Pennsylvania Third-Party Legal Opinion Report

Legal Opinion Committee of the Business Law Section of the Pennsylvania Bar Association
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FOREWORD

Developments in Third-Party Legal Opinion Practice

During the 1990s there was a considerable effort by the corporate and business bar on a state and national level to clarify the meaning and resolve differences in interpretation of third-party legal opinions. As a result, the literature on third-party legal opinions has grown considerably.

ABA Opinion Report

The initial effort on a national level was an attempt to work toward a national consensus on the purpose, format, and scope of a third-party legal opinion. Following a conference in 1989 known as the “Silverado Conference” and subsequent meetings, the American Bar Association published the Third-Party Legal Opinion Report of the Section of Business Law in 47 Bus. Law. 167 (1991) (the ABA Opinion Report). The ABA Opinion Report, which includes the Legal Opinion Accord (the Accord), commentary and guidelines, as well as an illustrative third-party opinion letter, represented the consensus of the Committee on Legal Opinions of the Business Law Section. The Accord set forth certain opinion principles, assumptions, definitions, remedies opinion analysis, qualifications, interpretations, and limitations that would apply to opinions adopting the Accord. Commentary, although not part of the Accord, was provided for each section of the Accord to provide guidance as to interpretation.

The Accord was not successful, in part because counsel to Opinion Recipients were not included in the process. The Accord was also difficult to use. Nevertheless, the Accord was not a total failure. It caused Opinion Givers to think about what assumptions, exceptions, and qualifications might be required as a result of state-specific legal issues, and in that sense was a progenitor to the Special Report of the TriBar Opinion Committee: The Remedies Opinion—Deciding When to Include Exceptions and Assumptions, 59 Bus. Law. 1483 (August 2004) (the TriBar Remedies Report). The Guidelines, which were almost an afterthought, were the progenitor of the ABA Legal Opinion Guidelines and the Legal Opinion Principles.
Literature on Opinion Customary Practice

By the mid-1990s, the efforts of bar associations on a national level, rather than attempting to modify the Accord to address criticisms, turned to describing customary practice among lawyers and providing guidance in areas where customary practice remains unclear. The literature in this area has grown considerably since the publication of the ABA Opinion Report:

TriBar Report. A group known as the “TriBar Opinion Committee” has published a series of Reports over the years on legal opinion practice.

ABA Guidelines. The ABA Opinion Report, as originally published, set forth “Certain Guidelines for the Negotiation and Preparation of Third-Party Legal Opinions” (the ABA Guidelines), which the ABA Committee on Legal Opinions of the Business Law Section (the ABA Committee) regards “as a sound and fair basis, drawn from current custom and practice,” for the negotiation and preparation of third-party legal opinions. The ABA Guidelines apply to opinion practice generally.


1. The TriBar Opinion Committee now consists of members of the following organizations functioning as a single Committee: New York County Lawyers’ Association; The Association of the Bar of the City of New York; New York State Bar Association; and members of the Allegheny County (Pa.), Atlanta, Boston, California, Chicago, Delaware, District of Columbia, Georgia, North Carolina, Ontario, Pennsylvania, and Texas bar associations.
In addition to the Bar Association reports described above, an excellent treatise by Donald W. Glazer, Scott T. FitzGibbon, and Steven O. Weise contains detailed and comprehensive analysis of all aspects of third-party legal opinions, including descriptions of customary practice among knowledgeable lawyers.

**Pennsylvania Third-Party Legal Opinion Report**

The Report contains model opinion language on various substantive Pennsylvania corporate law topics for corporations, limited liability companies, and limited partnerships and provides commentary on the meaning of this language and the customary practice by Pennsylvania lawyers in rendering these substantive opinions.

The Report is applicable to an opinion on Pennsylvania law whether or not expressly incorporated in the Opinion Letter. The Legal Opinion Committee believes that the Report reflects customary practice by knowledgeable Pennsylvania lawyers rendering and receiving third-party opinions on the topics covered in the Report.

**Model Opinion Letter**

In addition to the Report, which addresses issues of substantive Pennsylvania law, a Model Closing Opinion Letter (Annotated) (the Model Opinion Letter), which is intended to be used as an exemplar for Pennsylvania lawyers in drafting or reviewing an opinion letter, is also included. The Model Opinion Letter is based in large part upon an exemplar developed by William P. Hackney of Reed, Smith, Shaw & McClay and used by that firm as an internal exemplar.

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2. Donald W. Glazer, et al., *Glazer and FitzGibbon on Legal Opinions: Drafting, Interpreting, and Supporting Closing Opinions in Business Transactions* (2d ed. 2001). The three authors were members of the ABA Committee that drafted the ABA Opinion Report; Mr. Glazer was Co-Reporter for the TriBar Report and is a past chair of the ABA Committee; and Mr. Weise is a past chair of the ABA Committee.
The Model Opinion Letter is an opinion letter of a corporate borrower’s counsel relating to an unsecured bank credit agreement, but much of the introductory language, qualifications, and assumptions are usable in closing opinion letters in a number of types of transactions. The Model Opinion Letter is annotated to describe what the Legal Opinion Committee believes is Pennsylvania customary practice in giving and receiving third-party legal opinion letters in Pennsylvania.

The Model Opinion Letter contains basic corporation law opinions, two different versions of a remedies opinion, opinions as to governmental approvals and filings, no breach or default, no violation of law, margin regulation and investment company status, and a confirmation as to legal proceedings. In addition, the Model Opinion Letter contains optional paragraphs on a number of topics, such as reference to the ABA Principles, securities laws, arbitration, authenticity assumptions, assumptions as to other parties, and the presumption of regularity and continuity.

The Model Opinion Letter should be read in conjunction with applicable commentary in this Report. The Legal Opinion Committee believes the Model Opinion Letter accurately describes customary practice in third-party legal opinions by knowledgeable Pennsylvania lawyers.

**Secured Transactions Opinions**


**Approval of the 1999 Report and Model Opinion Letter**

The 1999 Report and the Model Opinion Letter were the products of numerous meetings of a steering committee, which met over a two-year period. Exposure drafts of the Report and the Model Opinion Letter were circulated to the Council of the Business Law Section, the Title 15 Committee of the Council, and to the 70 members of the Pennsylvania Legal Opinion Task Force representing a broad geographic and practice cross section of Pennsylvania corpo-
rate, banking, and business law practitioners. Members of the steering committee for the 1999 Report were Thomas M. Thompson (Chair), Lawrence H. Berger, E. Carolan Berkley, Michael A. Budin, Joy Flowers Conti, Charles M. Grimstad, William P. Hackney, and Morris C. Kellett (the Steering Committee).

On November 22, 1999, the Council of the Business Law Section of the Pennsylvania Bar Association approved both the 1999 Report and the Model Opinion Letter, and directed the Committee to publish both documents together with a number of other valuable resources for Pennsylvania third-party legal opinion practice in a Deskbook to be made available to the Bar.

**Approval of the Revised Report**

The revised Report and Model Opinion Letter were approved by the Executive Committee of the Council of the Business Law Section of the Pennsylvania Bar Association on September 19, 2007.
GLOSSARY

The following terms (whether used in the singular or in the plural) shall have the meanings indicated:

**Actual Knowledge:** the conscious awareness of facts or other information, without investigation.


**Company:** the party or parties to the Transaction (including predecessor entities where relevant) for which the Opinion Giver provides legal representation.


**Opinion:** a legal opinion that is rendered to one or more persons involved with the Transaction other than the Client.

**Opinion Giver:** the lawyer or legal organization rendering the Opinion.

**Opinion Letter:** a letter containing one or more Opinions that is delivered to and accepted by the Opinion Recipient.

**Opinion Preparer:** those lawyers at the Opinion Giver who take on the responsibility to prepare an Opinion Letter.

**Opinion Recipient:** the addressee or addressees of the Opinion Letter.

**Transaction:** the business transaction (e.g., loan, sale of securities, merger, or acquisition) between the Company and other parties.

**Transaction Documents:** the document setting forth the principal terms of the transaction addressed by the Opinion and other documents ancillary thereto that are explicitly addressed by the Opinion.

I. OPINIONS FOR CORPORATIONS

1. Incorporation and Existence

The Company is a corporation presently subsisting under the laws of the Commonwealth of Pennsylvania.

or

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

1.1. An Opinion as to the incorporation and status of a Pennsylvania business corporation (a) assures the other party of the legal character of the corporation, which may have implications for the liability of the corporation’s principals, and (b) confirms that the corporation has not been dissolved, terminated, or undergone any organic change that would affect its ability or authority to consummate the Transaction.

1.2. The standard form of this Opinion cannot be given if the Opinion Giver concludes that the Company is merely a de facto corporation or a corporation by estoppel. TriBar Report § 6.1. The investigation customarily undertaken by Pennsylvania Opinion Preparers in order to opine that an entity “is a corporation” is described in ¶ 1A.11, below.

