clear what an Opinion as to “good standing” adds to an Opinion that a corporation is validly existing—in part because what “good standing” means varies from state to state (TriBar Report § 6.1.4). While the TriBar Report discusses the meaning of good standing Opinions in section 6.1.4, it states that such Opinions “usually add little of value analytically,” and its illustrative opinion letters do not include an Opinion as to good standing. The same is true of the Model Opinion language in the Pa.Op.Report Part I, Section 1.*

*The TriBar Report in section 6.1.4 states that the term “good standing” “is understood as a matter of customary usage to cover the matters addressed by the certificates of government officials that lawyers in the jurisdiction in question customarily obtain to support the opinion.” The Pennsylvania Opinion Report states that the phrase “presently subsisting” as used in Pennsylvania is “somewhat analogous” to the term “good standing” used in other states, and that a Pennsylvania Opinion Giver will customarily state that a Pennsylvania corporation is “presently subsisting” rather than “in good standing.” Pa.Op.Report Part I, ¶1C.5.*

*If the corporation’s charter would be subject to revocation for failure by the corporation to keep its state filings current, the TriBar Report (§ 6.1.4) indicates that a good standing Opinion would be inappropriate. The Pennsylvania Opinion Report, however, takes the position that a “validly existing” opinion for a Pennsylvania corporation may be given if the Department of State issues a “presently subsisting” certificate notwithstanding that facts exist that would enable the state to bring an action to revoke the charter (Pa.Op.Report Part I, ¶¶1C.3, 1C.5, 1C.8). The Legal Opinion Committee believes that the better practice would be for the Opinion Giver to call attention to any known facts that would enable the state to bring an action to revoke the charter.*

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(b) *Opinions relating to incorporation, organization, existence, and good standing do not cover licenses, registrations, or other governmental or third-party approvals that might be required prior to commencement of a particular type of business but that were not a condition to incorporation. If such matters are to be covered in an Opinion Letter, they should be covered by a separate Opinion on the applicability of and compliance with those licensing requirements.*

C. Qualification in Principal Foreign State

**1C. The Company is duly qualified as a foreign corporation and is in good standing in the (Commonwealth of Pennsylvania) [if Borrower is a Delaware corporation] (State of \_\_\_) [if Borrower is a Pennsylvania corporation].**

**Note:** (a) *ABA Guideline 4.1 states that this Opinion should normally not be requested on a cost-justified basis because it involves extensive factual inquiry and a review of the law of jurisdictions where the Opinion Giver would not reasonably be expected to have expertise. See also TriBar Report § 6.1.6. The Opinion Giver may have an experienced corporate service company obtain the certificates customarily obtained by it in the particular states involved based upon a factual certificate from the client, and then, if an Opinion is required, rely on those certificates without further inquiry. Id. The Pennsylvania Opinion Report does not deal with an Opinion as to qualification in a foreign state.*

(b) *Sometimes the Opinion that the Company is qualified in all states where necessary was limited to states where the failure to be qualified would not have a “material adverse affect.” However, an Opinion as to “material adverse effect” is based in large part on a financial judgment, and ABA Guideline 1.4 states that an Opinion requiring interpretation of financial statements should not be requested; in addition, ABA Guideline 3.2 discourages the use of the “materiality” concept in an Opinion Letter, unless objectively defined. ABA Guideline 4.1 indicates that qualification and good standing certificates (and tax certificates where available) from public officials, without a legal Opinion, should be sufficient. The TriBar Report, section 6.1.6, is in accord.*

(c) *At most, the Legal Opinion Committee believes that any Opinion on foreign qualification should be limited to named states (following the format of Opinion paragraph 1C), based on the Public Authority Documents referred to in note (a) thereto.*

(d) As to “good standing” in addition to “qualification,” see TriBar Report § 6.1.6:

*“Like the opinion on the Company’s good standing in its state of incorporation, good standing in this context customarily is understood to have whatever meaning is ascribed to it in the certificates on which the opinion preparers are relying.”*

*If a tax certificate is obtained that shows any tax delinquency, a “clean” opinion as to good standing can still be given. However, if the delinquency would give the state the power to revoke corporate qualification, the Opinion Giver may want to call attention to that fact.*

## **2. Corporate Power**

**2. The Company has the corporate power [and authority] to execute, deliver and perform [all of its obligations under] each of the Loan Documents.**

**Note:** (a) *A Corporate Power Opinion relating to the Transaction Documents means that the Company has the power to take the specified actions under its charter and bylaws and applicable corporation law. TriBar Report § 6.3. The phrases “corporate power” and “corporate power and authority” are understood to have the same meaning. The phrase “full power” has no generally accepted meaning and its use should be avoided. Id., § 6.3 n.138. In considering the Corporate Power Opinion, the Opinion Giver should consider the matters set forth in Part I, Section 2 of the Pa.Op.Report.*

(b) *An Opinion is sometimes requested as to the client’s corporate power “to carry on its business as it is now being conducted”—i.e., that the nature of its business is not ultra vires. Such an Opinion is not included in the illustrative opinion letters in the TriBar Report, nor discussed in the text of that Report. The Pennsylvania Opinion Report, however, contemplates the giving of such an Opinion (see Pa.Op.Report Part I, Opinion ¶3), and recommends in paragraph 3.5 obtaining a certificate from an official of the corporation describing the corporation’s business, or defining the corporation’s business through reference to descriptions in public documents such as SEC Form 10-K.*

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(c) A Corporate Power Opinion may be requested concerning the question of a subsidiary's power to guarantee the obligations of its corporate parent. See, e.g., Del. Code Ann. Tit. 8 § 122(13); Pa.B.C.L. § 1502(a)(6) (and the definition of "distribution" in Pa.B.C.L. § 1103). See TriBar Report § 6.3.

### 3. Authorization, Execution and Delivery

**3. The Company has taken all corporate action necessary to authorize the execution, delivery and performance of each of the Transaction Documents, and has duly executed and delivered each of them.**

**Note:** See Pa.Op.Report Part I, Section 4; TriBar Report §§ 3.5.2(b), 6.4.

### 4. Remedies Opinion (Opinion ¶4)

**Note: Meaning of Remedies Opinion.**

Glazer<sup>11</sup> states that

*"An enforceability opinion provides comfort to the recipient that, subject to express and customarily assumed exceptions, (i) the company has taken the steps required by corporate law and its charter and bylaws to bind itself under the agreement. . . . and (iii) the terms of the agreement, as they apply to the company, will be given legal effect."*

*In other words, in the event of a material breach by the Company, a court would give effect to the obligations of the Company in the agreement, either by requiring performance of those obligations as written or by granting the other party money damages or some other relief.*

*It is important to note that the assurance provided by the Remedies Opinion is subject to certain standard qualifications and any express exceptions stated in the Opinion Letter. The standard qualifications set forth in the Model Opinion paragraphs 4A or 4B (pp. 77 to 79, below), are the bankruptcy and insolvency exception and the*

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11. Glazer § 9.1, at 209.

*equitable principles limitation. See also the TriBar Remedies Report for a process that can be used to determine whether to include express exceptions or assumptions.*

*Examples of additional express qualifications and limitations are set forth for illustrative purposes in paragraphs (E)(1) through (E)(4) (pp. 102 to 103, below) and optional paragraphs (E)(5) through (E)(8) (pp. 107 to 108, below). Other qualifications to the Remedies Opinion may be deemed accepted without being explicitly stated therein (see note 3, “Which Laws Are Addressed?,” p. 71, below).*

**1. Formation of Contract.**

*As noted above, the Remedies Opinion means, in part, that the Company is bound by the agreement. The Opinion thus confirms compliance with applicable requirements for the formation of a contract, and confirms that the agreement complies with any contract law requirements with respect to form. An unqualified Opinion could not be given, for example, about a bond that did not comply with a statutory requirement for a seal or about an instrument that did not contain a notarization as required by applicable law. The Opinion also confirms that the Company’s obligations are supported by consideration to the extent required by applicable contract law. In the case of an exchange of promises, counsel may assume, without explicit disclosure, that the agreements of the other party are binding on it and enforceable by the Company (see item 3 of the note to ¶(B)(4), p. 96, below).*

**2. Provisions of Agreement to be Given Legal Effect.**

*(a) The Legal Opinion Committee is of the view that the Remedies Opinion should be interpreted to mean that a court would give legal effect to all the obligations of the client in the agreement<sup>12</sup>—not just the material or essential provisions—either by requiring performance of those obligations or by granting the other party money damages or some other relief. An exception would be required to be stated if under applicable law (i) a remedy specified in the agree-*

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12. See TriBar Report § 3.1 n.69; Glazer § 9.7. California takes a somewhat different approach, but the result is the same. See State Bar of California Business Law Section, *Report on Third-party Remedies Opinions* (September 2004).

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ment will not be given effect under the circumstances contemplated, or (ii) the Opinion Recipient would not have a remedy for a breach of an undertaking by the Company. See TriBar Report § 3.1.

(b) *The Remedies Opinion also means that the courts will enforce provisions of the agreement that are unrelated to the concept of breach, such as a chosen-law provision, or a provision as to how the agreement can be amended.*

(c) *The Company's obligations covered by the Opinion include promises made by the Company, duties imposed on it, corresponding rights granted to others, and remedies against the Company conferred by the agreement. In the opinion of the Legal Opinion Committee, the safest course, and the one followed by most lawyers, is to analyze the "legal, valid, and binding" status of every obligation of the Company specified in the agreement. Of course, the issue of concern regarding the enforceability of the provision may not be covered by the Opinion because it arises under a law generally understood not to be covered by the Opinion (see "Which Laws Are Addressed?", p. 71, below) or under the law of a jurisdiction not included in the law of the Opining Jurisdiction. If there is doubt as to the enforceability of an obligation of the Company in the agreement, and the matter is covered by the Opinion, a limitation such as "We express no opinion with respect to [the specified provision]" should be included in the Opinion.*

(d) *For example, provisions that purport to establish the nature and extent of relief for defaults may raise problems. Thus, counsel must consider the validity of acceleration clauses and clauses affording secured creditors the right to take and sell collateral.*

(e) *Other clauses to be considered as to enforceability include those releasing a party prospectively from liability for its own wrongs, affording indemnification for securities law violations, requiring waiver of the obligations of good faith, fair dealing, diligence, and reasonableness, prohibiting a party from bringing legal action except in a specified forum, shortening or extending the statute of limitations, or waiving the right to a jury trial. Similarly to be considered are clauses relating to determination of damages, provisions imposing liquidated damages, entitlement to attorneys' fees and other costs, and releasing a party from, or requiring in-*

*demnification for, liability for its own action or inaction, to the extent it involves negligence, recklessness, willful misconduct, or unlawful conduct.*<sup>13</sup>

(f) **Arbitration.** *A Remedies Opinion will be taken to confirm that any clause selecting arbitration as the method of resolving disputes will be given effect; in other words, that if one of the parties should challenge the right to arbitrate, a court will compel arbitration. If there is doubt as to this conclusion, an exception should be noted, such as:*

*We express no opinion with respect to the provision in the agreement requiring arbitration [because it may not be given effect in certain circumstances].*

*The Remedies Opinion does not deal with how any dispute under the contract would be resolved in the arbitral process, and it is not necessary in the Opinion Letter to discuss the differences between arbitration and judicial proceedings. See TriBar Report § 3.6.2. If desired, it would be proper to qualify an Opinion by language such as is set forth in optional paragraph (E)(6), p. 107, below.*

### **3. Which Laws Are Addressed?**

(a) *A Remedies Opinion as to a particular agreement deals not only with contract law but also with the other areas of Law customarily understood to be covered in a Remedies Opinion based on customary practice. See TriBar Report § 3.5.1. The ABA Principles provide in paragraph IIB that an Opinion Letter covers only Law that a lawyer in the Opining Jurisdiction exercising customary professional diligence would reasonably be expected to recognize as being applicable to the entity, the transaction, or agreement to which the Opinion Letter relates. However, as a matter of customary practice, some laws are not implicitly covered by the Remedies Opinion even though lawyers would recognize them as being applicable to the transaction. These laws are referred to in the succeeding paragraphs. See ABA Principles ¶IID; TriBar Report §§ 3.5.1 and 3.5.2(c); Glazer § 9.8.4.*

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13. See TriBar Remedies Report for a discussion regarding the enforceability of many of these provisions.

