Model Stock Purchase Agreement with Commentary
Second Edition

Exhibits 8.6(a) and 9.5(a)
Legal Opinions

Mergers & Acquisitions Committee
EXHIBITS 8.6(a) and 9.5(a)

Legal Opinions

PRELIMINARY NOTE

Stock purchase agreements sometimes (but far less frequently than in the past) provide as a condition to closing that each party deliver to the other party an opinion letter prepared by the delivering party’s lawyer. Delivery of opinion letters is rare when the target is a public company.

Opinion letters delivered in an acquisition by counsel for the sellers and the target (which sometimes are different counsel) generally cover the following:

- valid existence of the target and its corporate power to enter into the transaction;
- authorization, execution, and delivery of the transaction documents by the opinion giver’s client;
- the transaction does not violate the target’s organizational documents (i.e., corporate charters and bylaws) or breach or result in a default under specific agreements to which the target is a party;
- no governmental consents or filings are required in connection with the transaction;
- the transaction documents are valid, binding, and enforceable obligations of the opinion giver’s client;
- the capitalization of the target and certain characteristics of its issued and outstanding stock; and
- less frequently, the effect of the receipt of the target stock by the buyer (but not as to title to that stock).

Counsel for buyers in acquisitions deliver opinion letters even less frequently than counsel for sellers and targets, and rarely when the buyer is paying all cash at the closing. When counsel for a buyer does deliver an opinion letter, the opinions it gives usually do not address all of the subjects described above. See preliminary note to Exhibit 9.5(a). There is a trend away from “no litigation confirmations” in opinion letters, even when they are limited to the opinion giver’s knowledge, and certainly away from those addressing litigation generally affecting the client.
The illustrative opinion letters and commentary set forth below are intended to provide a guide for M&A lawyers to basic considerations in giving opinions in the context of acquisitions. A much more thorough discussion of opinion practice is contained in reports of the ABA and other bar associations and treatises referenced in the commentary below.

At times, this commentary uses nomenclature from ABA and other opinion literature to describe lawyers in the opinion process. The term “opinion giver” refers to the lawyer or law firm in whose name the opinion letter is signed. The term “opinion recipient” refers to the addressee of the opinion letter and others, if any, granted permission by the opinion giver to rely on the opinion letter. The term “opinion preparers” refers to the lawyers in a law firm who prepare the opinion letter.

Whether to Request—Applying a Cost-Benefit Analysis. Rather than automatically requiring opinion letters as a closing condition, the parties should consider at the outset whether the opinions being requested provide sufficient value to the recipient to justify the time and expense of preparing and negotiating them. This cost-benefit analysis is treated as a fundamental consideration in legal opinion reports, including Section 1.2 of the ABA Business Law Section’s Legal Opinions Committee’s Guidelines for the Preparation of Closing Opinions found in 57 BUS. LAW. 875 (Feb. 2002) (the “ABA LEGAL OPINION GUIDELINES”) and Section 1.3 of the TriBar Opinion Committee’s Third Party “Closing” Opinions: A Report of the TriBar Opinion Committee, 53 BUS. LAW. 592 (Feb. 1998) (“TriBar ‘98”). See also Lipson, Cost-Benefit Analysis and Third-Party Opinion Practice, 63 BUS. LAW. 1187 (Aug. 2008), and Opinions Committee of the California State Bar Business Law Section, Toward a National Opinion Practice: The California Remedies Opinion Report, Part II.B., 60 BUS. LAW 907 (May 2005).

In an increasing number of acquisitions, parties are willing to dispense with the condition that the other party’s lawyer deliver a closing opinion, and rely instead upon their own diligence, the representations of the other party, and the remedies in the acquisition agreement. Nontax legal opinions are rarely given in public company acquisitions, and even in private company acquisitions, the percentage is declining. The Deal Points Studies in 2004, 2006, and 2009 showed a continuing decline in the number of deals requiring closing opinions from 73% to 70% to 58%.

Notwithstanding the decline in closing opinions in private target acquisitions, many buyers still see value in obtaining an opinion regarding the sellers and the target and may view the following as benefits:

- Opinions on subjects such as legal status of an entity, corporate power, due authorization, and governmental consents are all within the special competence of the sellers’ or target’s lawyer, and, although representations from the sellers or target provide comfort and protection on these topics, the legal opinion provides additional comfort.
In some transactions, the buyer may have more confidence in the thoroughness, sophistication, and integrity of the lawyer or firm delivering the legal opinion than in the individual officers of the party providing the representations and warranties; that is, the buyer may fear that the other party is making representations without the requisite care or based on a business risk analysis and that its lawyers will likely be more focused and careful.

When target’s counsel has a long-standing relationship with the target and, as is often the case, also serves as sellers’ counsel, the opinion provides a buyer with additional assurance that representations on some topics that the target or sellers may not be capable of making without legal advice have, in fact, been carefully considered.

A buyer may anticipate the need for an opinion regarding the target for the benefit of a lender that is providing acquisition financing.

Tradition and habit – “we always get an opinion.”

Some buyers take the position that at the very least the remedies (enforceability) opinion is appropriate when the sellers insist that the transaction documents be governed by the law of the target’s jurisdiction and that is not a jurisdiction in which the buyer’s lawyer practices. Even in those instances, however, the advice of buyer’s local lawyer may be more valuable to buyer than a legal opinion of sellers’ counsel.

“Customary Practice” Governs Opinion Letters. The scope and meaning of, and diligence required to support, third-party opinion letters are governed by “customary practice.” Customary practice is addressed in many sources, including (1) the ABA Business Law Section’s Legal Opinions Committee’s Legal Opinion Principles, 57 BUS. LAW. 882 (Feb. 2002) (the “ABA LEGAL OPINION PRINCIPLES”), specifically its introductory paragraphs, (2) TriBar ’98 §§ 1.1 and 1.14, and (3) more recently, Statement of the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions, 63 BUS. LAW. 1277 (Aug. 2008) (a brief statement approved by the ABA Business Law Section’s Legal Opinions Committee, the TriBar Opinion Committee, and numerous other bar and legal groups listed in the statement). All these cite RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 as confirming the role of customary practice.