1.3. The first, narrower formulation of this Opinion set forth above means simply that the Company currently exists as a corporation under Pennsylvania law. That formulation is preferable in that it is more precise and can usually be rendered with less legal expense (see ¶ 1C.3, below), and in many Transactions it should satisfactorily address the concerns of the Opinion Recipient. Opinion Recipients may request the second, broader formulation of the Opinion in certain Transactions, such as acquisitions and investment transactions. That formulation has several components, each with a distinct purpose and involving a separate inquiry, as discussed in the following paragraphs.
A. Duly Incorporated

1A.1. There is a difference between an Opinion that a Company “is a corporation,” and an Opinion that a Company “is a corporation duly incorporated.” To say that an entity “is a corporation” is simply to say that it has made the minimum requisite filings in the appropriate state office that, under the applicable statute, result in its being a corporation, and that it has not ceased to exist as of the date of the Opinion.

1A.2. A “duly incorporated” Opinion means that the corporation complied with all material requirements of the statute under which the corporation was formed, and that it has not ceased to exist as of the date of the Opinion. Although the word “duly” is not a precise term of art, it conveys not only that the minimum filings necessary at the time the entity was formed were made, but also that the documents that were filed conformed in all material respects to the statutory requirements as to form and content. (On the other hand, “duly organized” (see Section 1B, below) means that certain organizational actions were properly taken after “due incorporation.”) It advises the Opinion Recipient that, in the opinion of the Opinion Giver, even the Commonwealth cannot successfully challenge the legal existence of the entity as a Pennsylvania corporation on the basis of deficiencies in the statutory filings for incorporation.

1A.3. The inclusion of the adjective “business” before “corporation” in this Opinion may clarify later Opinions on corporate power (see Opinions 2 and 3, below) by picking up the definitions of the 1988 BCL and the exclusion by 1988 BCL §1102(c) of regulated entities such as banking institutions, credit unions, and savings associations.

1A.4. Under the 1988 BCL, the articles of incorporation must set forth the information required by 1988 BCL §1306(a) and must comply as to form with 15 Pa.C.S. §135. 1988 BCL §1309 and 15 Pa.C.S. §503 are intended to reenact existing law, including the rule that substantial compliance with the statutory procedures for incorporation is sufficient for de jure incorporation.

1A.5. In order to form an entity that is a corporation under the 1988 BCL, the incorporator (one or more corporations for profit or not-for-profit or natural persons of full age) must file executed articles of incorporation with the Department of State. 1988 BCL
§§ 1302, 1308(a). The articles will be accepted for filing if the name is available and if the articles purport on their face to relate to the matters set forth in 1988 BCL § 1306, are executed, are accompanied by a docketing statement as required by 15 Pa.C.S. § 134, and comply as to physical characteristics with applicable regulations. 15 Pa.C.S. § 135(a). The affixation and attestation of a corporate seal are not required for any filing. 1988 BCL § 1109(a).

1A.6. Corporate existence begins upon the filing of the articles or upon a later date specified in the articles of incorporation. 1988 BCL § 1309(a). The filed articles of incorporation are conclusive evidence that the corporation has been incorporated, subject to the actions set forth in 15 Pa.C.S. § 503 that could cause corporate existence to cease. See Section 1C, below.

1A.7. Articles of incorporation filed under the 1988 BCL must be accompanied by a docketing statement (under prior law, a “registry statement” contained analogous information), but the docketing or registry statement is not a document “filed” under the BCL and its absence or defect has no legal effect if the underlying articles were accepted by the Department of State for official filing. 15 Pa.C.S. § 134.

1A.8. An existing corporation whose documents are not on file in the Pennsylvania Department of State (e.g., because originally filed only at the county level under certain laws earlier than the 1933 BCL) may file a “statement of summary of record” and obtain a certification of incorporation. 1988 BCL § 1311. Upon filing a statement of summary of record, a corporation is deemed to be a validly subsisting corporation to the same extent as if it had been incorporated and was existing under the 1988 BCL. 1988 BCL § 1311(b). The Department of State is required thereafter to certify that the corporation is incorporated and existing under the 1988 BCL regardless of any absence of or defect in the prior proceedings relating to incorporation. 1988 BCL § 1311(b).

1A.9. In addition to the 1988 BCL, statutes under which Pennsylvania corporations have been incorporated include the Iron Manufacturing Companies Act of 1836, the Manufacturing Companies Act of 1849, the Mining Act of 1854, the Mechanical, Mining, Quarrying and Manufacturing Companies Act of 1863, the Hotel Companies Act of 1867, the Iron and Steel Manufacturing Act of 1873, the Corporation Act of 1874, the Insurance Company

1A.10. The term “articles” is defined in 1988 BCL as meaning the original articles of incorporation, all amendments thereof, and any other articles, statements, or certificates permitted or required to be filed in the Pennsylvania Department of State. 1988 BCL § 1103. However, if the corporation has filed articles of amendment or articles of merger or division restating the articles of incorporation in their entirety, or articles of consolidation, conversion, or domestication, the term “articles” thereafter does not include any prior documents. 1988 BCL § 1103. In that event, a certified copy of the corporation’s “articles” will not include the prior articles of incorporation. Hence, if the amendment restating the articles was properly adopted and filed, the Opinion Preparer need not examine the original articles of incorporation or the advertising thereof in order to give a “duly incorporated” or “duly organized” Opinion.

1A.11. To give an Opinion that the entity “is a corporation,” the Opinion Preparer need only obtain from the Department of State a subsistence certificate and examine the corporation’s articles (see Section 1C, below). Where no stamped copy or other confirmation has been received from the Department of State to confirm that Articles of Incorporation, Division, or Merger have been accepted for filing, and no subsistence certificate has been or can be obtained for the Company, it may be impossible to render an opinion regarding the subsistence of the Company without an assumption that such articles were or will be accepted for filing as of the date submitted to the Department.

1A.12. To give an Opinion that the entity was “duly incorporated,” the Opinion Preparer should (a) determine what corporation law was in effect at the time the corporation was incorporated and (b) examine a certified copy of the corporation’s articles of incorporation in order to ascertain whether they conform to the law in effect at the time of incorporation. However, if the corporation has restated its articles or filed articles of consolidation, conversion, or domestication, as stated in ¶ 1A.10, above, the Opinion
Preparer need examine only the earliest charter documents included in a certified copy of the corporation’s articles. Inconsequential defects in incorporation will not preclude giving a “duly incorporated” Opinion. In determining whether a defect is “inconsequential,” the Opinion Preparer should consider the corporation’s history and surrounding circumstances, as well as the statutory requirements.

B. Duly Organized

1B.1. An Opinion that a corporation was “duly organized” means that the corporation (a) was “duly incorporated” and (b) thereafter took such initial organizational action as was required by the corporation law such as the adoption of bylaws, election of directors, and (if organized on a stock basis) authorization of the initial issuance of stock.

1B.2. After the corporate existence begins, the incorporators must hold an organization meeting to adopt the corporation’s bylaws and elect directors; but if the directors were named in the articles of incorporation, they may hold the organizational meeting to adopt the bylaws. 1988 BCL § 1310(a). The directors may adopt the bylaws by unanimous written consent without holding a formal meeting. At the organizational meeting, the board of directors should adopt a resolution authorizing the issuance of the initial shares of the corporation. 1988 BCL §§ 1721(a), 1502(a)(20), 1521.

1B.3. Since 1933, the BCL has provided for the official advertisement of the filing of articles of incorporation. Under the 1933 BCL, the advertisement of incorporation was required to state the purpose of the corporation and the date on which the articles of incorporation were or would be filed with the Department of State. Since a 1953 amendment, the BCL has provided that either (a) the incorporators shall officially publish a notice of intention to file prior to the day the articles of incorporation are filed, or (b) after the date of filing, the corporation shall publish a notice that the articles have been filed. 1988 BCL §§ 1307, 1103 (defining the term “officially publish”). Because the statute does not specify any time period within which this notice must be published, publication at any time will cure a prior failure to publish. Although the BCL contains no provision relating to the failure to advertise, section 307 of the Newspaper Advertising Act, 45 Pa.C.S. § 307, provides that no
“matter ... in which notices required to be given by official or legal advertising, shall be binding and effective upon any interested person" unless advertising is effected “and a proof of publication is filed of record in such matter...” It therefore appears that the required notice should be published before an Opinion can be given that the corporation has been “duly organized.”

1B.4. Under the 1933 BCL, section 208 set forth two conditions precedent to beginning business, and provided that all officers and directors who participated in a violation thereof would be personally liable for corporate debts. The conditions related to the payment of beginning capital (required to be set forth in the articles) and the filing of an affidavit with the Department of State as to such payment. By amendment of section 208 in 1953, such liability was imposed if business was transacted prior to the publication of the legal advertisement required by section 205. Section 208 and the requirement that a minimum capital be set forth in the articles were deleted from the 1933 BCL in 1957. There are no similar provisions in the 1988 BCL.

1B.5. To render an Opinion that the corporation was “duly organized,” the Opinion Preparer should (a) determine that the corporation was “duly incorporated” (see Section 1A, above) and (b) examine the corporation’s records, including minute books, to confirm that (i) an organizational meeting was held to adopt the bylaws, (ii) directors were either named in the articles of incorporation or elected at the organizational meeting of incorporators, and (iii) the board of directors authorized the corporation’s initial issuance of stock. 1988 BCL §§ 1521–1524.