## 2 Model Closing Opinion Letter (Annotated)

(b) **Regulatory Law.** *As an example of the “laws of the Opining Jurisdiction” referred to, if the client is a regulated company it may need governmental agency approval to borrow money. If failure to obtain such approval would cause the contract to be void or would impair its enforceability, the Remedies Opinion would subsume the obtaining of such approval and its sufficiency. But a Remedies Opinion does not as a matter of customary practice cover regulatory statutes applicable to parties other than the client, such as bank lending limits or the necessity that the Opinion Recipient qualify to do business in Pennsylvania. See TriBar Report § 3.5.2(a).*

(c) **Securities Laws.** *The authorities state that as a matter of custom, in giving the Remedies Opinion with respect to an ordinary bank credit agreement, the Opinion Giver need not consider federal or state securities laws. See ABA Principles ¶IID; TriBar Report § 3.5.2(c); Glazer § 9.10.1. However, when the Opinion Letter does not explicitly address securities law compliance in a separate Opinion clause, it may be wise in some circumstances to consider an express disclaimer of such coverage by the Governmental Approvals and Filings Opinion, see note (b) to Op. ¶5, p. 83, below, or the No Violation of Law Opinion, see note (d) to Opinion ¶7, p. 86, below. In Opinions relating to insurance company loans (which typically take the form of a private placement of a company’s notes), it is frequently requested that the Securities Act of 1933 and the Trust Indenture Act of 1939 be expressly covered. Because of the question as to whether a Remedies Opinion covers the Federal Reserve Board’s margin regulations, a separate Opinion paragraph ordinarily covers that issue. (See Opinion ¶8, p. 87, below.)*

(d) **Insolvency Laws.** *In customary practice, the effect of insolvency laws is covered by the Remedies Opinion only when an Opinion refers to them expressly. See ABA Principles ¶IID; TriBar Report § 3.5.2(c).*

(e) **Usury Laws; Set-off Provision.** *The Remedies Opinion on a commercial loan confirms that the interest rate and related fees and charges do not violate the usury laws of the Opining Jurisdiction to the extent a violation of those laws would affect enforceabil-*

ity of the loan.<sup>14</sup> Violation of usury laws should be considered in the case of (a) a variable interest rate (such as prime plus), (b) the possibility of a mandatory reset of the interest rate, or (c) the possibility of non-monetary consideration given by the Company being considered as additional interest. The distinction between a violation of a criminal statute that does not make the agreement unenforceable and a violation of a criminal statute that would make the agreement unenforceable in accordance with its terms should be kept in mind; the former would not require a qualification of the Remedies Opinion, while the latter would. However, when an Opinion Letter contains a No Violation of Law Opinion (Op. ¶7, p. 85, below), most Opinion Givers in Pennsylvania choose to make reference to a statute of either type.

On occasion, an Opinion Recipient may ask for a specific Opinion that the terms of the Transaction Documents do not violate the usury laws. If a specific Opinion is requested as to usury, see Pa.Op.Report Part IV.

If the coverage of the Opinion is extended to the criminal laws of Pennsylvania, depending on the circumstances and the Opinion Giver's view of the Law, the Opinion Giver may wish to include a qualification of the type set forth in paragraph (E)(1), p. 102, below. The Task Force notes that whether or not an express Opinion is given concerning the usury laws, Opinion Givers in Pennsylvania often conclude that there is no need for such a qualification. See Pa.Op.Report Part IV, ¶1.9.

In view of the covered law limitation in Opinion paragraph (C), p. 97, below, there is no need to expressly make an exclusion of the usury laws of other states, such as those where any Bank may be located or wherever enforcement of the Transaction Documents may be sought.

The Remedies Opinion also requires the Opinion Preparers to consider whether an exception is required for a contractual "set-off" provision that permits a bank lender or a purchaser of a participation interest from any lender to apply the deposits of the debtor against the debt. If there is doubt as to enforceability of such a con-

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14. The No Violation of Law Opinion (Opinion ¶7, p. 85, below) would cover usury violations that violate criminal statutes but would not affect enforceability.

*tractual provision, the Opinion Giver should consider a qualification such as that in paragraph (E)(2) (page 102, below). See Glazer § 9.10.2.*

(f) **Security Interests.** *When an agreement grants a security interest in personal property, the question arises whether a Remedies Opinion covers the status of the security interest (i.e., its creation, perfection, or priority) under the Uniform Commercial Code. The TriBar UCC Report recognizes that, by longstanding custom, the Remedies Opinion does not cover the creation, attachment, perfection, or priority of the security interest. This is true whether or not the opinion contains a security interest opinion.<sup>15</sup> Nevertheless, some counsel choose to exclude creation expressly from the Remedies Opinion. While the Remedies Opinion should not be read to cover the perfection and priority of a security interest, it should be read to cover clauses in the agreement that confer on the creditor the right to take remedial action, including action involving the collateral.*

*If a security interest is granted to the Agent on behalf of the Banks, the following Opinion may be requested:*

*“The Agent will not be required to qualify to transact business in the Commonwealth of Pennsylvania solely as a result of extensions of credit pursuant to the Credit Agreement and the security interests granted to the Agent securing such extensions of credit.”*

*In this connection, see 15 Pa.C.S. § 4121 (general qualification requirement for foreign business corporations “doing business” in Pennsylvania); § 4122 (excluded activities). Excluded activities include, at section 4122(a)(7), “[c]reating as borrower or lender, acquiring or incurring, obligations or mortgages or other security interests in real or personal property,” and at section 4122(a)(8), “[s]ecuring or collecting debts or enforcing any rights in property securing them.” See also American Housing Trust, III v. Jones, 696 A.2d 1181 (Pa. 1997) (implying, in dictum, that sufficient regular and repeated acts otherwise falling within the exclusions of section 4122(a)(7) and (8) might constitute “doing business”).*

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15. See TriBar UCC Report § 2.2.

(g) **Local Law.** Ordinarily, when an Opinion Letter limits its coverage to laws of a specified state or states, municipal or other local laws and regulations such as those of counties and municipalities are not covered. See ABA Principles ¶IIC; TriBar Report § 6.7. The Opinion Recipient should expressly request an Opinion as to Local Law if one is desired, such as in the case of a real estate development, a project financing, and other transactions of a type ordinarily dependent upon compliance with local zoning and similar laws. See TriBar Report § 6.7.

(h) **Federal Law.** As stated in note (b) to paragraph (C), p. 98, below, in almost all cases, the Opinion Letter should explicitly cover matters of Federal Law. It should be noted, however, that many Federal laws described in these notes to Opinion paragraph 4 are excluded from the scope of the Opinion Letter by implicit or explicit understanding. See, e.g., note 3, items (c) and (d), p. 72, above, and item (k), p. 76, below.

(i) **Corporate Law Matters.** The Pa.Op.Report contains model Opinions pertaining to various corporate law matters, including shares of stock authorized, issued, and outstanding, preemptive rights, and effectiveness of a merger.<sup>16</sup>

*Because the Remedies Opinion means, among other things, that the client has taken the steps required by corporate law to bind itself under the Transaction Documents, the Opinion cannot be given unless the Opinion Giver can give Opinions 1, 2, and 3, namely, that the client validly exists in its jurisdiction of organization, that the client has the corporate power to perform the Transaction Documents, and that all actions or approvals by the client (e.g., by its*

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16. In a Remedies Opinion on a merger, the lawyer should not be required to consider the possible applicability of the antitrust laws unless the transaction, on its face, raises price fixing, conspiracy to monopolize, or other problems of a similar nature. See TriBar Report § 3.5.2(c); Glazer § 9.8.4. However, in an acquisition, counsel should consider the validity of “no-shop” clauses and other devices such as break-up fees and lock-up options designed to protect against competing bidders, “no-poach” provisions in which the parties commit not to hire each other’s employees, and non-competition clauses. In opining on shareholder agreements, counsel should consider legal restrictions on the duration and scope of a voting agreement or a stock transfer agreement.

board of directors) and its owners (e.g., shareholders or partners) necessary to bind the client have been taken or obtained and the Transaction Documents have been duly executed pursuant thereto.

*Thus, when the client's jurisdiction of organization is other than the Opining Jurisdiction, the Remedies Opinion is given on the basis that it also addresses the Law of the client's jurisdiction of organization to the extent it governs the client's organizational status and authorization of the Transaction Documents and any other corporate, partnership, or similar requirements with respect to its execution. If the Opinion Giver is not competent to give a corporate law opinion under the Law of such jurisdiction, it should either expressly state assumptions regarding such issues (see paragraph (B)(4), p. 95, below) or rely upon Other Counsel in respect of one or more of those matters (see paragraphs (D)(1), (D)(2), p. 99, below).*

(j) **Public Policy.** *The TriBar Report states in section 1.9(i) that "General unspecified 'public policy' exceptions are not used because they make the entire opinion unacceptably vague, requiring the opinion recipient to guess at the opinion giver's source of concern."*

(k) **Other Issues.** *Where custom is unclear, the TriBar Report (§ 3.5.3) recommends that the Opinion Recipient should request Opinions on the matters it wishes to have covered; the TriBar Committee believes that it would ordinarily be unproductive for Opinion Givers to try to identify in Opinion Letters each area that is not covered. Following this line of reasoning, the Legal Opinion Committee is of the opinion that a number of other specific legal issues should be deemed not to be covered by an Opinion Letter unless specifically addressed; these would include pension and employee benefit laws, environmental law, OSHA, RICO, labor laws, tax law, criminal laws of general application, Hart-Scott-Rodino requirements, and the Exon-Florio Amendment to the Defense Production Act of 1952. See Glazer § 9.8.4. Of course, where there is any serious question and the issue is not covered explicitly, the better course is to discuss the question with the Opinion Recipient, and either cover the issue in a specific Opinion or make the exclusion explicit.*

(l) **Choice-of-law Provision.** *Insofar as the Law governing the Transaction Documents is concerned, the effectiveness of a chosen-law provision of an agreement is covered by the Remedies Opinion. See TriBar Report § 4.4. If the contract being opined upon chooses*

*the law of Pennsylvania, the Remedies Opinion (Opinion ¶4A) is given on the basis that it includes an Opinion that such governing law provision will be given effect under the Pennsylvania choice-of-law rules. If the contract chooses as governing law the law of a jurisdiction other than the Opining Jurisdiction—as in our example, the Pennsylvania lawyer is to give an Opinion under a contract that provides that it is to be governed by New York law—Opinion paragraph 4A should not be used, and instead Opinion paragraph 4B should be used.*

\* \* \* \* \*

**4. Remedies Opinion**

**A. Remedies Opinion Where Pennsylvania Law Is Chosen As the Governing Law**

*If the Transaction Documents provide that Pennsylvania law is to be the governing law, the Remedies Opinion may be in the following form:*

**4A. The Credit Agreement and the Note are [legal,] valid and binding obligations of the Company, enforceable against the Company in accordance with their respective terms**

**[, except as may be limited by (a) bankruptcy, insolvency, reorganization, moratorium, fraudulent transfer or other similar laws affecting the rights and remedies of creditors generally, and (b) general principles of equity {(regardless of whether such enforceability is considered in a proceeding in equity or at law)} {, including (without limitation) concepts of materiality, reasonableness, good faith and fair dealing}]<sup>17</sup>.<sup>18</sup>**

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17. The TriBar Report concludes that an Opinion Letter no longer needs to point out that the equitable principles limitation applies even if a court is not sitting under local practice as a court of equity. Likewise, the TriBar Report states that the “including” clause “merely illustrates the breadth of the equitable principles limitation,” and “does not add to or subtract from the limitation.” See TriBar Report § 3.3.1 n.74.