Opinion Resources. What constitutes customary practice has become increasingly clear in recent years. Third-party closing opinions are the subject of relatively few court decisions. (For a list of court decisions, see ABA Business Law Section’s Legal Opinions Committee’s Annual Review of the Law on Legal Opinions, 60 BUS. LAW. 1057 (May 2005)). The principal sources of guidance are the ABA, TriBar, and state bar association reports, most of which are reproduced in GLAZER, FITZGIBBON & WEISE, GLAZER & FITZGIBBON ON LEGAL OPINIONS: DRAFTING, INTERPRETING AND SUPPORTING CLOSING OPINIONS IN BUSINESS TRANSACTIONS (3d ed. 2008) (“GLAZER & FITZGIBBON”). See also FIELD AND SMITH, LEGAL OPINIONS IN BUSINESS TRANSACTIONS (2d ed. 2009).
The bar association reports with the broadest following, particularly among firms with a multi-jurisdictional practice, are those issued by the ABA Business Law Section’s Legal Opinions Committee and by the TriBar Opinion Committee. In addition, opinion preparers should be aware of any opinion committee or similar reports of the state bar association of the opinion giver’s jurisdiction.

ABA Business Law Section’s Committee on Legal Opinions Reports. The ABA LEGAL OPINION GUIDELINES and ABA LEGAL OPINION PRINCIPLES are together a concise statement of the basic approach to customary practice to be followed in preparing and interpreting third-party closing opinions. The ABA LEGAL OPINION PRINCIPLES apply to closing opinions, whether or not they are expressly incorporated. Nevertheless, some firms expressly incorporate them by reference.

TriBar Opinion Committee Reports. The TriBar Opinion Committee (consisting of representatives of the New York County Lawyers’ Association, the Association of the Bar of the City of New York, the New York State Bar Association, and many other bar associations, including Atlanta, Boston, California, Chicago, Delaware, Washington, D.C., Georgia, North Carolina, Pennsylvania, Texas, and Ontario) has published a series of very well regarded reports, including (1) the TriBar ’98 report and (2) a report titled Special Report of The TriBar Opinion Committee: The Remedy Opinion – Deciding When to Include Exceptions and Assumptions, 59 BUS. LAW. 1483 (Aug. 2004) (“TriBar ’04 (Remedies Supp.)”.

Supplemented by State Bar Association Reports. As to specific issues under applicable state law, the bar association reports of the opinion giver’s jurisdiction are important tools, particularly with regard to corporate status, authorization, and valid issuance of stock and legal issues that may require a qualification to the remedies/enforceability opinion.

Access to the ABA, TriBar, and Certain Other Reports. The various ABA and TriBar reports are collected in an ABA Business Law Section publication titled The Collected ABA and TriBar Legal Opinion Reports 2009, and can also be accessed at the Joint ABA/TriBar Legal Opinion Resource Center website www.abanet.org/buslaw/tribar. That website also provides access to other opinion letter-related articles and publications, including selected reports of state bar associations.

The Illustrative Opinion Letters are Intended to be Reasonable First Drafts—Reflecting the “Golden Rule.” Unlike the Model Agreement (which is drafted from the perspective of a buyer’s first draft), the illustrative opinion letters set forth below are designed to serve as opinion letters that both a reasonable recipient is willing to accept and a reasonable opinion giver is willing to deliver, subject to qualifications appropriate to the particular jurisdiction, target and transaction. This approach reflects the “golden rule” admonition of ABA LEGAL OPINION GUIDELINES § 3.1 and TriBar ’98 § 1.3. The illustrative opinion letters follow the format and language of the “Illustrative Legal Opinion” attached to TriBar ’98 as Appendix B-1 (Outside Counsel—Stock Purchase Agreement).
Requested Opinions Should be Limited to Opinion Giver’s Professional Judgment as to Legal Matters and Not Overly Broad. Legal opinions reflect the opinion giver’s professional judgment as to legal matters based on facts that are represented by the client or certified by an appropriate officer of the client or that are confirmed by the opinion giver’s customary diligence. This concept—that an opinion is limited to the lawyer’s professional judgment on legal matters—is supported by all the recognized authorities. See ABA Legal Opinion Guidelines § 1.2; ABA Legal Opinion Principles § I.D.; and TriBar ’98 § 1.2(a). In other words, “an opinion is not a guaranty.”

Opinion givers should not be asked for opinions on broad-ranging topics regarding the client’s general business. ABA Legal Opinion Guidelines § 4.3 (titled “Comprehensive Legal or Contractual Compliance”) states that an opining lawyer should not give “an opinion that its client is not in violation of any applicable laws. . . .” TriBar ’98 § 6.6, n.162 states: “In addition, opinion givers should not be asked to render an opinion that covers compliance by the Company with laws generally. . . . Such an opinion would require a detailed understanding of a Company’s business activities and could almost never be rendered (assuming it could be rendered at all) without great expense.”

ABA Legal Opinion Guidelines § 4.4 (titled “Lack of Knowledge of Particular Factual Matters”) states as follows: “An opinion giver normally should not be asked to state that it lacks knowledge of particular factual matters. Matters such as the absence of prior security interests or the accuracy of the representations and warranties in an agreement or the information in a disclosure document (subject to section 4.5 below [discussing ‘Negative Assurance’]) do not require the exercise of professional judgment and are inappropriate subjects for a legal opinion even when the opinion is limited by a broadly worded disclaimer.” [Emphasis added.] Finally, TriBar ’98 § 1.3 states: “No opinion letter should be sought that is so broad that it seeks to make the opinion giver responsible for its client’s factual representations or the legal or business risks inherent in the transaction.”

Legal Opinions as a Closing Condition. Receipt of the opinions specified in an acquisition agreement is often a condition to a party’s obligation to close the acquisition, as provided in §§ 8.6(a) and 9.5(a) of the Model Agreement. This may have the effect of making matters covered by those opinions a closing condition, typically without the materiality standard that would apply to the same matter if cast solely as a representation required to be affirmed at closing. Lawyers should be sensitive to the interplay between the opinions that are to be given and the representations. Parties are cautioned against making receipt of opinions a contractual requirement rather than just a closing condition because, if the opinion giver is unable to deliver the specified opinions, even for valid reasons, the opinion giver’s client may be found to have breached the agreement.

Matters Covered by Other Lawyer’s Opinions. Sometimes, opinions are obtained from local or specialist lawyers (such as opinions on tax treatment or regulatory issues) in addition to the basic transaction opinion. The illustrative opinion letters neither state that counsel is relying on nor otherwise comment in any way on
a separate local counsel opinion (that is, neither that it is reasonable for the recipient to rely on it or that it is in form and scope satisfactory). This approach of “unbundling” opinions is supported by ABA LEGAL OPINION GUIDELINES § 2.2 and TRIBAR ’98 §§ 5.2 and 5.5. In addition, if another lawyer is giving an opinion on existence, power, and authorization and/or other matters that are necessary for the opinions covered by the opinion giver’s opinion letter, the opinion letter should expressly assume the legal conclusions in that other lawyer’s opinion letter and not comment on them.