1B.6. The Opinion Preparer should also examine the proofs of publication to ascertain that proper advertisement was accomplished. The 1988 BCL (as well as the 1933 BCL) contains no requirement that a proof of publication be filed of record, but the Newspaper Advertising Act (see ¶ 1B.3, above) appears to contain such a requirement. The customary practice is to treat the minute book of the corporation as the requisite place of record for proofs of publication of corporate advertising.
C. Existence as a Corporation; “Status”

1C.1. A corporation is “validly existing” or “presently subsisting” under Pennsylvania law if it has commenced existence as a corporation (see Section 1A, above) and has not:

(a) merged into or consolidated with another entity (1988 BCL § 1929);

(b) undergone a corporate division in which it did not survive (1988 BCL § 1957(A));

(c) voluntarily dissolved (1988 BCL § 1971 as to dissolution of a corporation that has not commenced business and 1988 BCL § 1972 as to dissolution of a corporation that has commenced business);

(d) dissolved by expiration of its period of duration (under 1988 BCL § 1306(a)(6), existence of a corporation is perpetual unless the articles establish a shorter term and if the directors have not acted to make the corporation’s duration perpetual under 1988 BCL § 1914(c)(2));

(e) involuntarily liquidated and dissolved in a court proceeding (1988 BCL §§ 1981, 1982);

(f) been extinguished by reason of the sale of the corporate franchise of the corporation for unpaid corporate taxes under the “floating lien” of the Fiscal Code, 72 P.S.A. § 1401 (1995), or as a result of proceedings brought by the Pennsylvania Attorney General to revoke the corporation’s charter for (i) misusing or failing to use its powers, privileges, or franchises, (ii) having procured its articles by fraud, or (iii) having relied on improper statutory authority for its incorporation (15 Pa.C.S. § 503);

(g) dissolved by proclamation of the governor for failure to file tax returns for three successive years (the Department of Revenue may seek a proclamation from the governor declaring the corporation’s charter forfeited), 72 P.S.A. § 1704 (1995 & Supp. 1999); or

(h) dissolved by domesticating itself in another jurisdiction and thereafter voluntarily dissolving in Pennsylvania (1988 BCL § 1980).

1C.2. A corporation may be deemed by the Commonwealth to not be presently subsisting if the corporation fails to file a
required report or return with the Pennsylvania Department of Revenue for three successive years or if an out-of-existence affidavit has been filed with the Department of Revenue. 1988 BCL § 1303(b)(1)(i)(B).

1C.3. To give a “validly existing” or “presently subsisting” Opinion, the Opinion Preparer may rely on (a) evidence of the filing of articles of incorporation that have become effective and a review of the articles of incorporation to assure that they do not specify a term of existence that has expired, and (b) the recent issuance of a “presently subsisting” certificate by the Pennsylvania Department of State as evidence that Pennsylvania still regards the company as being in existence. This is so, notwithstanding that facts exist that would enable the Commonwealth to bring an action to revoke the charter. A subsistence certificate should serve to evidence that neither the state nor a court has taken any action to terminate the existence of the corporation. The Opinion does not require a review of the corporate record books. The Pennsylvania Corporation Bureau will issue a “subsistence certificate” if the corporation has been incorporated and has complied with state laws and regulations necessary for its continued existence and none of the actions described in ¶¶ 1C.1 and 1C.2 has occurred to terminate its existence.

1C.4. The phrase “presently subsisting” is customarily used in Opinions relating to Pennsylvania corporations, and arises from the language used in the certificate issued by the Pennsylvania Corporation Bureau of the Department of State.

1C.5. The phrase “presently subsisting” as used in Pennsylvania is somewhat analogous to the term “good standing” used in many other states. Because the certificate issued by the Pennsylvania Corporation Bureau will state only that a corporation is “presently subsisting” and will not state that it is in “good standing,” an Opinion with respect to a Pennsylvania corporation will customarily state that the corporation is “presently subsisting” rather than stating that it is in “good standing.” However, an Opinion that a Pennsylvania corporation is in “good standing” should be understood to mean the same thing as an Opinion that the corporation is “presently subsisting.” If an Opinion Recipient wants the additional comfort that there exist no tax liens or failures to file tax returns or other reports, which liens or failures
might constitute grounds for forfeiture of the articles, the Opinion Recipient should request express confirmation of those facts.

1C.6. In the alternative, an Opinion Giver should be able to give a “validly existing” Opinion after (a) a review of a certified copy of the articles obtained from the Pennsylvania Department of State and (b) confirmation that the corporation has not taken action that would terminate its existence.

1C.7. If the fact of such reliance is disclosed in the Opinion, the Opinion Giver may in some cases rely on information provided by the computer database of the records of the Pennsylvania Department of State as maintained and supplied by private services.

1C.8. It is not customary in Pennsylvania to obtain full tax clearance certificates in order to give a “presently subsisting” Opinion, because those certificates can be obtained only after long delay, and because a corporation is “presently subsisting” as long as none of the actions described in ¶¶ 1C.1 and 1C.2 has occurred. However, Opinion Recipients sometimes expect to see a certification as to taxes, and a tax status certificate can be obtained from the Department of Revenue showing any tax liens and reflecting any unpaid taxes. If the Pennsylvania Department of State is willing to issue a “presently subsisting” certificate, an Opinion that a corporation is “presently subsisting” may be given notwithstanding the fact that a tax status certificate reflects tax liens and unpaid taxes.

2. Corporate Power—Transaction

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

2.1. This Opinion means that (a) the corporation is authorized, by the statute under which it is organized and its articles of incorporation, to enter into the particular agreements and execute the other documents covered by the Opinion and to comply with the provisions of those agreements and other documents, and (b) there is nothing in the applicable organizational statute or the articles and bylaws of the corporation that would prohibit or limit
those actions by the corporation—i.e., the nature of the actions to be taken by the corporation is not ultra vires.

2.2. This Opinion does not address (a) whether the Transaction and Transaction Documents have received all necessary corporate approvals, (b) whether the execution, delivery, and performance by the Company of the Transaction Documents is subject to regulations imposed by other laws, such as those requiring the receipt of licenses or permits, or (c) whether consents may be required under other agreements or the effect of any court orders. Those subjects are customarily addressed by other Opinions.

2.3. The Opinion Preparer should consider the currently applicable corporate law, and should examine the corporation’s articles and bylaws to verify that they do not restrict the corporation’s powers in a manner that conflicts with the Transaction or any of the Transaction Documents to be entered into by the corporation. The 1988 BCL gives a business corporation broad general powers, which should eliminate most ultra vires questions in the absence of an unusual restriction in the corporation’s articles. See 1988 BCL § 1502(a) (listing the powers of business corporations). Those powers do not need to be set forth in the articles. 1988 BCL § 1502(b). However, the articles or bylaws of the corporation may limit or restrict the powers listed in section 1502.

2.4. The Opinion Preparer should consider whether the corporation is subject to special statutory restrictions on its powers. A Pennsylvania business corporation, although subject generally to the 1988 BCL, may be a special type of business corporation such as a management corporation (1988 BCL Ch. 27), a professional corporation (1988 BCL Ch. 29), or an insurance corporation (1988 BCL Ch. 31). Each of those statutory chapters may in some fashion limit the corporate powers. Some business corporations are subject to special statutory restrictions on powers contained in regulatory statutes not included in the 1988 BCL. See 15 Pa.C.S. § 103.

2.5. A Pennsylvania domestic corporation for profit may be a banking institution, a credit union, or a savings association, to which the 1988 BCL does not apply except as expressly provided by the 1988 BCL or by a statute applicable to the corporation, or it may be a cooperative corporation to which the 1988 BCL applies
only to the extent provided in Subpart D of 15 Pa.C.S. See 1988 BCL § 1102(c), (d). As to the definitions of and statutes applied to these various types of corporations, see 1 William E. Zeiter, Pennsylvania Associations Code 52–75 (1991), and William H. Clark, Jr., Foreword to Title 15, 15 Pa.C.S.A. xxv (1995).

2.6. The Opinion Preparer should pay special attention to actions that are likely to raise particular problems of corporate power, such as a Transaction involving the corporation’s purchase or redemption of its own stock. 1988 BCL §§ 1551, 1552. In preparing an Opinion concerning the purchase or redemption of a corporation’s stock, the Opinion Preparer may need to determine whether the board of directors reasonably relied upon supporting data to address issues such as the solvency of the corporation so as to demonstrate that the stock purchase or redemption satisfies the requirements of the applicable law.

2.7. If any obligations of the Company under the Transaction Documents are to be performed after the date of the Opinion Letter, the Opinion Preparer should consider whether to include, in the Opinion, language indicating that it is based on and limited to assumed future facts or specified facts and circumstances in existence at the date of the Opinion Letter.

3. Corporate Power—Business

The Company has the corporate power to carry on the Company’s business as [it is now being conducted] [described in ____________].

3.1. In addition to Opinion 2 as to the power of a corporation to execute, deliver, and perform the Transaction Documents, the Opinion Giver may be requested to opine that the Company has the power to carry on its business. This Opinion is given less frequently today than in the past.