18. The bankruptcy exception and the equitable principles limitation can affect Opinions other than the Remedies Opinion. See note (a) to Opinion ¶4A. The Opinion Giver may make other Opinions or the entire Opinion Letter subject thereto.

## 2 Model Closing Opinion Letter (Annotated)

**Note:** (a) *This, the basic version of the Remedies Opinion (sometimes called the “Enforceability” Opinion), together with its exceptions and qualifications, is the basic opinion sought by the Opinion Recipient. It has become accepted that the Remedies Opinion is not analyzed word by word; i.e., it is understood to have the same meaning as long as it contains one of the operative words, “binding,” or “enforceable.” See TriBar Report § 3.1. It is also becoming the practice not to include the bankruptcy and equitable principles exceptions as applicable solely to the Remedies Opinion, but rather to include them as general exceptions to all the Opinions. See TriBar Report § 1.2(c).*

(b) *Opinion paragraph 4A subsumes an Opinion that the governing law clause of the Transaction Documents will be given effect under the choice-of-law rules of Pennsylvania.*

(c) *Two general qualifications to the Remedies Opinion are set forth in the Model Opinion: (a) the bankruptcy and insolvency exception, and (b) the equitable principles limitation. Examples of additional qualifications and limitations are set forth in paragraphs (E)(1) through (E)(4), pp. 102 through 103, below, and optional paragraphs (E)(5) through (E)(8), pp. 107 through 108, below. Certain other qualifications to the Remedies Opinion are commonly accepted without being explicitly stated therein (see “Which Laws Are Addressed?,” note 3 to Opinion ¶4, p. 71, above). See also TriBar Remedies Report.*

(d) *Both the bankruptcy exception and the equitable principles limitation should be drafted so as to qualify not only the words “enforceable in accordance with its terms” but also the words “legal, valid and binding.”*

### B. Remedies Opinion Where New York Law Is Chosen As the Governing Law

*What is meant by the Remedies Opinion, given by a non–New York lawyer, when the governing law provisions of the Transaction Documents specify New York Law?*

*Any one of three alternatives can be used. The effect of all three approaches, each of which has gained wide acceptance, is to render an Opinion that expressly addresses the effectiveness of the governing law clause under only the Law of the Opining Jurisdiction, accompanied by a standard Remedies Opinion under that Law*

*rather than under the Law specified in the governing law provisions. The three approaches are illustrated by the alternatives in Opinion paragraph 4B set forth below.*

*These three approaches are justified (and are normally satisfactory to counsel representing the Opinion Recipient) on the ground that having drafted the agreement to select the Law of the Opinion Recipient's state,<sup>19</sup> the Opinion Recipient would normally be informed (expressly or impliedly) by its own counsel about the status of the agreement under that state's Law. The Opinion Recipient thus will have Remedies Opinions (advice from its own counsel and an Opinion Letter from Borrower's counsel) as to enforceability of the entire agreement under the Law of each state.*

*If the Transaction Documents provide that New York law is chosen as the governing law, the Remedies Opinion may be in the following form with any of the three alternatives:*

**4B. We note that the Credit Agreement provides that it is to be governed by and construed in accordance with the substantive law of the State of New York. In any proceedings arising out of or relating to the Credit Agreement in any court of the Commonwealth of Pennsylvania, or in any Federal court sitting in the Commonwealth of Pennsylvania, that court would give effect to the governing law provision of the Credit Agreement, except to the extent that the application of New York law is contrary to a fundamental public policy of the Commonwealth of Pennsylvania [or any other state whose law would apply to an issue absent such choice of New York Law<sup>20</sup>].**

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19. See TriBar Report § 4.6. Under the golden rule, those with the gold—the banks, insurance companies, or other financial institutions—make the rules, including the selection of the governing law.

20. The Opinion Giver must determine first that the transaction or a party to the transaction bears a reasonable relation to the jurisdiction whose Law is chosen; otherwise, contacts must be created or no Opinion on the chosen Law can be given. In transactions that bear a reasonable relation to more than the jurisdictions of Pennsylvania and New York, the bracketed language should be included as a correct statement of Pennsylvania Law.

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*Alternative 1:*

**However, if a court were to hold, notwithstanding the express terms of the Credit Agreement, that it is governed by and to be construed in accordance with the Law of [Pennsylvania],**

*Or Alternative 2:*

**However, our Opinion is given as if the law of the Commonwealth of Pennsylvania, without regard to its conflict of laws provisions, were chosen as the governing law in the Loan Documents. Based on that assumption,**

*Or Alternative 3:*

**However, if the Credit Agreement were governed by the law of the Commonwealth of Pennsylvania,**

**the Credit Agreement and the Note would be legal, valid and binding obligations of the Company, enforceable against the Company in accordance with their respective terms**

**[, except as may be limited by (a) bankruptcy, insolvency, reorganization, moratorium, fraudulent transfer or other similar laws affecting the rights and remedies of creditors generally, and (b) general principles of equity {(regardless of whether such enforceability is considered in a proceeding in equity or at law)} {, including (without limitation) concepts of materiality, reasonableness, good faith and fair dealing}].**

***Note:** Alternatives (1), (2), and (3) are all seen frequently, and yield substantially the same result: each results in the requirement that the Opinion speak to the enforceability of the Transaction Documents under the Law of Pennsylvania.*

***The Bankruptcy and Insolvency Exception***

*The bankruptcy exception puts the Opinion Recipient on notice that the rights it has bargained for may, if the Company encounters financial difficulty, be impaired under laws affecting the rights and remedies of creditors generally. In a debt financing, for example, the bankruptcy exception covers the possibility that in a bankruptcy proceeding a lender might be permitted to recover only a portion of its claim or might find that its claim was subject to avoidance (for example, as a fraudulent transfer) or subordination to the claims of*

*others (under the doctrine of equitable subordination) or that payments it received prior to bankruptcy could be recaptured by the debtor's trustee (for example, as a preference).*

*While the view is generally taken that the term "similar laws" covers state fraudulent transfer laws (the Federal law being covered by the reference to "bankruptcy"), to avoid any doubt, the Model Opinion expressly includes such laws in its list covered by this exception. In some cases, such as highly leveraged buy-out transactions or upstream guaranties, an explicit exception as to the applicability of corporate law restrictions on dividends, stock purchases, and other distributions should be written in (see paragraph (F), p. 103, below). Furthermore, in such cases, the Opinion Giver may wish to highlight the fraudulent transfer issue by making a statement after the full Opinion that:*

*"We understand that you have considered [and have satisfied yourself with respect to] the applicability to this transaction of fraudulent transfer laws, as to which we express no opinion."*

*Although the bankruptcy exception relates primarily to the Remedies Opinion, it may be applicable to some other Opinions, such as an Opinion that a security interest has been perfected. It is becoming the practice not to include the bankruptcy and equitable principles exceptions as applicable solely to the Remedies Opinion, but rather to include them as general exceptions to all the Opinions. See TriBar Report § 1.2(c).*

#### **The "Equitable Principles" Limitation**

*This limitation excludes from the Remedies Opinion limitations as to enforceability based on general principles of equity, including not only those principles governing the availability of traditional equitable remedies (such as specific performance or injunctive relief), but also defenses rooted in equity. The equitable principles limitation applies to the enforcement of an agreement, not to its formation. As stated in the TriBar Report,<sup>21</sup>*

*"Opinion preparers may conclude that particular provisions of an agreement are binding and yet envision that, under certain circumstances, those provisions may not be given effect by a*

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21. TriBar Report § 3.3.4.

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*court. The equitable principles limitation relates to those principles courts apply when, in light of facts or events that occur after the effectiveness of an agreement, they decline in the interest of equity to give effect to particular provisions in the agreement.*

*The intent of the equitable principles limitation is thus to point out the uncertainty of application of literal contract language when courts intervene to infuse notions of justice and fairness into a contract.*

*Examples of the application of the equitable principles limitation include defenses that result from the immateriality of the breach or the enforcing party's lack of good faith and fair dealing, unreasonableness of conduct, or undue delay or laches. Similarly, a court of equity may not allow a plaintiff's overreaching pursuit of disproportionate relief. Other defenses rooted in equity and excluded from the remedies opinion by the equitable principles limitation (whether in a proceeding in equity or at law) include waiver, estoppel, unclean hands, misrepresentation, duress, and defenses based on a breach of fiduciary duty, mutual mistake, and materiality of the client's breach and the consequences of the breach to the injured party.*

*The equitable principles limitation also covers the effect of judicially developed rules concerning the manner and continuing effect of waivers and modifications, notwithstanding a provision in a contract requiring written waivers or modifications. Examples include rules of law that (i) enforce an oral waiver or modification where a material change of position in reliance on the waiver or modification has occurred, and (ii) provide that a course of performance may operate as a waiver.*

*The Legal Opinion Committee believes that the implied covenant of good faith and fair dealing, while a "legal" concept, is within the coverage of the equitable principles limitation. Therefore, the words "including (without limitation) concepts of materiality, reasonableness, good faith and fair dealing," while permissible, are not necessary.*

*The equitable principles limitation is applicable to Opinions that raise equitable concerns and to no others, whether stated within the Remedies Opinion or as a general exception to all the Opinions. See TriBar Report § 1.2(c).*

## 5. Governmental Approvals and Filings Opinion

**5. The execution and delivery by the Company of the Loan Documents do not, and the performance by the Company of its obligations thereunder will not, require approval from or any filings with any governmental authority under any law of the United States or of Pennsylvania, or any rule or regulation thereunder. As used in this paragraph, the term “governmental authority” means any legislative, judicial, administrative or regulatory body of the United States or the Commonwealth of Pennsylvania.**

*Note:* (a) *If the Borrower is a regulated company and failure to obtain regulatory approval would cause the Credit Agreement to be void, then the Remedies Opinion would subsume the obtaining of any such required approval and its sufficiency; a fine or other sanction arising from a violation of a law requiring a permit or governmental approval would be noted in the “No Violation of Law” Opinion (Op. ¶7, p. 85, below). Nevertheless, the Opinion in paragraph 5 is frequently requested. See TriBar Report § 6.7. It should cover the necessity of governmental approvals, filings, registrations, declarations, etc., or the prior satisfaction of any such requirements.*

(b) **Securities Laws Registration.** *There formerly was a conflict among the authorities as to whether Opinion paragraph 5 covered federal and state securities laws. Paragraph IID of the ABA Principles states that securities laws are understood as a matter of customary practice to be covered in an Opinion Letter only when an Opinion refers to them expressly, and the TriBar Report, section 6.7, provides somewhat obliquely to the same effect. Glazer, in the 1999 Supplement, section 15.1, changed positions and expressed the same conclusion, namely, that the Approvals and Filings Opinion covers securities laws only when an Opinion refers to them expressly. Thus, in customary practice today, it is not necessary to set forth the optional qualification in paragraph (E)(3), p. 103, below. See optional Op. ¶11, p. 107, below, for a form of Opinion on securities law registration, if requested.*

## 6. No Breach or Default Opinion

**6. The execution and delivery by the Company of the Loan Documents do not, and the performance by the Company of its obligations thereunder will not, (a) result in a violation of the Articles [Certificate] of Incorporation or Bylaws of the Company,**

**(b) breach or result in a default under any Other Agreement listed in the Company's Certificate, or (c) result in a violation of any Court Order listed in the Company's Certificate.**

**Note:** (a) See *TriBar Report* § 6.5. “Company’s Certificate” is defined in paragraph (B)(3), p. 95, below. Other commonly used approaches to identify which contracts and court orders the Opinion Preparer will be expected to review are to limit the Opinion to the items listed in a filing by the Company with the Securities and Exchange Commission or in an attachment to the Opinion Letter. See *TriBar Report* § 6.5.5. If the Opinion does not refer specifically to a list of contracts and court orders prepared by the client, the Opinion should be limited by the phrase “to our knowledge”; this term should be defined as in paragraph (G), p. 104, below. See *TriBar Report* § 6.5.5; note (b) to section B, p. 92, below. The Legal Opinion Committee believes it is preferable to specifically identify the Other Agreements and Court Orders covered by this Opinion.