Limited Liability Companies. Special issues are raised by legal opinions involving target LLCs because they are governed in many, and frequently most, respects by a contract (often referred to as an operating agreement) that overrides the default provisions of the applicable LLC statute. An excellent discussion of legal opinion issues involving LLCs is contained in the TriBar Opinion Committee’s “THIRD PARTY CLOSING OPINIONS: LIMITED LIABILITY COMPANIES,” 61 BUS. LAW. 679 (Feb. 2006).

Preferred Stock. Issues relating to preferred stock are not specifically addressed in the illustrative opinion letters, but if a target has preferred stock or the buyer is issuing its preferred stock, the opinion preparers should consider the special issues involved. See, TriBar Opinion Committee, Special Report of the TriBar Opinion Committee: Duly Authorized Opinions on Preferred Stock, 63 BUS. LAW. 921 (May 2008). See also GLAZER & FITZGIBBON §§ 10.4.2, 10.4.5, 10.6.4.2 (2009 Supplement).

Caveat Regarding Not Misleading Opinion Recipients. Above and beyond the specific language of the opinions and qualifiers, an opinion giver should not give an opinion that the opinion giver knows will mislead the recipient with regard to the matters addressed. This overriding concept is covered in the ABA and TriBar reports (see ABA LEGAL OPINION GUIDELINES § 1.5 and TRIBAR ’98 § 1.4(d)). Examples of matters that may mislead an opinion recipient are: (1) a “no litigation” confirmation that is limited to claims asserted in writing, but does not point out that the opinion giver (and not the recipient) knows of a substantial and serious claim made orally with sufficient formality, and (2) an opinion ignoring adopted legislation that is not yet effective. TRIBAR ’98 §§ 1.4(d) and 1.2(a), n.11.

The Illustrative Opinion Letters Are Not “Accord” Opinions. In 1991, the Section of Business Law of the American Bar Association published the Third-Party Legal Opinion Report, which includes the Legal Opinion Accord (the “Accord”) (47 BUS. LAW. 167 (Nov. 1991)). The Accord proposed a different approach to establishing the meaning of legal opinion letters. Instead of attempting to describe customary practice, the Accord was designed to be adopted by the opinion giver and agreed to by the opinion recipient by incorporating the Accord by reference. The Accord, however, has not been generally accepted, and it is not commonly used in current opinion practice. The Model Agreement provides only non-Accord illustrative opinion letters.
EXHIBIT 8.6(a)

Opinion Letter—
Counsel to Sellers

[Opinion Giver’s Letterhead]

[Date]

[Name and Address of Buyer]

Re: Acquisition of ______________ (the “Company”) by ______________ (the “Buyer”) pursuant to the Stock Purchase Agreement dated ______________ __, ____ (the “Stock Purchase Agreement”)

Ladies and Gentlemen:

We have acted as counsel for Sellers (as identified and defined in the Stock Purchase Agreement) in connection with their execution and delivery of the Stock Purchase Agreement.

COMMENT

The reference line and this introductory paragraph are stated in a manner to avoid an argument or claim, no matter how implausible, that counsel is giving an implicit opinion either that “the Company” is a corporation or Sellers have title to the shares being sold—that is, the Company is not identified in the reference line as an XXXX corporation and Sellers are not referred to in the reference line as shareholders. More properly, the opinion as to the Company’s status is addressed in opinion number 1 and, as discussed in the commentary to opinion numbers 6 and 7, an opinion should not be given as to Sellers’ stock ownership. Even if the reference
line and this paragraph did identify the Company as a corporation and identify Sellers as shareholders, an opinion should not be inferred on either the Company’s status as a corporation or Sellers’ title to the shares being sold.

Some opinion givers add “special” before counsel in the introductory sentence, particularly when the opinion giver does not regularly represent that client. Adding that qualification is less common than in the past, and merely using the term “special counsel” without describing how the opinion giver has limited the investigation required by customary practice does not change the standard of care to which the opinion giver is subject. GLAZER & FITZGIBBON § 2.5.2.

This opinion letter is delivered to you pursuant to Stock Purchase Agreement § 8.6(a).

COMMENT

The fact that the Model Agreement contemplates the delivery of a legal opinion letter to the other party as a condition to closing constitutes the client’s consent to the delivery of the opinion letter. See ABA LEGAL OPINION GUIDELINES § 2.4 and TRIBAR ’98 § 1.7.

Although the second sentence states that the opinion letter is delivered “pursuant to Stock Purchase Agreement § 8.6(a),” the opinion letter only says what it says. Thus, if the opinions given at the closing differ from the opinions required as a condition to closing in the stock purchase agreement, the opinions given (and not the opinions required by the stock purchase agreement) establish the matters covered. See TRIBAR ’98 § 1.6. The penultimate paragraph of this opinion letter is included to eliminate any doubt as to that conclusion.

Each capitalized term in this opinion letter that is not defined in this opinion letter but is defined in the Stock Purchase Agreement is used herein as defined in the Stock Purchase Agreement.

COMMENT

This is a common provision of an opinion letter, but, as discussed in the context of the “no breach or default” opinion (opinion number 3), the opinion giver may want to avoid using defined terms in some opinions. Accordingly, some opinion givers do not include this sentence but rather define terms in the opinion letter to avoid an inadvertent use of a term that is intended to have a different meaning in the opinion letter than in the Model Agreement.
In acting as counsel to Sellers, we have examined [copies of] the following documents and instruments (collectively, the “Transaction Documents”):

1. The Stock Purchase Agreement;
2. The Escrow Agreement; and
3. The Releases.

In addition to the Transaction Documents, we have examined:

4. The Articles [Certificate] of Incorporation of each Acquired Company, as in effect on the date hereof, certified by the Secretary of State of its jurisdiction of incorporation;
5. The other Organizational Documents of each Acquired Company, certified to be true and correct by the Secretary of the Company;
6. Certificates from the Secretary of State of the state of incorporation of each Acquired Company with regard to each Acquired Company’s existence and good standing;
7. Copies of resolutions adopted by the board of directors of the Company with respect to the authorization of the execution, delivery, and performance of those Transaction Documents to which the Company is a party and certified to be true and correct by its secretary;
8. Certificate of [title of officer] of the Company, dated the date hereof, certifying as to certain factual matters (the “Company Certificate”);
9. Documents listed in the Company Certificate; and
10. Such other documents as we have deemed appropriate in order to give the opinions expressed below.