3.2. This Opinion means that (a) the statute under which the corporation is organized and its articles of incorporation authorize the corporation to conduct its current business, and (b) there is nothing in the applicable organizational statute or the articles or bylaws of the corporation that prohibits or limits the corporation’s current business—i.e., the nature of the corporation’s business is not ultra vires.
3.3. This Opinion does not address (a) whether or not the corporation holds various regulatory permits or licenses necessary for its activities or (b) whether or not the manner in which the corporation conducts its business is lawful.

3.4. The alternative bracketed provisions are two formulations frequently used. The first formulation is less specific and may be subject to dispute later, since the Opinion Giver may have a different understanding of the business being conducted than does the Opinion Recipient. The second formulation would make reference to a document that contains a description of the corporation’s business.

3.5. Regardless of which formulation of this Opinion is used, the Opinion Preparer should generally obtain a certificate from an appropriate official of the corporation describing the corporation’s business, in order to provide a factual basis for the Opinion that the corporation’s activities are within the scope of the powers and purposes permitted under the statute and the corporation’s charter documents. The description of the business of a publicly held corporation is typically provided by a reference to the description contained in the corporation’s annual report on SEC Form 10-K.

3.6. An Opinion concerning the Company’s corporate power to carry on its business raises questions of corporate power similar to those discussed in ¶¶ 2.2–2.5, above, with respect to Opinion 2, but in relation to the Company’s business, which may not be of the same nature as the Transaction Documents and the Transaction.

3.7. In considering the Company’s corporate power to carry on its business, the Opinion Preparer should consider whether the corporation is subject to special statutory restrictions on its powers, or whether its business is of a type that can be carried on only by a corporation incorporated under a special statute (such as a bank) or that must meet special statutory requirements (such as an insurance company).

4. Authorization, Execution and Delivery

The Company (i) has taken all corporate action necessary to authorize the execution, delivery and performance of each of the Transaction Documents, and (ii) has duly executed and delivered each of them.
4.1. This Opinion means that (a) the board of directors and, if necessary, the shareholders, have taken all actions required under the corporation laws and the corporation’s articles and bylaws (i) to authorize the corporation to engage in the Transaction and to enter into and perform the Transaction Documents, and (ii) to authorize the execution and delivery of the Transaction Documents on behalf of the corporation by the particular persons who took those actions—i.e., that the persons who signed the Transaction Documents on behalf of the corporation had actual (not merely apparent) authority to do so—and (b) the Transaction Documents were executed and delivered in conformity with any requirements of applicable contract law as well as the corporation laws, the corporation’s articles and bylaws, and the authorizing resolution(s).

4.2. To give an Opinion that all of the necessary steps have been taken by the corporation to authorize a Transaction and the execution, delivery, and performance of the Transaction Documents, the Opinion Preparer should review the articles, the bylaws, and the applicable current law to determine what authorizations are required.

4.3. If the Transaction and/or any of the Transaction Documents requires approval by the board of directors or the shareholders, the Opinion Preparer should verify that the necessary approval was given at a duly held meeting or by unanimous or partial written consent, if permitted.

4.4. Any action by the board of directors by vote at a meeting that has been duly called and held requires that a quorum of the board be present and vote on any resolution. 1988 BCL § 1727(a). The board of directors may act without a meeting by unanimous written consent. 1988 BCL § 1727(b). The requirements of 1988 BCL Chapter 19 should be carefully considered in the case of a fundamental transaction.

4.5. In certain situations, a shareholder vote may be necessary to enter into one or more of the Transaction Documents or to consummate the Transaction. In lieu of a meeting, the shareholders may act by unanimous written consent (1988 BCL § 1766(a) and (c)), or, if permitted by the articles or, in the case of a nonregistered corporation (1988 BCL Chapter 25), the bylaws, of a corporation, by partial written consent in accordance with the notice
provisions of the statute in the case of a nonregistered corporation. 1988 BCL § 1766(b) and (c). Any special shareholder vote required by the provisions of 1988 BCL Chapter 19 or 25 should be covered by the Opinion.

4.6. Attention should be given to such matters as (a) call and notice of the meeting (which may depend on whether the meeting is a regular or special meeting), (b) quorum (as required by statute, the articles, or bylaws), (c) requisite number of votes to take action, (d) sufficiency of action taken by written consent, and (e) propriety of delegation in the case of action by a committee of the board. Pennsylvania lawyers customarily rely upon a certificate of the Company secretary as to the factual aspects of the foregoing matters.

4.7. The Opinion Preparer should determine that the authorizing resolution has not been rescinded and remains in effect by examining the minute books or by obtaining a certificate, if appropriate, from the corporation’s secretary to that effect. In addition, the Opinion Preparer should determine from the bylaws and minutes which corporate officers are authorized to execute and deliver the specified Transaction Documents on behalf of the corporation.

4.8. The Opinion Giver may rely on a certificate of the secretary of the corporation as to relevant factual information about which the secretary is an appropriate source—such as the signatures and incumbency of the corporate officers who signed a particular document on behalf of the corporation, facts relating to a directors’ or shareholders’ meeting at which authorizing action was taken, or the absence of any revocation or modification of a resolution—unless the Opinion Giver has Actual Knowledge of irregularities that call into question the reliability of the certificate. The certificate should recite factual matters only, and should not include statements of “ultimate fact” that are tantamount to a legal conclusion being expressed in the Opinion.

4.9. If the form of a particular Transaction Document has changed since its approval by the board or the shareholders, the Opinion Preparer must determine whether the change is of such a nature that the final form of that Transaction Document should be resubmitted for board or shareholder approval, or whether the corporation’s officers still have authority under the resolution to execute that Transaction Document. Since the authorizing resolu-
tions are often prepared by the Opinion Giver, it is usual to authorize execution “in the form presented, with such changes as those executing deem necessary or desirable” in order to avoid the necessity of getting reauthorization.

4.10. This Opinion assumes compliance with fiduciary duty requirements and does not address that question unless it is specifically addressed. This means, among other things, that the Opinion does not cover the question of whether the approval of the Transaction or a specified Transaction Document is void or voidable because of the interest of a director or officer. See 1988 BCL § 1728. The Opinion also does not require an assessment of the adequacy of proxy statement disclosure in connection with any required shareholder authorization. However, if the Opinion Giver has Actual Knowledge of facts that make the assumption of performance of fiduciary responsibility unreliable, the Opinion should be appropriately qualified or should contain appropriate disclosure.

4.11. An Opinion that the Transaction Documents have been duly executed and delivered by the corporation involves an analysis of applicable contract law as well as corporate law requirements. The Opinion Preparer should determine (a) which jurisdiction’s law governs the formalities required to form a contract and (b) whether those formalities have been satisfied. The Opinion Letter should specify which jurisdictions’ laws are addressed by the Opinion.

4.12. The Opinion Preparer should either expressly assume or obtain verification of the execution and delivery of the documents covered by this Opinion if the Opinion Preparer does not have personal knowledge of execution or delivery—e.g., when the Opinion Giver does not attend the closing or when one or more of the documents has been delivered in escrow.

5. Authorization and Issuance of Specific Shares; Nonassessability

The [Shares] have been duly authorized and validly issued and are fully paid and nonassessable.

5.1. As noted in TriBar Report § 6.2, this Opinion has four component parts:
(a) The authorization of shares, meaning that under the corporation law of the state in which the Company was organized and under the Company's charter, the Company had authority to issue the shares having the characteristics of the shares in question. Authorization also covers the question of whether there was a sufficient number of authorized shares available for issuance when the shares in question were issued. Some lawyers may take the view that “duly authorized” also means any necessary board action has been taken, but see TriBar Report fn. 125.

(b) Valid issuance, meaning that any shareholder and board action necessary for the issuance of the shares has been taken and that the Company has received legally sufficient consideration for the shares. The conclusion that such shares have been duly authorized is a prerequisite to an Opinion that shares have been duly issued. In the case of a regulated business (such as a public utility), it may be necessary for a regulatory authority to approve the issuance of such shares. In that circumstance, the “validly issued” Opinion covers the receipt of such approval.

(c) Fully paid, meaning that (i) the consideration required by the corporate action authorizing the issuance has been received and (ii) that such consideration satisfied any requirements of law. An Opinion that the shares are validly issued necessarily covers the satisfaction of any requirements of law regarding consideration, whether or not a “No Violation of Law” Opinion is given (Op. ¶ 7 of the Model Closing Opinion Letter).

(d) Nonassessable, meaning that under the law the holders of the shares will not be subject to future assessments by the Company as the result of their ownership of such shares.

5.2. As noted above, the “validly issued” Opinion covers compliance with any statute applicable to the issuance of shares by particular kinds of regulated businesses. However, as a matter of custom the Opinion does not cover compliance with state or federal securities laws. TriBar Report fn. 129.