(b) A “breach” or “default” under an Other Agreement or Court Order means an act or failure that, by itself, or with the giving of notice or passage of time, or both, would constitute an event of default or other event having similar remedial consequences under such Other Agreement or Court Order.

The Opinion is designed to tell whether the client’s entering into the transaction or performance of its obligations thereunder will result in a breach of or default under the Company’s other legally binding obligations. When the Other Agreements contain financial covenants, counsel should not be requested to give an Opinion as to breach or satisfaction thereof or as to violation of financial restrictions requiring interpretation of financial covenants. See *ABA Guidelines* 1.4. The Opinion Giver is not responsible for the resolution of any factual issue that is not readily apparent from the terms of the document being reviewed or cannot be established through certificate reliance.

(c) **“Conflict”; Lien Triggering, Acceleration of Debt.** Adverse economic consequences not constituting a breach or default need not be considered in a “No Breach or Default” Opinion. *TriBar Report* § 6.5.3. To avoid such an interpretation, the Opinion Letter should not use language confirming that the transaction does not “conflict with” or “contravene” a Company’s Other Agreements. See *TriBar Report* § 6.5.2.

*The Opinion Recipient may request that the Opinion also cover the possible triggering of liens (e.g., “. . . or result in the creation or imposition of any lien on the Company’s property”) or the possible acceleration of other loans (e.g., “or result in the acceleration of (or entitle any party to accelerate) any existing obligation of the Company under any such Other Agreement”). Such Opinions may be appropriate as serving a legitimate need.*

(d) **Other Agreements and Court Orders—Applicable Law.** *Even if the interpretation of an Other Agreement or Court Order requires reference to the applicable law of a jurisdiction other than the Opining Jurisdiction, the Opinion Giver may assume that the agreements governed by the Law of the other jurisdiction will be enforced as written, without the need to address legal issues not present under the Law of the Opining Jurisdiction. See TriBar Report § 6.5.6.*

(e) **Future Discretionary Action.** *A “No Breach or Default” Opinion does not extend to future discretionary action permitted under a document, except to the extent that discretionary action is taking place simultaneously with, and the Opinion Giver has Actual Knowledge that it constitutes part of, the consummation of the Transaction to which the Opinion relates.*

## **7. No Violation of Law Opinion**

**7. The execution and delivery by the Company of the Loan Documents do not, and the performance by it of its obligations thereunder will not, result in a violation of any applicable statute of Pennsylvania or the United States, or any rule or regulation thereunder (, or [if the Company is a Delaware corporation] any provision of the General Corporation Law of the State of Delaware).**

**Notes:** (a) **Meaning.** *A “No Violation of Law” Opinion means that the execution and delivery by the Company of, and performance of its agreements in, a Transaction Document do not violate the applicable provisions of statutory law or regulation. It addresses the issue of whether the Company’s entering into the Transaction or performance of its obligations thereunder is prohibited by a statute or regulation, or will expose it to a fine, penalty or other sanction for violating a statutory or regulatory prohibition (either civil or criminal in nature). TriBar Report § 6.6. The Opinion is understood to exclude local law. See note 3(g) to Op. ¶4, page 75,*

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above. Note (e) to Opinion paragraph 6, p. 85, above, as to coverage of future discretionary action, is also applicable to Opinion paragraph 7.

(b) **Usury Laws.** See the discussion of usury laws in relation to the Remedies Opinion in note 3(e) to Opinion paragraph 4, p. 72, above. As stated in item 3 of the note to paragraph (B)(4), p. 97, below, it is proper and customary practice in Pennsylvania to rely in an Opinion Letter on an unstated assumption to the effect that each party other than the client has complied with all legal requirements pertaining to its status as such status relates to its rights to enforce the Transaction Documents against the client. A question arises as to whether Opinion paragraph 7, which purports to cover “a violation of any applicable statute,” can be given without qualification if the prescribed interest rate violates a usury statute that by its terms is applicable to the lender (but not the client-borrower). The No Violation of Law Opinion does not, as a matter of customary practice, address laws that are applicable only to the lender. Nevertheless, if the terms of a Transaction Document were to violate a usury law (civil or criminal) applicable to the lender, the Legal Opinion Committee believes that most Pennsylvania Opinion Givers, when representing the borrower, choose to make reference to the existence of such a law in a No Violation of Law Opinion, particularly when they recognize that the Opinion Recipient is not aware of it. See, e.g., paragraph (E)(1), p. 102, below; and see Pa.Op.Report Part IV.

(c) **Limitation.** The Opinion should be limited to execution, delivery, and performance of the Credit Agreement, and should not cover “related transactions” or transactions “contemplated by” the Agreement. See TriBar Report § 6.6 n.162.

(d) **Antitrust, Securities, Tax, Insolvency Laws.** There formerly were differing views as to whether a No Violation of Law Opinion should be read to confirm that a merger complies with the antitrust laws, or a bank credit agreement with the securities laws. An example of an express exclusion of antitrust and securities laws is in paragraph (E)(4), page 103, below. The TriBar Report states that as a matter of customary usage, the No Violation of Law Opinion is understood not to cover antitrust, securities, tax, and insolvency

laws.<sup>22</sup> *The Legal Opinion Committee believes that this is the customary practice in Pennsylvania and, if such matters are to be covered by an Opinion, they should be specifically requested by the Opinion Recipient.*

(e) **General Compliance.** *It is inappropriate for the Opinion Recipient to request an Opinion to the effect that the Company is in compliance with all applicable or “material” laws of specified jurisdictions. See ABA Guidelines ¶4.3. However, the Opinion Recipient’s request for an Opinion concerning compliance with a specific law may be appropriate if the Opinion Giver can ascertain compliance without making factual or other assumptions that effectively render the Opinion meaningless, and if such Opinion is not inappropriate in view of the amount of time and effort required for the Opinion Giver to become able to render the Opinion, the attendant costs to the client, and the importance of the issue to the Transaction.*

(f) **Which Jurisdiction’s Laws Are Covered.** *Because Pennsylvania and the United States are the Opining Jurisdictions (see paragraph (C), p. 97, below), the statutes, rules, and regulations covered by Opinion paragraph 7 (other than the Delaware General Corporation Law) are those of Pennsylvania and of the United States that, given the nature of the transaction and the parties to it, a lawyer in Pennsylvania exercising customary diligence would reasonably be expected to recognize as being applicable. See ABA Principles ¶IIB.*

## 8. Margin Regulation Opinion

**8. Neither the extension of credit nor the use of proceeds as described in Section \_\_\_ of the Credit Agreement violates the provisions of Regulation T, U or X of the Board of Governors of the Federal Reserve System.**

**Note:** *Custom is not clear as to coverage of the Federal Reserve Board’s margin regulations, although a violation of the regulations may void a loan. The Legal Opinion Committee concurs with the TriBar Committee’s belief that a separate Opinion on the effect of these regulations is the better practice. See TriBar Report § 3.5.2(a)(iii).*

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22. TriBar Report § 6.6. Accord: Glazer § 13.2.2.7.

## 9. Investment Company Opinion

**9. The Company is not required to register as an “investment company” under the Investment Company Act of 1940, as amended.**

**Note:** *If the Borrower is a registered investment company, the Opinion Giver should consider the Borrower’s compliance with the Investment Company Act. This Opinion requires the Opinion Giver to determine that the Borrower is not required to register as an investment company. This Opinion should not be implied if not expressly given, even though a violation of the Investment Company Act may void a loan or other contract. If the Opinion Preparer recognizes that the activities of the Borrower may make it an inadvertent investment company, an Opinion as to the application of the Investment Company Act should be considered in order to avoid misleading the Opinion Recipient. See TriBar Report §§ 1.4(d), 3.5.2(a)(i).*

## 10. Confirmation as to Legal Proceedings

**10. We hereby confirm to you that to our knowledge there are no actions or proceedings against the Company pending before any court, governmental agency or arbitrator, or overtly threatened in writing, that [(i)] seek to enjoin the performance of the Loan Documents [, or (ii) seek damages in excess of \$\_\_\_ from the Company {, or \$\_\_\_ in the case of any subsidiary of the Company}], except as disclosed in Schedule \_\_\_ to the Credit Agreement.**

**Note:** (a) **Confirmation or Opinion.** *The Opinion Recipient will often request confirmation from the Opinion Giver (“to the (best) knowledge of the Opinion Giver”) as to the existence of pending or threatened legal proceedings as an additional assurance that no undisclosed matters are outstanding that may interfere with the Transaction. The information may be furnished in the form of a factual confirmation rather than an Opinion, in which event the paragraph would be unnumbered. (See ABA Guideline 4.4 n.16.)*

(b) **Limitations.** *The response should be limited to legal proceedings that are pending before an adjudicative tribunal (including an arbitration panel) or legal proceedings overtly threatened by a written communication. Although the Opinion speaks of proceed-*

ings threatened “in writing,” the Opinion Giver, in order to avoid giving a misleading opinion, may need to disclose a substantial and apparently serious claim known to the Opinion Giver that has been made orally in a formal manner (see ABA Guideline 1.5, TriBar Report § 1.4(d)).

(c) **Necessary Review.** Subject to the “Actual Knowledge” of the Opinion Giver’s “Primary Lawyer Group” (see under “Actual Knowledge” in note (b) to section B, p. 92, below, and the definition of “to our knowledge” in paragraph (G), p. 104, below), the confirmation should be based upon information provided by certifications of the Company’s officers. The Opinion Preparer should not be expected to review court or other public records, undertake any broader review of its own files, or make inquiry of other lawyers in the firm. (See ABA Principles IIIB; TriBar Report §§ 2.2.2(a) and 6.8.) *Dean Foods Co. v. Pappathanasi*, 18 Mass. L. Rptr. 598 (Mass. Super. 2004), involved a litigation confirmation given in a much broader form and addressed the issue of customary diligence where the firm had knowledge of the proceeding. See also Donald W. Glazer and Stanley Keller, A Streamlined Form of Closing Opinion Based on the ABA Legal Opinion Principles, 61 *Bus. Law.* 389 (November 2005); Donald W. Glazer and Arthur N. Field, No-Litigation Opinions Can be Risky Business: Looking at the Facts—and Beyond, 14 *Bus. Law Today* 6 (July/August 2005).

(d) **Opinion as to Adverse Effect.** The Legal Opinion Committee disapproves of an Opinion in the form set forth in Appendix A-2, paragraph 3, of the TriBar Report to the effect that no such litigation exists that “may adversely affect the transactions contemplated by the Credit Agreement or that may have a material adverse effect on the Company.” Any Opinion as to “material adverse effect” would be based largely on a financial judgment, which would be inappropriate under ABA Guideline 3.2, which discourages use of the materiality concept in an Opinion Letter unless objectively defined; the TriBar Report itself (in section 6.6 n.162) states that the phrase “transactions contemplated by” the Loan Documents is imprecise and may be misleading.

(e) **Not a Party, but Subject.** The Legal Opinion Committee also ordinarily disapproves of a request that an Opinion from outside Counsel cover legal proceedings to which the Company is not a party but is otherwise subject. See TriBar Report §§ 6.5.5 and 6.8 n.177.