COMMENT

The definition of Items (1) through (3) as “Transaction Documents” is intended to limit the documents covered by some opinions (for example, due authorization, execution and delivery, and enforceability) to the specified documents. Many lawyers eliminate Items (4) through (9) on the basis that review of those documents (as well as others) is covered by Item (10). Some lawyers eliminate Item (10) in the belief that doing so narrows the opinion letter’s scope. That belief, however, is mistaken because, even without Item (10), a recitation of documents reviewed for purposes of giving the opinion is understood as a matter of customary practice not to excuse the opinion preparers from reviewing all documents customarily required to be reviewed. Unless expressly stated otherwise in the opinion letter, the opinion preparers are expected to have conducted customary diligence whether or not stated in the opinion letter. See TriBar ’98 §§ 1.4 and 2.6.1.
As to certain matters of fact relevant to the opinions in this opinion letter, we have relied on certificates of officers of the Company and on factual representations made by the Sellers in the Stock Purchase Agreement. We also have relied on certificates of public officials. We have not independently established the facts or, in the case of certificates of public officials, the other statements so relied upon.

COMMENT

An opinion letter typically states the source of the facts relied upon in giving the stated opinions. Many opinions are an interplay between facts and law. For example, an opinion that a corporation “duly authorized” an agreement relies on the shareholder and/or board resolutions certified to in an officer’s certificate, with the opinion preparers determining whether those resolutions comply with the corporation’s articles and bylaws and with applicable law. Although implicit even if not included, language along the lines of the last sentence of the above boldface paragraph is frequently included in opinion letters.

Limits on Permitted Reliance. An opinion giver cannot rely on factual certificates or representations if either (1) “reliance is unreasonable under the circumstances in which the opinion is rendered or the information is known to the opinion givers to be false” (TriBar 98 § 2.1.4; see also § 2.2.1(c)) or (2) “the factual information on which the lawyers preparing the opinion letter are relying appears irregular on its face or has been provided by an inappropriate source” (ABA Legal Opinion Principles § III.A). In addition, the opinion giver cannot rely on certificates that make statements or certifications that are tantamount to the legal conclusion in an opinion (other than in limited respects on a certificate of a governmental official). ABA Legal Opinion Principles § III.C; TriBar 98 § 2.2.1(b). For example, an opinion that the entering into and the consummation (or performance) of the Transaction Documents does not breach or result in a default under specified agreements cannot be made solely on the basis of an officer’s certificate to that effect, but rather must be made on the basis of the opinion preparers’ review of the specified agreements.

No Knowledge Definition in These Illustrative Opinion Letters. Because (1) the illustrative opinion states that the no breach or default opinion should be given with respect to listed agreements and not those “known to us” and (2) the recommended approach for a “no litigation confirmation” does not require a knowledge definition, the illustrative opinion letters do not contain a general “knowledge” definition. This approach reflects in part concern over a court decision that interpreted knowledge qualifiers (that the opinion giver thought were knowledge limitations) as assertions of superior knowledge. See the ABA Business Law Section Legal Opinion Committee’s Annual Review of the Law on Legal Opinions, 63 Bus. Law. 1057 (May 2005). However, if a knowledge limitation is included, then opinion givers should consider one of the following or a similar approach:
Alternative 1: The words “to our knowledge” or “known to us” in this opinion letter limit the statements to which they apply to the actual knowledge, without any investigation except as set forth herein, of the lawyers in this firm involved in representation of Sellers in connection with their execution and delivery of the Stock Purchase Agreement.

Alternative 2: When used in this opinion letter, the phrase “to our knowledge” or an equivalent phrase limits the statements it qualifies to the actual knowledge of the lawyers in this firm responsible for preparing this opinion letter after such inquiry as they deemed appropriate. Boston Bar Association, Streamlined Form of Closing Opinion, 61 Bus. Law. 389, at 397 n.21 (Nov. 2005).

Under either formulation, the opinion recipient might request that the opinion giver include within the definition of the opinion giver’s “knowledge” the knowledge of the lawyer or lawyers in the firm having principal responsibility for representation of the target or sellers.

No Statement of Scope of Investigation. These illustrative opinion letters do not state that “For purposes of this opinion letter, we have made such investigation as we have deemed appropriate” (although the optional and expanded listing of documents examined by the opinion givers states that they have examined “Such other documents as we have deemed appropriate in order to give the opinions expressed below.”) No statement of “such investigation” is included because the opinion giver has this obligation, even if not stated, and thus not only is no advantage gained by stating it, but a court could construe that statement as imposing some unintended obligation to investigate. See footnote 10 of Dean Foods Co. v. Pappathanasi, 2004 WL 3019442 (Mass. Super. Ct. Dec. 3, 2004). The second paragraph of TRIBAR ’98’s Illustrative Opinion B-1 does include such a statement, but TRIBAR ’98 § 1.4(c) states that it “merely emphasizes that the opinion letter is given in accordance with customary practice and its omission is not sufficient, by itself, to indicate that customary practice is not being followed.”

Based upon and subject to the foregoing and the other qualifications and limitations stated in this opinion letter, our opinions are as follows:

1. Each of the Company and its Subsidiaries is validly existing as a corporation [and in good standing] under the law of the State of ______________.

COMMENT

Validly Existing. This “validly existing” opinion reflects the view expressed in TRIBAR ‘98 § 6.1.3(b) that the “validly existing” opinion is increasingly accepted in lieu of a “duly incorporated” opinion. See also the related Illustrative Opinion Letter (TRIBAR ’98 Appendix B-1). TRIBAR ’98 § 6.1.3(b) states that the “validly existing” opinion is customarily based on the opinion giver’s review of the subject corporation’s
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charter documents and a good-standing certificate updated to the opinion date but not a review of the “corporate record books.” The opinion preparers should review any applicable report of a state bar association to determine if further diligence is necessary.

Many opinion recipients accept the narrower “validly existing” opinion in the M&A context. If a “duly incorporated” opinion is required, then further diligence will be necessary, essentially confirming that the incorporation documents and procedures complied with the corporation law in effect at the time. Although this is generally not a burdensome undertaking for a recently incorporated corporation, it could be quite burdensome for one incorporated under a now superseded corporation statute.