5.3. The “validly issued” Opinion requires consideration by the Opinion Giver of the effect of any preemptive rights arising from law or the Company's charter; however, the Opinion does not address rights to acquire shares arising under a contract. The TriBar Report, section 6.2.2, states that shares would not be validly issued if the issuance would violate preemptive rights estab-
lished by law or under the charter, but shares can be validly issued even if the issuance resulted in a breach of contract by the Company. Under customary Pennsylvania practice, the fact that shares may have been issued in the past in violation of then-existing preemptive rights does not affect the validity of their issuance. If shares are to be issued in the current transaction in violation of preemptive rights, an Opinion can be given that the shares are “validly issued” but the existence of such preemptive rights should be noted in the Opinion. See section 7, below.

5.4. If the Opinion Preparer is not in a position to know whether the consideration for the issuance of shares has been received, or if the Opinion is to be given prior to receipt of consideration, an alternate form of opinion may be necessary. For example, the Opinion might read “Upon receipt of the consideration specified by the Stock Purchase Agreement, the [Shares] will be validly issued, fully paid, and nonassessable.”

5.5. To give an Opinion that shares have been duly authorized and validly issued, the Opinion Giver should consider the requirements of the corporate law in effect at the time of issuance. In addition the Opinion Giver should determine whether the board of directors or the shareholders, if necessary, approved the issuance of the shares. The question of consideration also must be examined. See ¶ 5.6.

5.6. To give a valid issuance Opinion, the Opinion Giver should also determine what consideration was required under the corporate law in effect at the time of issuance. Prior to 1933, the quality and amount of consideration paid for the shares may have had an effect on whether the stock was validly issued. See ¶ 5.9. However, under both the 1933 BCL and the 1988 BCL, the failure to pay adequate consideration does not make the issued shares invalid. If consideration was paid for the shares, the Opinion Giver should determine the type and how the value of the consideration was determined by the board of directors. There may be situations where the Opinion Giver may not be able to render a “fully paid” Opinion due to the absence of records or of a factual base.

5.7. In order to give an Opinion as to full payment for outstanding shares, the Opinion Preparer should determine what consideration, if any, was paid for the shares. An Opinion that the
shares are “fully paid” means that the consideration required by the corporate action authorizing the issuance of the shares has been received in full by the Company, as well as that the consideration received satisfied the requirements of corporate law and the Company’s articles and bylaws in effect at the time of issuance. TriBar Report § 6.2.3; see ¶ 5.6, above. If consideration was paid for the shares, the Opinion Preparer should determine the type and how the value of the consideration was determined by the board of directors. The determination of whether the bargained-for consideration was received by the corporation for shares issued years ago may be a difficult task for the Opinion Preparer. Deeds or instruments of transfer are ideal. Accounting records, if available, can be used to substantiate what was received. If these are not available, an audited balance sheet at the end of the year showing an increase in net assets of the proper classification may substantiate an Opinion. If all else fails, where shares were issued many years ago and no records or specific financial data are available, but evidence of balance sheet solvency after the shares were issued is available, the presumption of regularity and continuity, if disclosed in the Opinion, may suffice to give the Opinion that the shares are now fully paid and nonassessable.

5.8. Ordinarily a stock certificate is issued to evidence the issuance of the underlying shares (1988 BCL § 1528(a)), unless the articles provide for the issuance of uncertificated shares (1988 BCL § 1528(f)), but the issuance of a share certificate is not a requisite to the valid issuance of a share. The proper execution and form of stock certificates are therefore irrelevant to the question of valid issuance of the underlying stock.

5.9. Under the 1933 BCL, prior statutory law, and the 1874 Pennsylvania Constitution, certain forms of consideration were invalid, including promises of future labor or services and a subscriber’s note or promise to pay. Under the 1988 BCL, future services and the note or obligation of a shareholder are permissible forms of consideration, and there is no requirement that a minimum value of consideration be received (1988 BCL § 1524(a)), so that it is permissible for the board to authorize issuance of par value stock for less than par. Shareholders have no liability for wages or salaries. All issued shares are nonassessable (1988 BCL § 1524(c)).
5.10. The board is given complete discretion to determine the issuing price for the shares; it may set a minimum price or establish a formula or method by which the price may be determined. 1988 BCL § 1523. All shares issued by the corporation after the effectiveness of the 1988 BCL are considered to be fully paid and nonassessable, even if the corporation has not received the full consideration (1988 BCL § 1524(c)). This provision does not affect the personal obligation of a subscriber or shareholder to pay the agreed consideration for the shares (1988 BCL §§ 1524(e), 1526).

5.11. Under prior law, shares could be authorized to be issued in a stock split or as a share dividend without consideration, but the 1933 BCL required capitalization of a specified amount of surplus (1933 BCL § 702.1). The 1988 BCL eliminated the concepts of par value, surplus, and stated capital and therefore under that statute there is no specific requirement of capitalization of any kind or amount of surplus.

5.12. The term “issue” is defined in 1988 BCL § 1103 as including shares previously issued by the corporation and thereafter acquired by it. See ¶ 6.9, below. For that reason, when giving a “validly issued” Opinion with respect to a resale by a corporation of shares that the corporation had previously issued and then acquired, the Opinion Giver should consider whether the Opinion might be construed as covering both the initial issuance of the shares and the resale transaction, in the absence of Opinion language that expressly excludes one transaction or the other from the matters covered by the Opinion.

6. Total Authorized Shares; Number Outstanding

The authorized shares of the Company consist of ____ shares of common stock and ___ shares of preferred stock, [of which ____ shares of common stock are issued and outstanding and ____ shares of preferred stock are issued and outstanding].

6.1. As to the total currently authorized capital stock of the corporation, the Opinion Preparer may rely upon the number and class (if any) of shares as set forth in the corporation’s current articles. 15 Pa.C.S. § 507, 1988 BCL §§ 1306 and 1521.

6.2. The TriBar Report points out that sometimes Opinion Recipients, such as underwriters, will request an opinion regarding the total number of the corporation’s shares that are issued
and outstanding. See TriBar Report § 6.2.5. The Legal Opinion Committee concurs in the TriBar’s view that the number of outstanding shares is a matter best left to a transfer agent’s certificate (which in the case of a public corporation normally provides the only basis for the opinion). However, when such an opinion is given, the bracketed language is a typical expression. When the corporation’s stock is not widely held, the Opinion Preparer may be able to ascertain the number of outstanding shares from a review of the stock transfer book and a certificate of a corporate officer. The Opinion Preparer should first examine the corporation’s articles to determine whether the corporation had the power to create and issue the shares in question.

6.3. In this Opinion, the term “authorized shares” refers to the number and kind of shares that the Company is authorized to issue by the provisions of its articles. “Issued” shares are shares that have been issued at any time by the corporation, including shares previously issued by the corporation and thereafter acquired by it. 1988 BCL § 1103 (definition of “issue”). The term “outstanding” refers to all issued shares of which, at a particular time, the holders are persons other than the corporation; the term thus excludes shares held by the corporation (commonly called “treasury shares”) and shares that have been acquired by the corporation and retired by reason of provisions of the articles prohibiting their reissuance. See ¶ 6.9.

6.4. As to the number of shares issued, the Opinion Preparer should confirm that the procedures required under the corporate law as then in effect and under the corporation’s articles and the bylaws were followed for each issuance of stock. The Opinion Preparer should consider the corporation law in effect at the time of issuance of the shares to determine applicable procedures and requirements. For example, prior to 1957, shareholder authorization following 60 days’ notice was necessary for every issuance of stock or increase in indebtedness. The articles and bylaws as in effect at different times, and resolutions evidencing corporate action, may be reviewed by examination of the minute books or by certification by the appropriate corporate officer or, in the case of the articles, by examination of the corporation’s filings with the Commonwealth. In particular, each issuance of shares must have been of shares theretofore authorized by the articles, and must have been authorized for issuance by a resolution of the board of directors or, if the articles or bylaws so provide, of the sharehold-
ers at a properly held meeting or by written consent. The Opinion Preparer should review the stock book of the corporation or obtain a certificate from the treasurer or transfer agent of the corporation as to the number of shares that have been issued and the dates of issuance. The Opinion Preparer should also review the articles to determine if the issuance of uncertificated shares under section 1528(f) of the 1988 BCL is authorized.

6.5. To determine the number of issued shares that are still outstanding, the Opinion Preparer may need to obtain an officer's certificate to determine whether any issued shares have at any time been repurchased, redeemed, converted, exchanged, or otherwise reacquired; if so, the Opinion Preparer should review the corporate action of the corporation to determine whether the proper corporate procedure was followed (if any was required) in any reacquisition. In particular, the Opinion Preparer should determine whether the articles prohibited the reissuance or resale of the shares and whether the board has restored the shares to the status of authorized but unissued shares. See ¶ 6.9, below.

6.6. Instances may arise where the corporation has repurchased its own shares and the Opinion Preparer has concluded or suspects that such repurchases were unlawful under Pennsylvania law in effect at the time of repurchase, because the funds used by the corporation to purchase its stock were unavailable for such purpose under applicable laws, the corporation's articles, bylaws, or relevant board resolutions. 1988 BCL §§ 1103 (definition of "distribution"), 1551, and 1552. Notwithstanding the Opinion Preparer's conclusion or suspicion that such repurchases were unlawful, for the purpose of calculating the number of shares outstanding, the 1988 BCL does not provide that the purchased shares remain outstanding. However, there may be adverse consequences associated with the unlawful repurchase. See 1988 BCL § 1553.