(f) **Reliance on Company.** *Since the Opinion (or confirmation) is largely based on information furnished by the Company, the TriBar Report concludes that in most cases it could be omitted if Opinion Recipients were instead to rely directly on the Company or its inside counsel for such information. See TriBar Report § 6.8.*

(g) **Evaluation of Legal Proceedings.** *Evaluations of the potential outcome of pending or threatened litigation normally should not be given in the Opinion Letter; evaluation is best considered in the informal due diligence process of the Opinion Recipient rather than in a formal closing opinion. TriBar Report § 6.8, n.174. However, if such an evaluation is given, it should be similar to the response given to an audit inquiry in compliance with the ABA Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, 31 Bus. Law. 1709 (1976). See the note on page 61, above, referencing the need for client consent to the making of such an evaluation.*

## **BASIS FOR OPINION; QUALIFICATIONS, LIMITATIONS, ETC.**

### **Section A. Scope of Inquiry; Documents Examined**

**Note:** (a) *It is generally accepted that in the absence of an explicit statement, the mere listing of documents examined should not be understood to mean that the documents listed are the sole basis for the Opinion. Ordinarily, regardless of such listing, the Opinion Giver has the responsibility of reviewing all such documents (and giving consideration to such matters of law and fact) as the Opinion Giver has deemed appropriate, in its professional judgment.*

(b) *It is possible, of course, for the Opinion Giver to expressly limit the scope of inquiry to particular documents, matters, or procedures. Such an express limitation is appropriate, for example, when the firm acts as Other Counsel, which provides an Opinion to the Opinion Recipient or to the principal Opinion Giver in support of or supplementary to the latter's Opinion, and the firm is provided only with certain Transaction Documents. In that case, the limitation on the scope of inquiry should be described in the Opin-*

*Basis for Opinion; Qualifications, Limitations, etc.*

*ion, in words such as: “[At your request, we] [We] have examined only the following documents and have made no other investigation or inquiry.”*

*(c) Paragraphs (A1) and (A2), below, are alternative methods of covering the scope of the examination; one or the other of the two paragraphs or some combination thereof is customary. (The categories of items to be listed in paragraph (A1) are a matter of personal preference for the Opinion Giver.)*

**[(A1) For purposes of this opinion letter, we have examined the following:**

- (i) the Credit Agreement;**
- (ii) the [form of the] Notes;**
- (iii) the Articles [Certificate] of Incorporation and all amendments thereto of the Company (the “Charter”);**
- (iv) the Bylaws of the Company, as in effect from \_\_\_\_\_;**
- (v) certified copies of resolutions of the Board of Directors of the Company relating to the Loan Documents;**
- (vi) various certificates of public officials, and certificates of officers of the Company as to factual matters;**
- (vii) documents furnished by the Company pursuant to Section \_\_ of the Credit Agreement; and**
- (viii) such other agreements, documents and records as we have deemed necessary as a basis for the opinions expressed below;**

**and we have made such other investigation as we have deemed appropriate.]**

**[(A2) For purposes of this opinion letter we have reviewed such documents and made such other investigation as we have deemed appropriate.]**

**Section B. Reliance on Information Provided by Others and on Assumptions**

**Notes:** *Opinions are based for the most part not on a lawyer’s first-hand knowledge but (i) on documents examined and what is known to others and represented in signed certificates, and (ii) assumptions as to certain facts. The clauses in section A, above, relate to the scope of inquiry (documents examined); those in section B, below, relate to reliance on specified certifications and assumptions.*

**(a) Unwarranted Reliance.**

*The Legal Opinion Committee believes that the principle of “unwarranted reliance” stated in section 5 of the ABA Legal Opinion Accord is a sound principle and the custom in Pennsylvania, and should be followed in the giving of all third-party Legal Opinions. Accord section 5 reads as follows:*

*§ 5. **Unwarranted Reliance.** As a general and overarching principle, the Opinion Giver may not rely on information (including certificates or other documentation) or assumptions, otherwise appropriate in the circumstances, if the Opinion Giver has Actual Knowledge that the information or assumptions are false or the Opinion Giver has Actual Knowledge of facts that under the circumstances would make the reliance unreasonable.*

*This principle, echoed in TriBar Report sections 1.4(d) and 2.1.4, reflects a threshold standard that calls for observance of rules of professional conduct and presumes avoidance of fraudulent or consciously deceitful conduct by the Opinion Giver.*

*The qualification as to otherwise unwarranted reliance can be superseded by a specific statement, set forth in the Opinion Letter, which constitutes an agreement between the Opinion Giver and Recipient to employ any arbitrary assumptions described in the Opinion Letter.*

**(b) Actual Knowledge.** *Where an Opinion or confirmation deals with facts—primarily in the No Breach or Default Opinion (Opinion ¶6, p. 83, above) and in the Confirmation As to Legal Proceedings (Opinion ¶10, p. 88, above)—the Opinion Giver is sometimes asked to speak in terms of its “knowledge.” If the requested Opinion Letter uses the phrase “to our knowledge,” or any correlative*

phrase,<sup>23</sup> the Legal Opinion Committee believes that the concept of knowledge should be defined in the Opinion Letter.<sup>24</sup> See paragraph (G), p. 104, below.

*If the Opinion Letter is given by a firm of lawyers, the Legal Opinion Committee recommends that the lawyers or categories of lawyers whose knowledge is covered should be identified in the Opinion Letter as set forth in paragraph (G), p. 104, below.*

*The “conscious awareness” concept in the definition of “to our knowledge” means that the Opinion Giver’s files need not be searched, and recognizes that what is “known” at one time may not be in the mind or may be forgotten altogether at another time. By identifying the lawyers whose “actual knowledge” is relevant, these provisions negate any duty to review the firm’s files or to have such information or assumption examined for reliability by all lawyers (or all partners) in the Opinion Giver’s organization. See TriBar Report §§ 2.2.2(a) and 2.6.1. An exception should be made to the extent the Opinion Preparers have identified a particular lawyer or file as being reasonably likely to have or contain information not otherwise known to them that they need to support an Opinion. See ABA Principles ¶III B; TriBar Report § 2.2.2(b).*

#### **Reliance Upon Certifications as to Factual Matters**

**Note:** *Reliance upon factual information provided by others is appropriate, subject to two qualifications: (1) in each case the provider of the information is reasonably believed by the Opinion Giver to be an appropriate source for the information, and (2) any reliance is subject to the qualification as to unwarranted reliance, discussed in note (a) to section B, p. 92, above. See ABA Principles ¶III A. The TriBar Report, section 2.5.1, indicates that reliance on*

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23. The TriBar Opinion Committee takes the view that the phrases “known to us,” “to the best of our knowledge,” “we do not know of,” “we have no knowledge,” and “to our knowledge,” are largely indistinguishable. TriBar Report § 2.6.1 n.58. The Opinions customarily qualified by a knowledge limitation are highly fact oriented, confirming the absence of breaches of or defaults under existing contracts and court orders (No Breach or Default Opinion, ¶6, above), and the absence of adverse litigation (Confirmation as to Legal Proceedings, Op. ¶10, p. 88, above).

24. See the extended discussion in Glazer, § 4.4, of the problems raised by the phrase, “to our knowledge,” if not defined.

*certificates of officers of the Company should be understood, whether or not the documents so certifying are described in the Opinion.*

**(B) As to certain matters of fact material to the opinions expressed herein,**

**(B)(1) We have relied upon certificates of public officials and of officers of the Company [and others<sup>25</sup>] with respect to the accuracy of factual matters contained therein, which we have not independently established.<sup>26</sup>**

***Note:** The statement in paragraph (B)(1) is included solely as a matter of emphasis since the reliance so described is customary without any express statement. TriBar Report § 2.6; see the TriBar Illustrative Opinion Letters. The Opinion Preparers (or inside counsel for the client) will customarily review the certificates with those who will be asked to sign them. The Opinion Preparers should look to a certificate of a public official rather than an officer's certificate, when that public official is the appointed custodian of the information and has the duty to provide information as to the status of the public record. TriBar Report § 2.5.2.*

*Reliance on a factual representation that is tantamount to a legal conclusion is inappropriate. An Opinion may ordinarily be based, however, on legal conclusions (or statements of "ultimate fact") contained in a certificate of a government official. See ABA Principles ¶IIIC.<sup>27</sup>*

**(B)(2) We have relied, without independent verification, upon factual representations made by the Company in Sections \_\_\_ of the Credit Agreement.**

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25. It is often proper to rely on certificates from others, such as service companies that deal with U.C.C. filing status.

26. The text of paragraph (B)(1) is derived in part from the TriBar Report Illustrative Opinion Letter, Appendix A1 (53 Bus. Law. at 667).

27. However, by custom, Opinion Givers do not rely on public official certificates as to "due incorporation." See Pa.Op.Report Part I, ¶IA.12; TriBar Report § 6.1.1.

**Note:** *This sentence is appropriate if any of Company's representations in the Credit Agreement are relied upon in giving the Opinion. Many representations in the usual Credit Agreement are tantamount to legal conclusions, and reliance thereon would be inappropriate.*

*Company representations in a Transaction Document are sometimes made as a means of allocating risk, or as an assessment of probability, or on mere surmise; if there is any question as to the actual existence of a fact represented by the client in a Transaction Document, reliance thereon by the Opinion Giver might well be inappropriate. See TriBar Report ¶ 2.2.1(d)(ii). Ordinarily an officer's certificate making the same representation would be preferred, because by signing such a certificate, an officer of the client takes personal responsibility for the accuracy of the factual representations made in the certificate. Id. § 2.5.4.*

**(B)(3) We have relied upon a certificate of the [OFFICER'S TITLE] of the Company dated the date hereof (the "Company's Certificate"), certifying that the items listed in such certificate are (a) all of the indentures, loan or credit agreements, leases, guarantees, mortgages, security agreements, bonds, notes, other agreements or instruments, and (b) all of the judicial or administrative orders, writs, judgments, awards, injunctions and decrees, which as to any matter in (a) or (b) affect or purport to affect the Company's right to borrow money or the Company's obligations under the Credit Agreement.**

**Note:** *The purpose of this clause is solely to define the "Company's Certificate," referred to in the No Breach or Default Opinion (Op. ¶6, p. 83, above). It is important that such Opinion not include in its breadth "all other agreements and court orders of the Company," but only those listed or that can be identified in a manner that is described in the Opinion Letter, such as by using the Company's Certificate referred to in this paragraph (B)(3). An alternative would be to refer to representations as to Other Agreements and Court Orders in the Credit Agreement.*

#### **Assumptions**

**(B)(4) We have assumed**

**[describe factual and other assumptions as to critical issues that should not be assumed without explicit statement].**

## 2 Model Closing Opinion Letter (Annotated)

**Note:** One way lawyers establish the factual bases for an Opinion Letter is to assume certain facts to be true. A factual assumption is a bridge that allows the Opinion Preparers to render an Opinion without investigation as to the facts being assumed. Subject to the qualification as to unwarranted reliance (described above in note (a) to section B, p. 92, above), the Opinion Giver may rely, without investigation, on (i) any assumptions expressly stated in the Opinion Letter, and (ii) certain assumptions that are implicit and need not be stated expressly. The TriBar Report states in section 2.3 that Opinion Preparers are often permitted by the Opinion Recipient to rely on assumptions when (i) information is not available (or is only available at substantial cost or delay), (ii) the facts being assumed relate to the Opinion Recipient, or (iii) the cost of establishing the facts exceeds the likely benefit from an investigation to verify their existence.

Assumptions regarding facts that are common to transactions generally and apply regardless of the type of transaction or the nature of the parties need not be stated in Opinion Letters. See TriBar Report § 2.3(a); ABA Principles ¶ IIIID. Glazer, in section 4.3.3, concludes that assumptions of general application, such as those set forth in section 4 of the ABA Legal Opinion Accord, may be relied on without being stated, and concludes that

*[o]mitting those assumptions allows stated assumptions to be reserved for matters that are not of general application, that are controversial, that require precise delineation or that might give rise to a misunderstanding if not spelled out expressly.*

Based on the foregoing principles, the Legal Opinion Committee believes that it is proper and customary practice in Pennsylvania to omit from Opinion Letters self-evident assumptions of general application such as the following:

1. **Legal capacity:** Clients who are natural persons, and natural persons acting on the client's behalf, have the requisite legal capacity.
2. **Title to property:** The client holds the requisite title and rights to any property involved.
3. **Legal requirements re enforceability—parties other than the client:** Each party (other than the client) has satisfied legal requirements necessary to make the Transaction Docu-

ments enforceable against it. This assumption includes the following with respect to all parties other than the client: (i) all have legal existence, (ii) the Transaction has been duly authorized by all necessary corporate or other action, and all Transaction Documents have been duly executed and delivered, (iii) the parties have the power to enter into the Transaction, (iv) each such party has complied with all legal requirements pertaining to its status as such status relates to its rights to enforce the transaction documents against the client, and (v) employees, agents, fiduciaries, etc. were all duly authorized. (These assumptions serve to establish mutuality of obligation.)