**Duly Organized.** Occasionally a buyer may request a further opinion that the entities are “duly organized.” However, “due organization” opinions are rarely requested or given and should be avoided (see TriBar ’98 § 6.1.3(b)). Giving a “due organization” opinion entails costs that are rarely justified. What “due organization” means will depend on the law in effect at the time of incorporation and organization, which law could be quite different from current law and will not always be clear. In some states, giving the opinion would require such steps as reviewing actions of the incorporators and initial directors, obtaining evidence of advertising, and confirming receipt of specified capital before commencing business.

**Good Standing and Qualification as a Foreign Corporation.** If given, an opinion as to “good standing” usually is limited to the company’s jurisdiction of incorporation. Buyers will sometimes request an opinion that the target is qualified to do business in specified jurisdictions, but because that opinion will be given solely on the basis of good-standing certificates issued by state officials, it is of little value, and thus ABA LEGAL OPINION GUIDELINES § 4.1 and TriBar ’98 § 6.1.4 recommend omitting it altogether. Even more inappropriately, buyers may request an opinion that “The Company is qualified in all jurisdictions where the nature of its business requires it to be so qualified.” Sometimes the formulation is limited to only those jurisdictions “where the failure to so qualify would have a material adverse effect on the Company and its operations.” However stated, requests for this opinion are not appropriate. Not only does this opinion require the opinion preparers to analyze state laws with which the opinion preparers are not familiar and to undertake extensive diligence (the cost of which is not justified by the benefit of this opinion), but also requires lawyers to make difficult materiality judgments—and thus the materiality qualifier does not cure the inappropriateness of this opinion. As a further reason that requests for this opinion are inappropriate, it improperly (as stated in TriBar ’98 § 1.3) “ . . . seeks to make the opining lawyer responsible for its client’s factual representations or the legal or business risks inherent in the transaction.” Finally, if the Company has numerous subsidiaries that are not individually significant to its overall operations, the parties should consider dispensing with this opinion as applied to those subsidiaries due to the likely cost in relation to the value of the opinion.
2. Each of the Transaction Documents has been [duly authorized,] executed, and delivered by the Sellers. [OPTIONAL: Include if the target is a party to any Transaction Documents: The Company (a) has the corporate power to execute and deliver, and to perform its obligations under, each Transaction Document to which it is a party, (b) has taken all necessary corporate action to authorize the execution and delivery of, and the performance of its obligations under, each Transaction Document to which it is a party, and (c) has duly executed and delivered each Transaction Document to which it is a party.]

COMMENT

The due authorization, execution and delivery opinion (or “action” opinion) is often stated separately from the remedies/enforceability opinion (see opinion number 5), even though a remedies/enforceability opinion could not, of course, be given unless the execution, delivery, and performance of the Transaction Documents had been duly authorized and the Transaction Documents had been duly executed and delivered.

The due authorization language is bracketed in the first sentence of this opinion as to the Sellers because that opinion is not appropriate in the circumstances of the Fact Pattern for the Model Agreement because each Seller is an individual of legal majority, and individuals are not required to authorize transactions. To the extent sellers in a transaction are corporations or other entities, a due authorization opinion is customary.

The illustrative opinion as to the Company also includes an optional opinion on the target’s corporate power and authorization. Even though the Company is not a party to the Model Agreement, these opinions are included on the assumption that the Company is a party to other ancillary agreements that may be defined as Transaction Documents.

3. Neither the execution and delivery by each Seller of each Transaction Document to which it is a party nor the consummation of the Contemplated Transactions by each Seller (a) violates any provision of the Organizational Documents of any Acquired Company; (b) breaches or constitutes a default (or an event that, with notice or lapse of time or both, would constitute a default) under, or results in the termination of, or accelerates the performance required by, or excuses performance by any Person of any of its obligations under, or causes the acceleration of the maturity of any debt or obligation pursuant to, or results in the creation or imposition of any lien or other security interest upon any property or assets of any Acquired Company under, any agreements or commitments listed in Part 3.17(a) of the Disclosure Letter; (c) violates any judgment, decree, or order listed in Part 3.15(b) of the Disclosure
Letter; or (d) violates any federal law of the United States or any law of the State of [the state whose law is covered by the opinion letter].

COMMENT

This opinion, which is regularly requested and given, is stated in terms of no “violation,” “breach” or “default.” Opinion givers are cautioned to avoid the use of “no conflict with” because of the imprecision of that phrase. See TriBar ’98 § 6.5.2. The opinion would have greater significance if the Company were a party to the agreement and not just the Sellers.

Also, this opinion avoids adopting the broad meaning of certain defined terms in the Model Stock Purchase Agreement by not capitalizing those terms (e.g., “breach” or “law”).

Consummation v. Performance. The opinion only covers breaches or defaults related to performance of the Stock Purchase Agreement through the closing when the opinion letter is delivered (“. . . consummation of the Contemplated Transactions by Sellers . . .”). Buyer may seek to broaden the opinion to include required post-closing performance, in which event the opinion should cover “execution, delivery, and performance . . . .”, and the language relating to consummation should be deleted. However, if the latter approach is taken, then a potentially difficult analysis is required. See TriBar ’98 §§ 1.2(f), 6.5.4 and 6.7. The discussion in TriBar ’98 § 6.5.4 addresses one aspect of this potentially difficult analysis, distinguishing between: (1) Obligations: actions that the Company is “obligated” to take (or not take) in the future under a Transaction Document (such as the Company’s obligation to issue shares if an investor exercises warrants) that will result in a breach or default of its articles, bylaws, or an agreement that prohibits the action—and thus that “obligation” prevents the opinion giver from giving this opinion (unless a consent is obtained); and (2) Rights: actions that the Company has the “right” (but not the obligation) to take in the future, but such permitted action will result in a breach or default of its articles, bylaws or an agreement only if taken (such as the exercise of a repurchase right for outstanding shares in violation of a prohibition on stock repurchases in a Transaction Document)—and thus the existence of that “right” does not prevent the opinion giver from giving this opinion. As a further illustration, TriBar ’98 § 6.5.4 also states that breaches or defaults under listed agreements that will occur only if specified events or circumstances occur or exist in the future ordinarily do not prevent giving this opinion—but if such events or circumstances exist at the time the opinion is given (and are not otherwise excepted out of the opinion), then this opinion should not be given.