6.7. Under the 1988 BCL, a Pennsylvania corporation may create and issue as many shares as its articles authorize. 1988 BCL § 1521(a). The corporation may have one or more classes of shares. There is no statutory limit on the voting or other rights that may be attached to the shares. 1988 BCL §§ 1103 (definition of "distribution") and 1522. The articles need provide nothing but the aggregate number of shares the corporation shall have authority to issue, without specifying whether or not the shares are to be
divided into classes or series. 1988 BCL § 1306(a)(4)(i). It is not necessary (although permissible) that the articles set forth a par value for shares, or provide that shares are without par value, because the concepts of par value, stated capital, and surplus have been deleted from the 1988 BCL.

6.8. The articles or any amendment to the articles may specify the division of shares into classes and into series within each class, the number of shares in each class or series, and the voting rights, preferences, limitations, and special rights, if any, of the shares of any class or series. 1988 BCL § 1522(a). The articles may authorize the board of directors to make the determination as to the divisions of the shares or classes of stock by amendment of the articles. 1988 BCL § 1522(b). This includes the power to determine the number of shares of any class or series, and to increase or decrease the previously determined number of shares in each class or series. 1988 BCL § 1522(b). However, the board of directors may not increase the aggregate number of shares of any class or series beyond the amount authorized by the articles or decrease the number of the shares of any class or series below the number of such shares outstanding. 1988 BCL § 1522(b). Repurchases of stock are governed by section 1552 of the 1988 BCL.

6.9. The 1988 BCL eliminated the concept of treasury stock as a statutory term, and treats purchased and redeemed, exchanged, or converted shares in the same manner. The word “issued” is defined to include sale or other disposition of shares previously issued and thereafter reacquired (1988 BCL § 1103), so that issuance of authorized shares and resale of reacquired shares are treated the same. If the articles prohibit the reissuance of reacquired shares, the authorized shares of the class are reduced by the number of shares acquired. Otherwise, the board may restore reacquired shares to the status of authorized but unissued shares, in which case they become “authorized shares” as defined in section 1103 without designation as to class or series. In any other case the reacquired shares shall be deemed to be issued but not outstanding, and may be treated or described as treasury shares for accounting or any other desired purpose. 1988 BCL § 1552(a).
7. Preemptive Rights

The issuance of the [Shares] does not give rise to any preemptive rights on the part of any holders of any outstanding shares of the Company.

7.1. This Opinion addresses only the absence of preemptive rights under the law and the charter of the Company. It does not address any contractual rights other shareholders may have. For Pennsylvania corporations, preemptive rights may only exist if provided for in the articles. See 1988 BCL § 1530. Therefore, in the case of an Opinion about a Pennsylvania corporation, the Opinion Giver may rely solely on an examination of the articles, as amended.

7.2. Regarding the impact of preemptive rights on the “validly issued” Opinion, see ¶ 5.3, above.

7.3. Prior to the adoption of the 1933 BCL, shareholders had a common-law preemptive right to subscribe pro rata for newly issued shares. The 1933 BCL reversed the common-law rule and denied preemptive rights unless provided for in the articles. There was a question, however, of whether the statute was intended to take away the preemptive right of holders of shares outstanding at the time it was enacted, because section 5A of the 1933 BCL provided that the 1933 BCL should not “impair or affect any … right … accrued” prior to the time the 1933 BCL took effect.

7.4. The 1933 BCL was amended in 1968 to preserve preexisting preemptive rights if the corporation was unlisted and was not incorporated under the 1933 BCL and its shareholders had such rights when it became subject to the 1933 BCL. Section 5 of the 1933 BCL was also amended to provide in effect that in all other cases the intention was to take away any such preexisting common-law right, unless provided in the articles.

7.5. As originally adopted, the 1988 BCL continued the provision of prior law that provided preemptive rights for shareholders in certain unlisted corporations not incorporated under the BCL. However, the GAA Amendments Act of 1990 eliminated all preexisting statutory or common-law preemptive rights, so that no preemptive rights now exist except as provided for in the articles. 1988 BCL § 1530(a).
8. Effectiveness of Merger

Upon the filing of the Articles of Merger and the accompanying docketing statement with the Department of State of the Commonwealth of Pennsylvania, the merger contemplated by the Agreement became effective in accordance with Section 1928 of the Pennsylvania Business Corporation Law of 1988.

8.1. To become effective under the 1988 BCL, articles of merger executed by the constituent corporations and containing the information set forth in 1988 BCL § 1926 must be filed with the Department of State, along with a docketing statement in the form and containing the information required by the Department of State pursuant to 15 Pa.C.S. § 134.

8.2. Implicit in this Opinion is the conclusion that the articles of merger are in proper form, contain the information required by 1988 BCL § 1926, and meet the requirements for filed documents generally under 15 Pa.C.S. § 135, and that a docketing statement in the form meeting the requirements of regulations of the Department of State pursuant to 15 Pa.C.S. § 134 has been filed. However, if articles of merger are filed by the Department of State without being accompanied by a docketing statement, an Opinion that the merger has become effective could be given.

8.3. The Corporation Bureau does not substantively review articles of merger, but can reject articles that fail to meet statutory or regulatory requirements or the instructions on the form (e.g., failure to include a plan of merger or originally executed copy of the articles of merger). If the deficiency is corrected within 30 days, the Bureau will still treat the original date of filing and the effective date for the merger (unless a different prospective date is specified in the articles) as the date on which the articles were first received by the Corporation Bureau.

8.4. Obtaining a file-stamped copy of the articles of merger when filed is not a guarantee that the articles will be accepted by the Corporation Bureau. The Corporation Bureau does provide for pre-filing approval that, when coupled with certified copies of the articles of merger (or, as a fallback, a file-stamped copy of the articles), should provide counsel with adequate assurance that all steps have been taken to satisfy the Corporation Bureau as to the effectiveness of the merger.
II.
OPINIONS FOR LIMITED PARTNERSHIPS

1. Formation and Existence

The Partnership is a [duly formed] Pennsylvania limited partnership presently subsisting under the laws of the Commonwealth of Pennsylvania.

1.1. This Opinion, with or without the bracketed phrase, advises that (a) an entity recognized as a limited partnership (an LP) under the Pennsylvania Revised Uniform Limited Partnership Act (the LP Act) (15 Pa.C.S. § 8501 et seq.) has been duly formed in compliance with the provisions of the LP Act and (b) a subsistence certificate has been received from the Pennsylvania Secretary of State indicating that, insofar as the state's records are concerned, the entity still retains its status as an LP. As such, the entity is subject to and entitled to the benefits of the LP Act. (Section references in the following comments are to 15 Pa.C.S.)

1.2. To form an LP in Pennsylvania, a certificate of limited partnership setting forth the information specified in section 8511 must be filed in the Pennsylvania Department of State. Formation is effective upon such filing unless a later effective time is specified in the certificate of limited partnership. If an effective time is specified in the certificate of limited partnership, such effective time must have passed before this Opinion can be given.

1.3. The fact that a certificate of limited partnership is on file in the Department of State is notice that the partnership is an LP and that all partners other than those designated as general partners in the certificate are limited partners. It will also be notice of the fact that the partnership is a registered limited liability partnership if it is registered under 15 Pa.C.S. Chapter 82. See § 8517.

1.4. The original certificate of limited partnership must be signed by all of the general partners. A certificate of amendment must be signed by at least one general partner and by each other general partner designated in the certificate as a new general partner. Except as otherwise provided in the limited partnership agreement, any person may sign by an attorney-in-fact or fiduciary without the need to present or file the original or a copy of
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the document evidencing the authority of such attorney-in-fact or fiduciary. See § 8514.

1.5. If a partner’s interest in an LP is to be evidenced by a certificate of partnership interest, a statement to that effect must be included in the certificate of limited partnership. See § 8511(a)(4).

1.6. The concept of formation of an LP is the equivalent of due incorporation of a Pennsylvania corporation. There is no limited partnership equivalent to the concept of due organization of a corporation. See Part I, Section 1B, above.

1.7. To render an Opinion that the entity is an LP, the Opinion Giver should obtain a certified copy of the certificate of limited partnership and all amendments thereto from the Pennsylvania Department of State and a copy of the limited partnership agreement and confirm that (i) the information required to be included in the certificate of limited partnership by the LP Act is included therein, (ii) either no effective time was specified (in which case the certificate of limited partnership was effective upon filing) or the specified effective time has passed, and (iii) no event has occurred causing the dissolution of the LP under the provisions of the certificate of limited partnership or the limited partnership agreement. The Opinion Giver should also confirm (e.g., through an appropriate certification) that a dissolution has not occurred pursuant to item (3), (4), or (5) in section 8571(a).

1.8. Just as in rendering an Opinion regarding subsistence of a corporation (see Part I, ¶ 1C.3), the Opinion Giver can render the Opinion regarding subsistence of the LP upon obtaining (a) evidence of the filing of a certificate of limited partnership that has become effective and that does not specify an event of dissolution that has occurred and (b) a subsistence certificate from the Pennsylvania Department of State, and need not conduct any further inquiry.