4. **Documents:** Each document reviewed is accurate and complete, originals are authentic, copies conform, and all signatures are genuine.

5. **Availability of Law:** Statutes, etc., comprising the relevant Law are generally available and in a format that makes legal research reasonably feasible.

6. **Constitutionality or validity of Law:** The validity of a relevant statute is not in issue, unless a reported decision has specifically addressed its unconstitutionality or invalidity.

7. **Other Agreements and Court Orders:** Such documents would be enforced as written.

An Opinion Giver should expressly state an assumption that is not of general application, such as an assumption that certain steps needed to close a transaction have been completed where the Opinion Giver was not involved in overseeing such steps.

If an Opinion Letter expressly states certain of these self-evident assumptions, that does not negate the application of others that are not expressly stated.

Finally, reliance on an assumption is not appropriate if it embodies a specific Opinion issue with which the Opinion Letter deals directly, or if such reliance would be unwarranted.

### C. Opining Jurisdiction

(C) The Law covered by the opinions expressed herein is limited to the Law of the Commonwealth of Pennsylvania and the Federal law of the United States of America (; and [if the Company

**is a Delaware corporation] in addition, in respect of the Opinions set forth in opinion paragraphs 1, 2 and 3 above, the General Corporation Law of the State of Delaware).**

**Notes:** (a) *Unless otherwise limited, an Opinion might be interpreted to cover the Law of all jurisdictions. Therefore, there must be in the Opinion Letter an express designation of those jurisdictions whose laws are covered (in our example, Pennsylvania and the United States (i.e., Federal Law))—or discrete laws of a single jurisdiction. If that is done, an Opinion Letter should not be read to cover the substance or effect of the Law of other jurisdictions. See ABA Principles ¶IIA. If the Opinions on Delaware Law are limited to such matters as corporate status, authority to enter into the Transaction Documents, and good standing, the Opinion may state that it is limited to the General Corporation Law of the State of Delaware. See the TriBar Report § 5.1.*

(b) *Notwithstanding case law to the effect that the Law of a particular state is deemed to include the Federal Law of the United States, in customary practice Federal Law is not covered in the giving of legal Opinions unless specifically referred to as being covered. See TriBar Report § 4.1; Glazer § 13.2.2.1. Therefore, in addition to relevant state Law, in almost all cases the statement should explicitly include the Federal Law of the United States.<sup>28</sup>*

(c) *Each of the jurisdictions so selected (whose applicable Law is addressed by the Opinion Giver in the Opinion) is defined for purposes of the notes herein as an “Opining Jurisdiction.” This limitation of applicable law coverage to the Opining Jurisdiction(s) is subject to an exception with respect to the Remedies Opinion, which, as described above in the notes to Opinion paragraph 4, is to the effect that a Remedies Opinion must also include the law not only of the Opining Jurisdiction(s) but also (if different) the law of the client’s jurisdiction of organization, with respect to the client’s organizational status, good standing, and authorization of the Transaction Documents and any other corporate, partnership, or similar requirements with respect to their execution. Therefore, if*

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28. Note that many Federal laws are excluded from the scope of the Opinion Letter by implicit or explicit understanding. (See “Which Laws Are Addressed?” in note 3 to Opinion ¶4, p. 71, above.)

*the Borrower is a Delaware corporation, the Model Opinion Letter covers the organizational, authorization, and execution matters of the Borrower under the Delaware General Corporation Law.*

(d) **“Practice Limitation.”** *The designation in the Opinion Letter of the jurisdiction whose law is covered is sometimes referred to as the “practice limitation,” but this is a misnomer in that the limitation need not and should not specify where the Opinion Giver is admitted to practice. Law firms themselves of course are not admitted to practice in a state, and the sentence “We are admitted to practice only in the States of X, Y, and Z” is inapt if not misleading. Oftentimes, all the partners in a firm are not admitted in all such jurisdictions, and a firm may properly opine on the Delaware General Corporation Law even if none of its partners may be admitted to practice there. Therefore, the Opinion Letter should not use a practice limitation (in the words of where they are admitted to practice) as a means of designating the Opining Jurisdiction.*

#### **D. Other Counsel**

**[(D)(1) Insofar as the opinions in paragraphs 1, 2 and 3 above relate to matters that are governed by the law of the State of \_\_\_\_, we have relied upon the opinion of [name, city and state of Other Counsel] being concurrently provided to you.]**

*Note:* Paragraph (D)(1) would be appropriate where the jurisdiction of organization is neither Pennsylvania nor Delaware. See note (c) to Op. ¶(C), above. Because a Remedies Opinion subsumes the Opinions based upon the law of the jurisdiction of organization (Opinion ¶¶1, 2, and 3), it would be necessary to rely upon an Opinion from Other Counsel as to those matters or to make appropriate assumptions.

**[(D)(2) Various issues concerning [describe matters] are addressed in the Opinion Letter of [name, city and state of Other Counsel] separately provided to you, and we express no opinion with respect to those issues.] [However, we believe that the opinion of such Other Counsel is satisfactory as to form and scope, and that you are justified in relying thereon.]**

*Note:* A legal opinion from Other Counsel may or should be obtained under three circumstances:

(1) **Governing Law Provision Stipulates the Law of a Jurisdiction on Which the Opinion Giver Is Not Qualified to Opine.** *If the Opining Jurisdiction is not one of those on which the Pennsylvania lawyer is qualified to opine, then special treatment must be accorded the enforceability Opinion. It would be possible, of course, for the client to employ New York counsel to give a Remedies Opinion upon which the Pennsylvania lawyer could rely. But if counsel for a New York bank drafts the credit agreement so as to specify that New York law shall be the governing law, it is contemplated that such counsel can advise its own client as to New York law, and it would not be cost-effective to request the Borrower's counsel to retain a third firm of lawyers to opine as to New York law. (See Opinion ¶4B, p. 79, above, for the recommended course to follow for the proper language for an Opinion; New York local counsel would not be retained.)*

(2) **Opinion Giver Not Qualified to Opine on Law of Jurisdiction of Organization of Borrower (or Guarantor).** *If, for example, the client (Borrower) or a Guarantor is a Utah corporation, an Opinion Letter from local counsel would ordinarily be required, because the law as to due incorporation, good standing, and authorization of Transaction Documents would be that of Utah, the jurisdiction of organization.*

(3) **Special Counsel—Special Matters.** *The client may have special counsel advising it in connection with tax, antitrust, environmental regulatory, ERISA, intellectual property, or other similar matters, and in that instance if an Opinion is requested as to any such matters, ordinarily the client may be expected to have such special counsel give the requested Opinion. Another reason for special counsel is that they may have better access to the facts, or have already done some or all of the work required to render an Opinion. The Pennsylvania lawyer may or may not wish to refer to such Opinion Letter from Other Counsel in its Opinion Letter, but in any event will not want to be responsible in any way for such Opinion.*

(4) **Reliance.** *The Opinion Giver should obtain permission from the Other Counsel to rely on their Opinion, since permission to rely is one key element in any malpractice claim against the Other Counsel. See TriBar Report § 5.4.*

(5) **Responsibility of Opinion Giver.** *The responsibility of the Opinion Giver for an Opinion from Other Counsel is well described in section 8 of the Accord, which describes the responsibility of the Opinion Giver in relation to an Opinion of Other Counsel (“Other Opinion”), in the following six situations: in the Opinion Letter, the Opinion Giver—*

- (a) *merely identifies the Other Counsel;*
- (b) *states that the Opinion Recipient is justified in relying on the Other Opinion;*
- (c) *states that the form or scope (or both) of the Other Opinion is satisfactory;*
- (d) *states reliance on Other Counsel’s legal Opinion;*
- (e) *does not state concurrence in the Other Opinion; or*
- (f) *does state concurrence in the Other Opinion.*

*The Legal Opinion Committee recommends that section 8 of the Accord be followed by Pennsylvania lawyers. If the Opinion Giver had no role in the selection of Other Counsel, it may be appropriate for the Opinion Giver in the Opinion Letter not to render a judgment as to competence. See TriBar Report § 5.1 n.100.*

*An alternative to reliance upon an Opinion from Other Counsel is for the Opinion Giver to rely on express assumptions for the matters otherwise covered by the Opinions of Other Counsel. See TriBar Report § 5.5.*

(6) **Duplication of Opinion.** *Unless the Opinion Giver has been asked to give an “umbrella opinion” (see TriBar Report § 5.1), there is no point in asking the Pennsylvania lawyer to give an Opinion on the Law of a foreign state in reliance solely on an Opinion of local counsel, since under the foregoing principles the Pennsylvania lawyer would not be assuming any responsibility to verify the substance of that Opinion. The Pennsylvania lawyer might (if appropriate) opine specifically on the competence of the Other Counsel (based upon its professional reputation) or on the form and scope of the Opinion of Other Counsel, without going through the meaningless gesture of giving the same Opinion as the Other Counsel in reliance thereon.*

(7) **Concurrence.** *An Opinion that an Other Opinion is “satisfactory in form and substance” is considered to be the same as a “concurrence” in the Other Opinion, requiring an independent investigation of the Law involved. Because concurrences are typically time-consuming and not cost-effective, ordinarily a concurrence should not be requested. See TriBar Report § 5.1 n.99; ABA Guideline 2.2.*

## **E. Additional Assumptions and Qualifications**

**(E) The foregoing opinions are subject to the following additional assumptions and qualifications:**

**Note:** *Many of the following paragraphs from (E)(1) to (E)(4), and (optional) (E)(5) to (E)(8), are meant to be simply suggestive of possible assumptions or qualifications that may or may not be appropriate in any specific transaction.*

### **1. Pennsylvania Qualification as to Usury**

**(E)(1) With respect to the opinion in paragraph 7, we call your attention to the provisions of Section 911(b) of the Pennsylvania Crimes Code (the “Crimes Code”), 18 Pa.C.S. § 911(b), which makes it unlawful to use or invest income derived from a pattern of “racketeering activity” in the establishment or operation of any enterprise. “Racketeering activity,” as defined in the Crimes Code, includes the collection of money or other property in full or partial satisfaction of a debt which arose as the result of the lending of money or other property at a rate of interest exceeding 25% per annum where not otherwise authorized by law. Accordingly, the opinion expressed in paragraph 7 is qualified to the extent, if any, that the statute referenced in this paragraph (E)(1) may be applicable to this transaction.**

**Note:** *Because Opinion paragraph 7 opines as to violation of applicable statutory law of Pennsylvania, depending on the circumstances, a usury qualification may be appropriate as to Opinion paragraph 7. See note (b) to Opinion ¶7, p. 86, above.*

### **2. Qualification as to Right of Set-off**

**(E)(2) We express no opinion as to (i) Section \_\_\_ of the Credit Agreement insofar as it authorizes each Bank to set off and apply any deposits at any time held, and any other indebtedness at any time owing, by such Bank to or for the account of the**

**Company, and (ii) Section \_\_\_ of the Credit Agreement insofar as it provides that any Bank purchasing a participation from another Bank pursuant thereto may exercise set-off or similar rights with respect to such participation.**

3. Exclusion of Certain Laws from Opinions

**(E)(3) Our opinions above are subject to the proviso that no opinion is given as to the application of any antitrust or securities laws.**

*Note:* While formerly the exclusion as to securities laws was thought to be advisable with respect to Opinion paragraphs 5 and 7, custom and practice have evolved to the point where it is no longer necessary: see Op. ¶4, note 3(c), p. 72, above; Op. ¶5, note (b), p. 83, above; and Op. ¶7, note (d), p. 86, above. As to antitrust laws on a merger, see note 3(i) to Op. ¶4, footnote 16, p. 75, above.