Listing of Covered Agreements. This opinion covers only those agreements and commitments that are listed in the applicable disclosure schedule or, if that disclosure schedule includes agreements that do not justify being covered by this opinion, to some other list (e.g., a list of agreements attached to the opinion letter or exhibits to an SEC filing). This approach of utilizing a specific list requires that
the parties define the selection criteria in a way that satisfies Buyer’s legitimate interest in having the opinion preparers review those agreements and commitments of the Company and the Sellers likely to present significant issues while limiting the scope of that review to one that is feasible and does not involve disproportionate costs in the context of the transaction. Lawyers should carefully consider the consequences before giving an opinion as to “any agreement or commitment known to us to which any Acquired Company is a party or by which any assets of an Acquired Company are bound” [emphasis added] because, as discussed under “No Knowledge Definition in These Illustrative Opinion Letters,” use of “known to us” introduces the uncertainties inherent in a knowledge standard.

Agreements Governed by the Law of Another State. Companies typically are parties to agreements governed by the law of states whose law is not covered by the opinion letter. In giving the no breach or default opinion above, Tribar ‘98 § 6.5.6 states the opinion giver may “assume, without so stating in the opinion letter, that those contracts would be interpreted in accordance with their plain meaning (unless the . . . [opining lawyer] identifies a possible problem, in which event they may want to obtain an opinion from local counsel).” Further, “[i]n the case of technical terms, their meaning would be what lawyers generally understand them to mean in the jurisdiction (or principal jurisdiction if more than one) whose law is specified for coverage in the opinion letter).” Nevertheless, some lawyers add a parenthetical to address this point expressly: (“interpreting each such agreement as if the law of the State of XXX were_________________ . . .”) with the “State of XXX” being the state whose law is being covered generally in the opinion letter (see the governing law paragraph below).

Acceleration Events; Expanding the Opinion Language to Cover Other Adverse Consequences. This opinion is stated so that it expressly covers “acceleration” events. This is important, particularly from the recipient’s viewpoint, because Tribar ‘98 § 6.5.3 states that the “no breach or default opinion” does not cover “adverse consequences” unless the opinion specifically states that it does – and then notes that the following “adverse consequences” are not automatically covered by the “no breach or default opinion”: (1) termination of a credit facility commitment; (2) increase in royalty rate or interest rate; (3) creation of a lien; (4) requirement to provide additional collateral; (5) creation of “puts” resulting from a change of control; and (6) creation of right to accelerate or require prepayment by existing debt holders. The recipient may want the opinion to cover adverse consequences (1) through (5) in addition to (6), which is the only acceleration event.

Possible Exceptions for Financial Covenant Analysis. Some opinion preparers take an exception for compliance with financial covenants or similar provisions requiring financial calculations or determinations to ascertain compliance. Others consider it appropriate for lawyers to cover compliance based on certificates of officers with the requisite knowledge. They note that financial covenants often require legal interpretation as to their meaning. Also, opinion preparers sometimes take an exception for provisions tied to a “material adverse event” or terms of similar import when there is uncertainty as to what is essentially a factual determination.
These exceptions are not addressed by either the ABA or TriBar reports but are sometimes included and accepted. See GLAZER & FITZGIBBON § 16.3.5.

4. Except for requirements of the HSR Act, no consent, approval, or authorization of, or declaration, filing, or registration with, any governmental authority of the United States or the State of [the state whose law is covered by the opinion letter] is required in connection with the execution and delivery of any Transaction Document by Sellers or the Company or the consummation by Sellers [or Company] of any of the Contemplated Transactions.

COMMENT

This opinion is limited to consents required through the Closing. Some buyers may seek to broaden the opinion to include consents required to perform the Model Agreement after the Closing. See the discussion of opinions addressing post-closing matters in the commentary to the immediately prior “no breach or default” opinion in opinion number 3 above. This opinion may be difficult for an opinion giver who has not previously represented the Company (see GLAZER & FITZGIBBON Ch. 15), but it is often requested and given. If no Transaction is to be consummated by Company, the language in the second bracket should be deleted.

5. Each of the Transaction Documents is a valid and binding obligation of Sellers, enforceable against Sellers in accordance with its terms; provided, however, that this opinion does not cover __________________________

[Note to Drafter: identify any particular clauses in the Transaction Documents to be excluded, such as the noncompetition provisions of § 7.1 of the Model Agreement].

COMMENT

The opinion that each of the Transaction Documents is a “valid and binding obligation of Sellers, enforceable against Sellers in accordance with its terms” is referred to as the “remedies opinion” (it is also commonly referred to as the “enforceability opinion”). Subject to exceptions express and implied, this opinion is generally understood to mean as to each Transaction Document: (1) that an agreement has been formed; (2) that the remedies specified in the agreement will be given effect by the courts; and (3) that each provision unrelated to the concept of breach (such as a choice of law provision or specified amendment procedures) will be given effect by the courts. The determination of whether a provision is enforceable is based on the opinion giver’s professional judgment as to whether the highest court of the jurisdiction whose law governs the agreement would enforce a particular provision. See TriBar ’98 §§ 1.2(a) and 3.1; GLAZER & FITZGIBBON §§ 9.6, 9.7 and 9.8.
Often lawyers use all or a combination of the words “valid,” “binding,” and “enforceable” to express the remedies opinion. Today, however, as a matter of customary practice, the words “valid,” “binding,” and “enforceable” are considered to provide the same opinion, and any of those words is sufficient for purposes of the remedies opinion. In the past, in addition to the words “valid,” “binding,” and “enforceable,” the word “legal” was used in the formulation. The word “legal,” however, adds nothing and no longer is commonly used. See Glazer & FitzGibbon § 9.1.1, n.10.

Exceptions—Bankruptcy and Equitable Principles. Courts may not give effect to a party’s contractual obligations in the context of bankruptcy or because of the application of equitable principles. Exceptions for bankruptcy and equitable principles are generally accepted and should not be a matter of controversy. As is done in the illustrative opinion letters (in a single, combined paragraph below), stating these exceptions is common (for example, the TriBar illustrative opinions expressly include them), but they are understood to be implicit even if not stated.

Exceptions—Certain Transaction Documents and Provisions. This opinion’s proviso contemplates excluding specified provisions. For example, noncompetition agreements are often expressly excluded from the remedies opinion.

Determining whether to include other exceptions to the remedies/enforceability opinion—which are generally listed separately towards the end of the opinion letter (as is the case in the illustrative opinion letters)—requires that the opinion giver review the Transaction Documents to identify provisions that are potentially unenforceable. Exceptions commonly include provisions relating to choice of law and forum (at least in some jurisdictions), broad waivers, and particular indemnification provisions that may violate public policy. TriBar ’04 (Remedies Supp) Part II suggests the following questions, modified for the Model Agreement Fact Pattern, to aid the opinion giver in deciding whether to include an exception:

1. Do any of the provisions of any of the Transaction Documents raise legal issues of concern as to enforceability?

2. Does the legal issue arise under the law covered by the opinion letter (taking into account that certain “bodies of law” are either expressly excluded by the coverage limitation or deemed excluded without so stating as described in the TriBar reports)?