2. Limited Partnership Power to Carry On Business

The Partnership has the limited partnership power to carry on the Partnership’s business as [it is now being conducted] [described in __________].
2.1. This Opinion means that there is nothing in the LP Act or in the LP’s certificate of limited partnership or limited partnership agreement that precludes the conduct of business as described. The alternative bracketed provisions are two formulations frequently used. The first formulation is less specific and subject to dispute later, because the Opinion Giver may have a different understanding of the business being conducted than does the Opinion Recipient. The latter formulation would reference some document that contains a description of the LP’s business.

2.2. This Opinion does not address any agreements that may limit the LP’s activities or any laws other than the LP Act, or regulations or court decisions that may limit the LP’s activities.

2.3. A Pennsylvania LP may carry on any business that a partnership without limited partners may carry on. See § 8508.

2.4. To render an Opinion that the LP has the limited partnership power to carry on the business as described in the Opinion, the Opinion Giver should first review a description of that business. If the “now being conducted” formulation is used, the Opinion Giver should consider obtaining a certificate from a general partner or other person authorized to give certifications on behalf of the LP describing the business being carried on by the LP. If the “described in ________” formulation is used, the Opinion Giver should review the description of the business in the cited reference. In either case, the Opinion Giver should determine that the description is not inconsistent with anything otherwise known to the Opinion Giver. The Opinion Giver should then determine that, based on a review of the certified copy of the certificate of limited partnership, as amended, and the LP’s limited partnership agreement, the business described is not in conflict with the LP’s organizational documents.

3. Limited Partnership Power and Authorization to Execute, Deliver and Perform All Necessary Action

The Partnership has the limited partnership power to execute, deliver and perform [the specified Transaction Document(s)], and the Partnership has taken all limited partnership action necessary to authorize the execution, delivery and performance of [the specified Transaction Document(s)].
3.1. This Opinion means that (a) execution, delivery, and performance of a specified document or specified documents is not contrary to any provision of the LP Act or the LP’s certificate of limited partnership or limited partnership agreement and (b) such execution, delivery, and performance have been approved by the requisite vote of the general partners and limited partners.

3.2. The LP Act sets forth procedures for approval of a merger or consolidation or a plan of division. See §§ 8546 and 8577.

3.3. The certificate of limited partnership and the limited partnership agreement should be reviewed to determine what voting rights have been granted and what procedural voting requirements have been established. See §§ 8522(c) and 8511(a)(5).

3.4. Subject to any standards and restrictions in the limited partnership agreement, an LP has the power to indemnify and hold harmless any partner or other person from and against any and all claims and demands whatsoever, except that indemnification shall not be made in any case where the act giving rise to the claim for indemnification is determined by a court to have constituted willful misconduct or recklessness. See § 8510.

3.5. The Opinion regarding limited partnership power to execute, deliver, and perform requires a determination that doing so does not exceed any limitation on the broad powers given by section 8508 imposed by the LP’s certificate of limited partnership or limited partnership agreement.

3.6. Except as provided in the LP Act or the certificate of limited partnership or the limited partnership agreement, a general partner of an LP has the rights and powers of a partner in a partnership without limited partners. See § 8533. Accordingly, any general partner has authority to bind the LP absent a contrary provision in the certificate of limited partnership or the limited partnership agreement and, to the extent applicable, except for (a) the provisions of the LP Act regarding approval of a merger or consolidation (see § 8546) or admission of additional general partners (see § 8531), and (b) section 8321, a provision of the Pennsylvania Uniform Partnership Act that denies authority to less than all the general partners (unless the other general partners have so authorized or have abandoned the business) to take certain actions (certain assignments of partnership property, disposal of goodwill, any act that would make it impossible for the partnership to carry
on business, confession of judgment, and submission of a claim or liability to arbitration or reference).

3.7. The limited partnership agreement can establish different classes of limited partners with different rights (see § 8522) and different classes of general partners with different rights (see § 8535). A written provision of the limited partnership agreement can specify the vote or other requirements for admission of an additional general partner (see § 8531). And the limited partnership agreement can eliminate the need for limited partnership approval of a plan of merger or consolidation (see § 8546(c)).

3.8. Provisions in documents providing for indemnification are permissible, subject to limitations in the certificate of limited partnership or limited partnership agreement and subject to the statutory restriction precluding indemnification where the act giving rise to the claim for indemnification is determined by a court (as defined in section 8503) to have constituted willful misconduct or recklessness. See § 8510. Indemnification of partners may be mandatory in respect of certain payments and liabilities. See § 8510(f).

3.9. In rendering the Opinion regarding power, the Opinion Giver should review the documents as to which the Opinion is being rendered to determine that they do not entail impermissible indemnification and do not contravene the provisions of the certificate of limited partnership or the limited partnership agreement.

3.10. The Opinion regarding authorization requires the Opinion Giver to determine the approval required (based on a review of the certificate of limited partnership and the limited partnership agreement, 15 Pa.C.S. § 8321, and provisions of the LP Act specifying vote requirements that apply absent other or more stringent vote requirements in the certificate of limited partnership or the limited partnership agreement). After making this determination, the Opinion Giver should obtain appropriate evidence that the necessary approval has been given. This evidence (certification of a vote, written action by consent, etc.) should be similar to the evidence an Opinion Giver would obtain in connection with approval by directors or shareholders of a corporation.

3.11. The Opinion Giver should review the certified copy of the certificate of limited partnership and all amendments thereto to confirm the proper status of all general partners of the LP. Each
general partner should have executed either the original certificate of limited partnership or an amendment thereto at the time of admission as a general partner.

3.12. Given the informality with which noncorporate entities often act, the Opinion Giver should be alert for facts or circumstances that appear to be inconsistent with the documents being reviewed (e.g., the list of parties who are partners).

3.13. In giving the Opinion regarding authorization, the Opinion Giver need not examine the power of, or proper authorization by, an entity (e.g., a corporation) that is a partner; however, if the Opinion Giver has knowledge of facts that indicate a lack of power or authorization by an entity that is a partner, the Opinion Giver cannot render the Opinion regarding authorization by the LP if the approval of such partner is necessary.
III.

OPINIONS FOR LIMITED LIABILITY COMPANIES

1. Organization and Existence

The Company is a [duly organized] Pennsylvania limited liability company presently subsisting under the laws of the Commonwealth of Pennsylvania.

1.1. This Opinion, with or without the bracketed phrase, advises that an entity recognized as a limited liability company (an LLC) under Pennsylvania’s Limited Liability Company Law of 1994, 15 Pa.C.S. § 8901 et seq. (the LLC Law), has been duly organized in compliance with the provisions of such law and that a subsistence certificate has been received from the Pennsylvania Secretary of State indicating that, insofar as the state’s records are concerned, the entity still retains its status as a limited liability company. As such, the entity is subject to and entitled to the benefits of the LLC Law. (Section references in the following comments are to 15 Pa.C.S.)

1.2. To be duly organized as an LLC in Pennsylvania, a certificate of organization signed by each organizer setting forth in English the information specified in section 8913 must be filed with the Pennsylvania Department of State as required by section 8914 and, if an effective time is specified in the certificate of organization, such effective time must have passed. Organization is effective upon such filing unless a later effective time is specified in the certificate of organization. See § 8914(b).

1.3. An LLC can be formed by one or more persons and they need not be members of the LLC at the time of organization or at any time thereafter. See § 8912.

1.4. If (a) a member’s interest in the LLC is to be evidenced by a certificate, (b) management is to be vested in one or more managers, or (c) the LLC is a restricted professional company, a statement to such effect (including, in the case of a restricted professional company, a brief description of the restricted professional services to be provided) must be included in the certificate of organization. See § 8913.

1.5. The concept of due organization of an LLC is the equivalent of due incorporation of a Pennsylvania corporation. There is
no LLC equivalent to the concept of due organization of a corporation. See Part I, Section 1B, above.

1.6. To render an Opinion that the entity is an LLC, the Opinion Giver should obtain a certified copy of the certificate of organization and all amendments thereto from the Pennsylvania Department of State and a copy of the operating agreement and confirm that (i) the information required to be included in the certificate of organization by the LLC Law is included therein in English, (ii) either no effective date was specified in the certificate of organization (in which case the certificate of organization was effective upon filing) or the specified effective date has passed, and (iii) no event has occurred causing the dissolution of the LLC under the provisions of the certificate of organization or the operating agreement. The Opinion Giver should also confirm (e.g., through an appropriate certification) that a dissolution has not occurred pursuant to item (3), (4), or (5) in section 8971(a).

1.7. Just as in rendering an Opinion regarding subsistence of a corporation (see Part I, ¶ 1C.3), the Opinion Giver can render the Opinion regarding subsistence of the LLC upon obtaining (a) evidence of the filing of a certificate of organization that has become effective and that does not specify an event of dissolution that has occurred, and (b) a subsistence certificate from the Pennsylvania Department of State, and need not conduct any further inquiry.