4. Other Assumptions and Qualifications

**(E)(4) [Set forth additional assumptions and qualifications that may be appropriate, depending on the particular transaction and who the Opinion Recipient is.]**

*Note:* No implication should be drawn from the absence from the Model Opinion Letter of other assumptions and qualifications that may be appropriate in the circumstances.

**F. Definition of “Fraudulent Transfer Laws”**

**(F) As used in Opinion Paragraph 4, the term “fraudulent transfer laws” is understood to include laws relating to restrictions on the ability of a corporation to declare or pay dividends, reacquire shares of its own stock, or make other distributions on or with respect to its capital stock (such as § 1551 of the Pennsylvania Business Corporation Law), as well as the Pennsylvania Fraudulent Transfer Act and similar laws.**

*Note:* See “The Bankruptcy and Insolvency Exception” in the note to Opinion ¶4, page 80, above.

### **G. Definition of “To Our Knowledge”**

**(G)** In the confirmation in Opinion Paragraph 10 [and specify any other paragraphs where the phrase is used], the phrase “to our knowledge” means the conscious awareness of facts, without investigation, by any of the lawyers currently with this firm who have given substantive attention to legal representation of the Company in connection with matters relating directly to the Transaction [, including the partner in this firm who is the current primary contact for the Company].

*Note:* See the discussion under “Actual Knowledge” in note (b) to section B, p. 92, above. The “to our knowledge” limitation deals with facts, and should not be used with respect to matters of law.

*The phrases “to our knowledge” and “without investigation” both indicate a reduced level of inquiry by the Opinion Preparers in making the investigation that establishes the factual basis for an Opinion. The Legal Opinion Committee does not concur in the position espoused in TriBar Report section 2.6.1, that the phrase “to our knowledge” does not indicate a limitation on the Opinion Giver’s investigation.*

### **H. Implications from Opinion; Assumptions and Qualifications; Updating**

**(H)** The opinions in this letter are limited to the matters set forth herein; no Opinion may be inferred or implied beyond the matters expressly stated in this letter; and the opinions must be read in conjunction with the assumptions, limitations, exceptions and qualifications set forth in this letter. We assume no obligation to update this opinion to advise you of any changes in facts or laws subsequent to the date hereof.

### **I. Restrictions on Use of Opinion Letter**

*Note:* It is important that the Opinion Letter should provide that only the Opinion Recipient is entitled to rely upon or to assert any legal rights based upon the Opinion Letter; however, such restriction may not prevent the assertion of rights by others than the addressee in some circumstances. See the note to ¶(I)(3), below.

**[(I)(1) A copy of this Opinion Letter is being concurrently delivered to [NAME OF AGENT'S COUNSEL], counsel to the Agent, and such counsel shall be entitled to rely hereon in rendering its Opinion to the Banks as if this Opinion Letter were expressly addressed and had been delivered to it.]**

*Note: Paragraphs (I)(1), (I)(2), and (I)(3) are possible exceptions to the limitation and prohibition stated in paragraph (I)(4).*

**[(I)(2) A copy of this Opinion Letter may be delivered by you to a prospective loan participant or purchaser for review in connection with their purchase of a portion of the credit facility created under the Credit Agreement, but such persons may not rely on this Opinion Letter without our prior written consent.]**

**[(I)(3) At your request, we hereby consent to reliance hereon by any future assignee of your interest in the loans under the Credit Agreement pursuant to an assignment that is made and consented to in accordance with the express provisions of Section [\_\_\_] of the Credit Agreement, on the condition and understanding that (i) this letter speaks only as of the date hereof, (ii) we have no responsibility or obligation to update this letter, to consider its applicability or correctness to other than its addressee(s), or to take into account changes in law, facts or any other developments of which we may later become aware, and (iii) any such reliance by a future assignee must be actual and reasonable under the circumstances existing at the time of assignment, including any changes in law, facts or any other developments known to or reasonably knowable by the assignee at such time.]<sup>29</sup>**

*Note: Increasingly, Opinion Recipients are requiring that legal opinions delivered in connection with the closing of a financial transaction include express permission for future holders of an interest in the financing documents to be able to rely upon the opinion. Initially this request was addressed to permitting future assignees of notes or interests in the loan documents, and in some circumstances participants, to rely upon the opinion. Opinion givers, when faced with this request, were often successful in not including direct reliance by participants, since the participants' claims were derivative through a holder of the note or a direct party to the loan agreement. The practice developed that Opinion*

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29. Lawrence Safran, quoted in *ABA Legal Opinion Newsletter*, Vol. 4 No. 4 (September 2005).

## 2 Model Closing Opinion Letter (Annotated)

*Givers would permit future lenders, as defined in the loan agreement, to rely upon the opinion with the caveat that the opinion spoke only as of its date with no obligation to address changes in law or changes in facts after the date on which the opinion was delivered, which was generally the original closing or funding date for the transaction, and that any future persons who were permitted to rely on the opinion were permitted to rely on the opinion “to the same extent as—but to no greater extent than—the addressee.” ABA Guidelines § 1.7.*

*Over time, as loan and real estate transaction documents came to be included in securitization and other structured transactions, requests were made to permit the rating agencies and all future assignees to rely upon the opinion. As Opinion Givers are having less success in limiting the universe of reliance parties to the original lenders, as defined in the transaction documents, and the definition of lenders has expanded beyond the normal banking lenders to include insurance companies, mutual funds, and hedge funds, Opinion Givers have become increasingly concerned over how widely their opinions may be circulated and how many potential recipients might one day surface in the event there is litigation with respect to the opinion.*

**(I)(4) [Subject to the foregoing, this] [This] Opinion Letter may be relied upon only by you in connection with the execution and delivery of the Loan Documents and the transactions contemplated thereby. You may not rely upon this Opinion Letter for any other purpose, and no other person or entity may rely upon this Opinion Letter for any purpose without our prior written consent. This Opinion Letter may not be referred to, or described, furnished or quoted to, any other person, firm or entity, without in each instance our prior written consent.**

**Note:** *Some cases hold that notwithstanding a prohibition against reliance by any party other than the Opinion Recipient, other persons who reasonably could have been expected to rely may have standing, and interested parties to whom copies of the Opinion Letter have been shown or delivered by the Opinion Recipient may be entitled to rely on it. Hence, paragraph (I)(4) goes further than simply prohibiting reliance.*

**Yours truly,**

## OPTIONAL PARAGRAPHS FOR MODEL CLOSING OPINION LETTER

### Optional Paragraph

#### 11. Securities Laws Registration

**11. It is not necessary to register the Notes under the Securities Act of 1933 or the securities laws of the Commonwealth of Pennsylvania in connection with the offer and sale of the Notes to the Banks under the circumstances contemplated by the Credit Agreement.**

*Note:* See Op. ¶4, note 3(c), p. 72, above, Op. ¶5, note (b), p. 83, above, and Op. ¶7, note (d), p. 86, above. If Opinion paragraph 11 is requested, it would be necessary to rely upon representations of the Banks in the Credit Agreement, with a sentence such as the following:

*In rendering the Opinion in paragraph 11 above, we have relied upon the representations of the Banks in paragraph \_\_\_ of the Credit Agreement.*

*This Opinion is more commonly requested in private placements of notes to institutional lenders than in bank financings.*

### Optional Qualifications, Assumptions, etc.

#### E.5. Arbitration Provision

**[(E)(5) We call your attention to the arbitration provision of the Credit Agreement and to the existence of differences between arbitral and judicial processes. We have based our opinion as to enforceability in paragraph 4 upon an assessment of legal authorities which would be applicable in judicial proceedings.]**

*Note:* See note 2(f) to Op. ¶4, p. 71, above. The qualification in paragraph (E)(5) is assumed even if not stated.

#### E.6. Assumptions as to Authenticity, etc.

**[(E)(6) In rendering the opinions hereinbefore expressed, we have assumed the genuineness of all signatures, the authenticity of all documents submitted to us as originals, the conformity to authentic, original documents of all documents submitted**

**to us as copies, the due authority of the parties executing such documents (other than those executing on behalf of the Company), and the legal capacity of natural persons.]**

*Note:* The Legal Opinion Committee believes that this assumption is unnecessary. See the note to paragraph (B)(4), items 1, 3, and 4, p. 96, above.

E.7. Assumptions as to Other Parties

**[(E)(7) In making our examination of documents which call for execution by parties other than the Company (“Other Parties”), we have assumed the enforceability thereof against all the Other Parties; and we have assumed that each of the Other Parties (i) has satisfied those legal requirements that are applicable to it to the extent necessary to make the Loan Documents enforceable against it, and (ii) has complied with all legal requirements pertaining to its status as such status relates to its rights to enforce the Loan Documents against the Company.]**

*Note:* The Legal Opinion Committee believes that this assumption is unnecessary. See the note to paragraph (B)(4), item 3, p. 96, above.

E.8. Presumption of Regularity and Continuity

**[(E)(8) In connection with our opinion in paragraph \_\_ above concerning [describe subject matter], our investigation revealed that certain corporate records concerning [specify the missing records and describe their relevance] were missing [or incomplete]. As a consequence, we have relied upon the presumption of regularity and continuity to the extent necessary to enable us to provide that opinion.]**

*Note:* The foregoing presumption is appropriate where there is no known basis for reaching a different conclusion. The ABA Guideline 3.3 indicates that, ordinarily, reliance on the presumption does not need to be disclosed except when the deficiency in corporate records is likely to be significant. The Legal Opinion Committee concurs with the TriBar Report, which indicates in section 2.4 that where (i) the missing records are not recent, (ii) existing records indicate that the Company ordinarily has been careful to observe formalities, and (iii) subsequent records treat the action as having been properly authorized, the presumption may be relied on without disclosure.

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**Text of Model Opinion Letter Basic Provisions without Annotations**

[Date of Closing]

To the parties identified in Schedule A hereto:

Ladies and Gentlemen:

We have acted as Counsel for [Name of BORROWER] (the “Company”), a Pennsylvania [Delaware] corporation, in connection with (i) [the preparation, execution and delivery of] the Revolving Credit and Term Loan Agreement dated [date] (the “Credit Agreement”) among the Company, the Banks parties thereto and [name of AGENT] as Agent for the Banks [, and (ii) the initial borrowing(s) made thereunder evidenced by the Revolving Credit Notes dated [date] (the “Notes”) of the Company in favor of the Banks]. (The Credit Agreement and the Notes are hereinafter collectively referred to as the “Loan Documents.”)

We are delivering this opinion letter to you [at the request of the Company] pursuant to [Section \_\_\_ of] the Credit Agreement. Unless otherwise defined herein, capitalized terms shall have the respective meanings set forth in the Credit Agreement.

On the basis of and subject to the assumptions, qualifications, exceptions and limitations set forth below, we express the following opinions:

1A. The Company is a Pennsylvania [business] corporation [duly incorporated] [duly organized] and presently subsisting under the laws of the Commonwealth of Pennsylvania.

1B. The Company is a corporation [duly incorporated] [duly organized], validly existing [and in good standing] under the General Corporation Law of the State of Delaware.

1C. The Company is duly qualified as a foreign corporation and is in good standing in the (Commonwealth of Pennsylvania) [if Borrower is a Delaware corporation] (State of \_\_\_) [if Borrower is a Pennsylvania corporation].

2. The Company has the corporate power [and authority] to execute, deliver and perform [all of its obligations under] each of the Loan Documents.

2 *Model Closing Opinion Letter (Annotated)*

3. The Company has taken all corporate action necessary to authorize the execution, delivery and performance of each of the Transaction Documents, and has duly executed and delivered each of them.