3. Is the legal issue addressed by the opinion letter in some other way—such as either (a) by an assumption otherwise included or deemed included in the opinion letter (for example, the genuineness of signatures) or (b) by the bankruptcy and equitable principles limitation? For example, with respect to the provision requiring that amendments to the Model Agreement be in writing, TriBar ’04 (Remedies Supp) Part III.D states that one of the bases for not enforcing the provision is excluded.
from the opinion’s coverage by the equitable principles limitation and the other—creation of a new contract—is not covered by the opinion. See also TriBar ’98 at 597 § 1.2(c).

(4) Can the legal issue be resolved by factual inquiry?

(5) Can the legal issue be avoided by restructuring the transaction or revising the agreement (for example, can issues as to enforceability of a waiver of rights be resolved by making the waiver more explicit)?

Thus, giving the remedies/enforceability opinion involves an analysis of the exceptions applicable to and assumptions underlying the opinion and the law covered by the opinion letter. In addition, in some cases, revisions to the Transaction Documents will eliminate an issue. See ABA LEGAL OPINION GUIDELINES § 1.3, TriBar ’98 § 3.2, and TriBar ’04 (Remedies Supp) § 1.

6. The authorized capital stock of the Company consists of ________ shares of common stock, ________ par value, [of which ________ shares] [all of which] are outstanding. The Shares have been duly authorized and validly issued and are fully paid and nonassessable.

COMMENT

The parties should consider whether the benefit of giving this opinion to the recipient justifies its cost. For example, after considering the cost, a decision might be made to cover only the authorized capital of the Company and not the number or status of outstanding shares. See ABA LEGAL OPINION GUIDELINES § 4.2, TriBar ’98 § 6.2 and Glazer & FitzGibbon § 10.16.

If an opinion is given on the number of outstanding shares, many opinion givers qualify it by the following introductory clause because it is based solely on the corporate records reviewed and not on any further independent investigation by the opinion preparers:

Based solely upon our review of the Company’s [articles] [certificate] of incorporation and the Company’s shareholders’ list maintained pursuant to [statutory cite]:

If an opinion on the due authorization and valid issuance of outstanding shares is given, then the applicable state bar association’s reports should be consulted for information about specific issues with regard to the issuance of stock under that state’s laws.

Shares Authorized by Articles/Certificate of Incorporation. This opinion as to the shares authorized by the articles/certificate of incorporation is frequently not given because it generally provides little benefit—it involves only reading straightforward provisions of the corporate charter and that can just as easily be done by the
buyer’s lawyer. If this opinion is given and covers more than one class of stock, the opinion giver needs to confirm that both the applicable corporation law and the corporate charter permit the attributes the stock purports to have.

**Number of Outstanding Shares.** The reasons for resisting giving the “outstanding shares” opinion range from the lack of any cost-justified benefit to the actual inappropriateness of giving this “opinion” because it does not involve any professional legal judgment. Glazer & FitzGibbon § 10.10 n.5 states: “The Revised ABA Guidelines state that opinions ‘should be limited to . . . matters that involve the exercise of professional judgment by the opinion giver’ . . . . The number of outstanding shares is not a matter requiring professional judgment . . . .” [Emphasis added].

**Due Authorization and Valid Issuance.** The “duly authorized” opinion addresses the proper creation of the shares in the charter documents under state law, and the “validly issued” opinion addresses whether the proper steps to approve a particular stock issuance have been taken. See TriBar ’98 §§ 6.2.1 and 6.2.2. “Validly issued” also addresses whether the issuance of the shares violated preemptive rights under the applicable corporation law and company charter but does not address, unless expressly stated, contractual preemptive-type rights.

**Fully Paid and Nonassessable.** Generally, the phrase “fully paid and nonassessable” means what the applicable corporation law says it means. This opinion has legal substance. Legal judgment is involved as to what was proper consideration for the issuance of shares; however, as it relates to the receipt of that consideration, the opinion ordinarily is based on an officer’s certificate. The “fully paid and nonassessable” opinion is often given in stock acquisitions, assuming it is cost-justified when the difficulties of giving it are considered.

**No Opinion as to Ownership of Shares.** An opinion as to registered (record) ownership of stock—which is not included in this illustrative opinion—is rarely given because it is primarily a factual issue. Any broader opinion (including an opinion on beneficial ownership) could not be given in the absence of a title system such as one that exists for motor vehicles. The TriBar reports do not specifically address the issue of opinions on share ownership, and such an opinion is not included in any of their illustrative opinion letters. In support of this, Glazer & FitzGibbon § 11.4.2 states: “The Seller’s status as a registered owner is a purely factual question, and the Buyer has the burden of making that determination . . . .” and § 11.4.2, n.8 states: “Sometimes, recipients ask for an ‘opinion’ that the Seller is the registered owner. This is not really an opinion but simply a statement of fact based solely on an examination of the stock record book or, for a public company, a certificate of the transfer agent.”

7. Upon the delivery of certificates to Buyer indorsed to Buyer or indorsed in blank by an effective endorsement and the payment to Sellers being made at the Closing, and assuming Buyer has no notice of an adverse
claim to the Shares within the meaning of Uniform Commercial Code § 8-105, Buyer will acquire the Shares free of any adverse claims within the meaning of Uniform Commercial Code § 8-303.

**COMMENT**

Title opinions should not be requested and, if requested, should be strongly resisted. As an alternative to a title opinion, buyers will sometimes ask for a “protected purchaser” opinion that the buyer is acquiring the shares free of adverse claims. This opinion can usually be given on the basis of UCC §§ 8-302 and 8-303. Note that this opinion is based on an assumption that buyer does not have notice of any adverse claim; that assumption should be acceptable to buyer because sellers’ lawyer has no way to know what the buyer knows.

A request by buyer that this opinion state that the ownership passes “free and clear” of adverse claims should not be given, because the “and clear” language is not used in the UCC.

8. **All of the outstanding shares of capital stock of each Subsidiary have been duly authorized and validly issued and are fully paid and nonassessable. The outstanding capital stock of each of the Subsidiaries is owned of record by one or more of the Acquired Companies.**

**COMMENT**

See the commentary to opinion number 6 as to the meaning and value of these opinions.