2. Limited Liability Company Power to Carry On Business

The Company has the limited liability company power to carry on the Company’s business as [it is now being conducted] [described in __________].

2.1. This Opinion means that there is nothing in the LLC Law or in the LLC’s certificate of organization or operating agreement that precludes the conduct of business as described. The alternative bracketed provisions are two formulations frequently used. The first formulation is less specific and subject to dispute later, because the Opinion Giver may have a different understanding of the business being conducted than does the Opinion Recipient. The latter formulation would reference some document that contains a description of the LLC’s business.
2.2. This Opinion does not address any agreements that may limit the LLC’s activities or any laws other than the LLC Law or regulations or court decisions that may limit the LLC’s activities.

2.3. The LLC may be organized under the LLC Law for any lawful purpose, except for the purpose of banking or insurance. See § 8911(a).

2.4. Except as limited or restricted by statute or its certificate of organization, an LLC may carry on any business that a partnership without limited partners may carry on. See § 8921(b).

2.5. To render an Opinion that the LLC has the limited liability company power to carry on the business as described in the Opinion, the Opinion Giver should first review a description of that business. If the “now being conducted” formulation is used, the Opinion Giver should consider obtaining a certificate from a person authorized to give certifications on behalf of the LLC describing the business being carried on by the LLC. If the “described in _________” formulation is used, the Opinion Giver should review the description of the business in the cited reference. In either case, the Opinion Giver should determine that the description is not inconsistent with anything otherwise known to the Opinion Giver. The Opinion Giver should then determine that the business described does not entail an activity precluded by statute (i.e., banking or insurance) and, based on a review of the certified copy of the certificate of organization, as amended, and the LLC’s operating agreement, is not in conflict with the LLC’s organizational documents.

3. Limited Liability Company Power and Authorization to Execute, Deliver and Perform All Necessary Action

The Company has the limited liability company power to execute, deliver and perform all necessary action to authorize the execution, delivery and performance of [the specified Transaction Document(s)].

3.1. This Opinion means that (a) execution, delivery, and performance of a specified document or specified documents is not contrary to any provision of the LLC Law or the LLC’s certificate of organization or operating agreement, and (b) such execution,
delivery, and performance has been approved by the requisite vote of the managers and/or members.

3.2. Unless otherwise provided in the certificate of organization, in any case not provided for in the LLC Law, (i) if the certificate of organization does not contain a statement to the effect that the LLC shall be managed by managers, the provisions of chapters 81 (relating to general provisions) and 83 (relating to general partnerships) govern, and the members are deemed to be general partners for purposes of applying the provisions of those chapters, and (ii) if the certificate of organization provides that the LLC shall be managed by managers, the provisions of chapters 81, 83, and 85 (relating to limited partnerships) govern and the managers have the authority of general partners prescribed in those chapters and the members are deemed to be limited partners for purposes of applying the provisions of those chapters. See § 8904(a).

3.3. As a general rule, subject to provisions of the certificate of organization and the operating agreement of the LLC, the affirmative vote or consent of a majority of the members or managers entitled to vote on a matter is required to decide any matter to be acted upon by the members or managers. With certain exceptions, including any other provision in writing in the operating agreement, the affirmative vote or consent of all the members of an LLC is required to amend the certificate of organization or any written provision of the operating agreement or to authorize a manager, member, or other person to do any act on behalf of the LLC that contravenes the certificate of organization or a written provision of the operating agreement. See § 8942.

3.4. Subject to any standards and restrictions in the certificate of organization or the operating agreement, an LLC has the power to indemnify and hold harmless any member or manager or other person from and against any and all claims and demands whatsoever, except that indemnification shall not be made in any case where the act giving rise to the claim for indemnification is determined by a court (as defined in section 8903) to have constituted willful misconduct or recklessness. See § 8945.

3.5. The Opinion regarding limited liability company power to execute, deliver, and perform requires a determination that doing so does not entail banking or insurance activities (which would exceed the lawful purposes for which an LLC can be formed,
as provided in section 8911(a)) and does not exceed any limitation on the broad powers given by section 8921(b) imposed by statute or the LLC’s certificate of organization or operating agreement.

3.6. The Opinion regarding authorization requires the Opinion Giver to determine the approval required (based on a review of the certificate of organization and the operating agreement and provisions of the LLC Law specifying vote requirements that apply absent other or more stringent vote requirements in the certificate of organization or the operating agreement) and then to obtain evidence of such approval. The certificate of organization should be reviewed to determine whether the LLC is managed by managers (this must be stated in the certificate of organization if it is to be so). See § 8913. After determining whether the LLC is manager managed or member managed, the Opinion Giver should determine from a review of the certificate of organization and the operating agreement whether approval provisions overriding the LLC Law apply or whether the default approval provisions of section 8942 apply. After making this determination, the Opinion Giver should obtain appropriate evidence that the necessary approval has been given. This evidence (certification of a vote, written action by consent, etc.) should be similar to the evidence an Opinion Giver would obtain in connection with approval by directors or shareholders of a corporation.

3.7. Given the informality with which noncorporate entities often act, the Opinion Giver should be alert for facts or circumstances that appear to be inconsistent with the documents being reviewed (e.g., the list of parties who are members and managers).

3.8. In giving the Opinion regarding authorization, the Opinion Giver need not examine the power of, or proper authorization by, an entity (e.g., a corporation) that is a manager or member; however, if the Opinion Giver has knowledge of facts that indicate a lack of power or authorization by an entity that is a manager or member, the Opinion Giver cannot render the Opinion regarding authorization by the LLC if the approval of such manager or member is necessary.
IV. USURY

1. Usury

The terms of the Credit Agreement and the Notes relating to the payment of interest by the Company do not violate the civil usury laws of the Commonwealth of Pennsylvania.

1.1. On occasion an Opinion Recipient may ask for a specific opinion that the terms of the documents do not violate the civil usury laws. The suggested language provides assurance that the terms of the documents do not violate any Pennsylvania civil usury laws.

1.2. If the coverage of the Opinion is extended to the criminal laws of Pennsylvania, depending on the circumstances, the Opinion Giver may wish to include a qualification of the type set forth in the illustrative qualification labeled as ¶(E)(1) in the Model Closing Opinion Letter. See ¶ 1.9, below.

1.3. If an Opinion is rendered on behalf of a borrower in a loan transaction, a usury opinion is implicit in the remedies opinion. See TriBar Report § 3.5.2(a) and (c). Accordingly, it is not necessary in such case to express the usury opinion explicitly. The Legal Opinion Committee believes that with respect to usury, a remedies opinion is customarily confined to the effect of the civil laws. However, an opinion that the Transaction Documents do not violate applicable laws does cover criminal usury laws unless the opinion is expressly limited to civil laws. See Note (a) to Model Opinion ¶ 7.

1.4. This Opinion does not address the question whether any terms of the specified Transaction Document providing for the payment of prepayment premiums or like charges are enforceable under principles of common law that may restrict the effect of provisions concerning yield maintenance or penalties.

1.5. In certain Transactions, particularly if a consumer loan or a portfolio of consumer loans is the subject matter, it may be appropriate to refer to finance charges, rather than interest. In any event, the term “usury laws” would normally be regarded as including not only laws restricting the amount of interest that
may be charged, but also laws restricting the amount of a finance charge or time-price differential.

1.6. To render a usury Opinion, either express or implied, one or more of the following factors may be relevant: the type of entity that is obligated to make the payment, the type of entity that is to receive the payment, the dollar size of the Transaction, and the nature of the Transaction. Accordingly, the Opinion Preparer may need factual information about each of these items. In particular, transactions in which a non-corporate borrower (such as a partnership or limited liability company) is involved may require a more extensive review of usury issues. In addition, in a multistate Transaction, a contractual choice of law may not be effective with respect to the issue of usury.

1.7. Under the BCL, neither domestic nor foreign business corporations may plead usury as a defense. 1988 BCL §§ 1510, 4146. Domestic nonprofit corporations may not plead usury as a defense; neither may nonqualified foreign nonprofit corporations with respect to obligations executed or effected in Pennsylvania or affecting real property situated in Pennsylvania. 15 Pa.C.S. § 5543.1.

1.8. Pennsylvania’s general usury law, known as “Act 6,” does not apply to loans in excess of $50,000 in original principal amount. Act of January 30, 1974 (P.L. 13, No. 6, 41 P.S. § 201). Act 6 also contains a special exception for business loans in excess of $10,000, but state regulations limit the availability of the exception. 41 P.S. § 301(f). In the area of consumer loans and installment sales, statutes other than Act 6 may limit the interest rate or finance charge that may be imposed.

1.9. Regarding criminal usury, the Pennsylvania Crimes Code, 18 Pa.C.S. § 911(b), makes it unlawful to use or invest income derived from a pattern of “racketeering activity.” “Racketeering activity” is defined to include the collection of money or other property in full or partial satisfaction of a debt made “at a rate of interest exceeding 25% per annum. . . . where not otherwise authorized by law.” Qualification (E)(1) of the Model Closing Opinion calls attention to this statutory provision. However, the Legal Opinion Committee believes that such a qualification would not customarily be necessary in a commercial loan transaction between an institutional lender and a borrower.