4A. The Credit Agreement and the Note are [legal,] valid and binding obligations of the Company, enforceable against the Company in accordance with their respective terms

[, except as may be limited by (a) bankruptcy, insolvency, reorganization, moratorium, fraudulent transfer or other similar laws affecting the rights and remedies of creditors generally, and (b) general principles of equity {(regardless of whether such enforceability is considered in a proceeding in equity or at law)} {, including (without limitation) concepts of materiality, reasonableness, good faith and fair dealing}].

4B. We note that the Credit Agreement provides that it is to be governed by and construed in accordance with the substantive law of the State of New York. In any proceedings arising out of or relating to the Credit Agreement in any court of the Commonwealth of Pennsylvania, or in any Federal court sitting in the Commonwealth of Pennsylvania, that court would give effect to the governing law provision of the Credit Agreement, except to the extent that the application of New York law is contrary to a fundamental public policy of the Commonwealth of Pennsylvania [or any other state whose law would apply to an issue absent such choice of New York Law].

*Alternative 1:*

However, if a court were to hold, notwithstanding the express terms of the Credit Agreement, that it is governed by and to be construed in accordance with the Law of [Pennsylvania],

*Or Alternative 2:*

However, our Opinion is given as if the law of the Commonwealth of Pennsylvania, without regard to its conflict of laws provisions, were chosen as the governing law in the Loan Documents. Based on that assumption,

*Or Alternative 3:*

However, if the Credit Agreement were governed by the law of the Commonwealth of Pennsylvania,

the Credit Agreement and the Note would be legal, valid and binding obligations of the Company, enforceable against the Company in accordance with their respective terms

[, except as may be limited by (a) bankruptcy, insolvency, reorganization, moratorium, fraudulent transfer or other similar laws affecting the rights and remedies of creditors generally, and (b) general principles of equity {(regardless of whether such enforceability is considered in a proceeding in equity or at law)} {, including (without limitation) concepts of materiality, reasonableness, good faith and fair dealing}]

5. The execution and delivery by the Company of the Loan Documents do not, and the performance by the Company of its obligations thereunder will not, require approval from or any filings with any governmental authority under any law of the United States or of Pennsylvania, or any rule or regulation thereunder. As used in this paragraph, the term “governmental authority” means any legislative, judicial, administrative or regulatory body of the United States or the Commonwealth of Pennsylvania.

6. The execution and delivery by the Company of the Loan Documents do not, and the performance by the Company of its obligations thereunder will not, (a) result in a violation of the Articles [Certificate] of Incorporation or Bylaws of the Company, (b) breach or result in a default under any Other Agreement listed in the Company’s Certificate, or (c) result in a violation of any Court Order listed in the Company’s Certificate.

7. The execution and delivery by the Company of the Loan Documents do not, and the performance by it of its obligations thereunder will not, result in a violation of any applicable statute of Pennsylvania or the United States, or any rule or regulation thereunder (, or [if the Company is a Delaware corporation] any provision of the General Corporation Law of the State of Delaware).

8. Neither the extension of credit nor the use of proceeds as described in Section \_\_\_ of the Credit Agreement violates the provisions of Regulation T, U or X of the Board of Governors of the Federal Reserve System.

9. The Company is not required to register as an “investment company” under the Investment Company Act of 1940, as amended.

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10. We hereby confirm to you that to our knowledge there are no actions or proceedings against the Company pending before any court, governmental agency or arbitrator, or overtly threatened in writing, that [(i)] seek to enjoin the performance of the Loan Documents [, or (ii) seek damages in excess of \$\_\_\_ from the Company {, or \$\_\_\_ in the case of any subsidiary of the Company}], except as disclosed in Schedule \_\_\_ to the Credit Agreement.

[(A1) For purposes of this opinion letter, we have examined the following:

(i) the Credit Agreement;

(ii) the [form of the] Notes;

(iii) the Articles [Certificate] of Incorporation and all amendments thereto of the Company (the “Charter”);

(iv) the Bylaws of the Company, as in effect from \_\_\_\_\_;

(v) certified copies of resolutions of the Board of Directors of the Company relating to the Loan Documents;

(vi) various certificates of public officials, and certificates of officers of the Company as to factual matters;

(vii) documents furnished by the Company pursuant to Section \_\_\_ of the Credit Agreement; and

(viii) such other agreements, documents and records as we have deemed necessary as a basis for the opinions expressed below;

and we have made such other investigation as we have deemed appropriate.]

[(A2) For purposes of this opinion letter we have reviewed such documents and made such other investigation as we have deemed appropriate.]

(B) As to certain matters of fact material to the opinions expressed herein,

(B)(1) We have relied upon certificates of public officials and of officers of the Company [and others] with respect to the accuracy of factual matters contained therein, which we have not independently established.

*Text of Model Opinion Letter Basic Provisions without Annotations*

(B)(2) We have relied, without independent verification, upon factual representations made by the Company in Sections \_\_\_ of the Credit Agreement.

(B)(3) We have relied upon a certificate of the [OFFICER'S TITLE] of the Company dated the date hereof (the "Company's Certificate"), certifying that the items listed in such certificate are (a) all of the indentures, loan or credit agreements, leases, guarantees, mortgages, security agreements, bonds, notes, other agreements or instruments, and (b) all of the judicial or administrative orders, writs, judgments, awards, injunctions and decrees, which as to any matter in (a) or (b) affect or purport to affect the Company's right to borrow money or the Company's obligations under the Credit Agreement.

(B)(4) We have assumed

[describe factual and other assumptions as to critical issues that should not be assumed without explicit statement].

(C) The Law covered by the opinions expressed herein is limited to the Law of the Commonwealth of Pennsylvania and the Federal law of the United States of America (; and [if the Company is a Delaware corporation] in addition, in respect of the Opinions set forth in opinion paragraphs 1, 2 and 3 above, the General Corporation Law of the State of Delaware).

(D)(1) Insofar as the opinions in paragraphs 1, 2 and 3 above relate to matters that are governed by the law of the State of \_\_\_\_, we have relied upon the opinion of [name, city and state of Other Counsel] being concurrently provided to you.]

(D)(2) Various issues concerning [describe matters] are addressed in the Opinion Letter of [name, city and state of Other Counsel] separately provided to you, and we express no opinion with respect to those issues.] [However, we believe that the opinion of such Other Counsel is satisfactory as to form and scope, and that you are justified in relying thereon.]

(E) The foregoing opinions are subject to the following additional assumptions and qualifications:

(E)(1) With respect to the opinion in paragraph 7, we call your attention to the provisions of Section 911(b) of the Pennsylvania Crimes Code (the "Crimes Code"), 18 Pa.C.S. § 911(b), which makes it unlawful to use or invest income derived from a pattern

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of “racketeering activity” in the establishment or operation of any enterprise. “Racketeering activity,” as defined in the Crimes Code, includes the collection of money or other property in full or partial satisfaction of a debt which arose as the result of the lending of money or other property at a rate of interest exceeding 25% per annum where not otherwise authorized by law. Accordingly, the opinion expressed in paragraph 7 is qualified to the extent, if any, that the statute referenced in this paragraph (E)(1) may be applicable to this transaction.

(E)(2) We express no opinion as to (i) Section \_\_\_ of the Credit Agreement insofar as it authorizes each Bank to set off and apply any deposits at any time held, and any other indebtedness at any time owing, by such Bank to or for the account of the Company, and (ii) Section \_\_\_ of the Credit Agreement insofar as it provides that any Bank purchasing a participation from another Bank pursuant thereto may exercise set-off or similar rights with respect to such participation.

(E)(3) Our opinions above are subject to the proviso that no opinion is given as to the application of any antitrust or securities laws.

(E)(4) [Set forth additional assumptions and qualifications that may be appropriate, depending on the particular transaction and who the Opinion Recipient is.]

(F) As used in Opinion Paragraph 4, the term “fraudulent transfer laws” is understood to include laws relating to restrictions on the ability of a corporation to declare or pay dividends, reacquire shares of its own stock, or make other distributions on or with respect to its capital stock (such as § 1551 of the Pennsylvania Business Corporation Law), as well as the Pennsylvania Fraudulent Transfer Act and similar laws.

(G) In the confirmation in Opinion Paragraph 10 [and specify any other paragraphs where the phrase is used], the phrase “to our knowledge” means the conscious awareness of facts, without investigation, by any of the lawyers currently with this firm who have given substantive attention to legal representation of the Company in connection with matters relating directly to the Transaction [, including the partner in this firm who is the current primary contact for the Company].

*Text of Model Opinion Letter Basic Provisions without Annotations*

(H) The opinions in this letter are limited to the matters set forth herein; no Opinion may be inferred or implied beyond the matters expressly stated in this letter; and the opinions must be read in conjunction with the assumptions, limitations, exceptions and qualifications set forth in this letter. We assume no obligation to update this opinion to advise you of any changes in facts or laws subsequent to the date hereof.

[(I)(1) A copy of this Opinion Letter is being concurrently delivered to [NAME OF AGENT'S COUNSEL], counsel to the Agent, and such counsel shall be entitled to rely hereon in rendering its Opinion to the Banks as if this Opinion Letter were expressly addressed and had been delivered to it.]

[(I)(2) A copy of this Opinion Letter may be delivered by you to a prospective loan participant or purchaser for review in connection with their purchase of a portion of the credit facility created under the Credit Agreement, but such persons may not rely on this Opinion Letter without our prior written consent.]

(I)(3) At your request, we hereby consent to reliance hereon by any future assignee of your interest in the loans under the Credit Agreement pursuant to an assignment that is made and consented to in accordance with the express provisions of Section [\_\_\_] of the Credit Agreement, on the condition and understanding that (i) this letter speaks only as of the date hereof, (ii) we have no responsibility or obligation to update this letter, to consider its applicability or correctness to other than its addressee(s), or to take into account changes in law, facts or any other developments of which we may later become aware, and (iii) any such reliance by a future assignee must be actual and reasonable under the circumstances existing at the time of assignment, including any changes in law, facts or any other developments known to or reasonably knowable by the assignee at such time.

(I)(4) [Subject to the foregoing, this] [This] Opinion Letter may be relied upon only by you in connection with the execution and delivery of the Loan Documents and the transactions contemplated thereby. You may not rely upon this Opinion Letter for any other purpose, and no other person or entity may rely upon this Opinion Letter for any purpose without our prior written consent.

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This Opinion Letter may not be referred to, or described, furnished or quoted to, any other person, firm or entity, without in each instance our prior written consent.

Yours truly,

### **Optional Paragraphs for Model Closing Opinion Letter**

11. It is not necessary to register the Notes under the Securities Act of 1933 or the securities laws of the Commonwealth of Pennsylvania in connection with the offer and sale of the Notes to the Banks under the circumstances contemplated by the Credit Agreement.

[(E)(5) We call your attention to the arbitration provision of the Credit Agreement and to the existence of differences between arbitral and judicial processes. We have based our opinion as to enforceability in paragraph 4 upon an assessment of legal authorities which would be applicable in judicial proceedings.]

[(E)(6) In rendering the opinions hereinbefore expressed, we have assumed the genuineness of all signatures, the authenticity of all documents submitted to us as originals, the conformity to authentic, original documents of all documents submitted to us as copies, the due authority of the parties executing such documents (other than those executing on behalf of the Company), and the legal capacity of natural persons.]

[(E)(7) In making our examination of documents which call for execution by parties other than the Company (“Other Parties”), we have assumed the enforceability thereof against all the Other Parties; and we have assumed that each of the Other Parties (i) has satisfied those legal requirements that are applicable to it to the extent necessary to make the Loan Documents enforceable against it, and (ii) has complied with all legal requirements pertaining to its status as such status relates to its rights to enforce the Loan Documents against the Company.]

[(E)(8) In connection with our opinion in paragraph \_\_ above concerning [describe subject matter], our investigation revealed that certain corporate records concerning [specify the missing records and describe their relevance] were missing [or incomplete]. As a consequence, we have relied upon the presumption of regularity and continuity to the extent necessary to enable us to provide that opinion.]