Except as set forth in Part 3.15(a) of the Disclosure Letter, we are not representing any of the Acquired Companies or Sellers in any pending litigation in which any of them is a named defendant [or in any litigation that is overtly threatened [in writing] against any of them by a potential claimant] that challenges the validity or enforceability of, or seeks to enjoin the performance of, the Transaction Documents.

**COMMENT**

A Confirmation and Not a Legal Opinion. This paragraph is set apart from the numbered opinion paragraphs because it is not a legal opinion but rather a confirmation of fact concerning pending or threatened legal proceedings relating to the contemplated transactions. It is not a general “no litigation” confirmation as to litigation in which the Company is involved, but is limited to matters potentially affecting the consummation of the transaction. The illustrative confirmation paragraph is taken from the Boston Bar Association’s *Streamlined Form of Closing Opinion*, 61 Bus. Law 389, 396–397 (Nov. 2005). A similar opinion is recommended in the Supplement to Report of the Legal Opinion Committee of the Business
Exhibit 8.6(a) Opinion Letter—Counsel to Sellers


**No Litigation Confirmations Are Less Frequently Given.** For reasons discussed below, many lawyers refuse to give a no litigation confirmation, even one that is limited to litigation involving the transaction. In the past, buyers often requested broad confirmations that no material proceedings of any nature were pending or threatened against the Company either (1) by reason of its operations or (2) by reason of the proposed transaction. Recent decisions – specifically Nat’l Bank of Canada v. Hale & Dorr, LLP, 17 Mass. L. Rptr. 681, 2004 WL 1049072 (Mass. Super. Ct. Apr. 28, 2004) and Dean Foods Co. v. Pappathanasi, 2004 WL 3019442 (Mass. Super. Ct. Dec. 3, 2004) – together with the “no misleading opinion” admonition of ABA Legal Opinion Guidelines § 1.5 and TriBar ‘98 § 1.4(d) – have heightened concerns of increased exposure from no litigation confirmations. See Glazer & Field, No Litigation Opinions Can Be Risky Business, 14 Business Law Today (July/Aug. 2005) for a more detailed account of Dean Foods and cautions regarding no litigation confirmations. TriBar ‘98 § 6.8 states that “. . . in most cases the no litigation opinion could be omitted with no real loss to opinion recipients . . . .” The TriBar Opinion Committee reached that conclusion before Nat’l Bank of Canada and Deans Foods were decided.

As a further caution, TriBar ‘98 § 1.4(d) specifically discusses a no litigation confirmation that is limited to written claims and concludes that an opinion would be “misleading” and thus should not be given if it does not disclose a substantial and apparently serious claim made orally in a formal manner (e.g., at a lawyers’ conference at which a draft complaint was discussed but not delivered) but not yet threatened in writing on the date of the opinion letter.

Our opinions are limited in all respects to the law of the State of _________ and the federal law of the United States.

**COMMENT**

The opinion letter should identify the law that it covers. This will generally be federal law and the law of a state in which the opinion preparers practice.

**Opinions under the Law of Other Jurisdictions – Generally.** The opinion recipient may ask for an opinion on the law of a jurisdiction other than the jurisdiction in which the opinion preparers practice. Whether a lawyer can give an opinion on the law of such other jurisdiction is principally an issue of competence with regard to that law (see the discussion following as to opinions on Delaware’s and other states’ corporation statutes). When an opinion is requested on the law of a jurisdiction on which the opinion preparers do not regard themselves as competent, the opinion recipient should be furnished an opinion of local counsel. Ordinarily, local counsel’s opinion letter should be addressed to the recipient and the primary opinion giver need not make reference to or comment on the local counsel opinion. This approach of “ unbundling” opinions is supported by ABA Legal Opinion Guidelines § 2.2 and TriBar ‘98 §§ 5.2 and 5.5.
Opinions on Delaware and Other State Corporations. Given the large number of corporations incorporated in Delaware, many lawyers in states other than Delaware give opinions on issues governed by the Delaware General Corporation Law (“DGCL”). See TriBar ‘04 (Remedies Supp), § II, n.25. However, non-Delaware lawyers usually are unwilling (without at least conferring with Delaware counsel) to give opinions involving particularly difficult issues under the DGCL (such as issues raised by some complex preferred stock provisions). When giving an opinion on the DGCL, some opinion givers add the following to the coverage limitation:

In addition, our opinions in numbered paragraphs 1 [status], 2 [due authorization, execution and delivery] and 3(a) [no breach of articles/bylaws] are limited to the Delaware General Corporation Law, as amended.

A reference to the DGCL, such as the foregoing, does not exclude coverage of applicable reported cases interpreting that statute.

Some lawyers may regard themselves as competent to give opinions on the corporate law of states other than Delaware in which they do not practice. The same analysis with regard to opinions on the DGCL by non-Delaware lawyers should apply to opinions on the corporate law of other states.

We express no opinion with respect to the law of any other jurisdiction [OPTIONAL—if applicable: (or the law of the State of [XXX] other than the [XXX corporate statute] as provided above) END OF OPTION]. We express no opinion as to any matters arising under, or the effect of any of, the following [bodies of law]:

COMMENT
The first sentence is implicit in all opinions and does not need to be stated — the opinion covers only what it says that it covers.

ABA LEGAL OPINION PRINCIPLES § II.D states that some laws are not covered by opinions even “when generally recognized as being directly applicable.” Also, TriBar ’98 §§ 1.2(e), 3.5.1, 3.5.2 and 6.6 discuss and list bodies of law “that lawyers would recognize as being applicable to the transaction, but that are customarily not covered [by a legal opinion] unless specifically addressed.” Thus, opinion letters that follow the TriBar approach generally do not include a long list of excluded laws.

However, because ABA LEGAL OPINION PRINCIPLES § II.D expressly refers only to local laws and to securities, tax and insolvency laws, some opinion givers expressly exclude other laws from the coverage of their opinion letters.

The 2005 Report on Legal Opinions in Business Transactions of the State Bar of California, Part V, § C.4.c, includes the following example:
Furthermore, we express no opinion with respect to compliance with any law, rule or regulation that as a matter of customary practice is understood to be covered only when an opinion refers to it expressly. Without limiting the generality of the foregoing [and except as specifically stated herein] we express no opinion on local or municipal law, antitrust, environmental, land use, securities, tax, pension, employee benefit, margin, insolvency, fraudulent transfer or investment company laws or regulations, nor compliance by the Company’s board of directors or shareholders with their fiduciary duties.

If a standard list of excluded laws is included in an opinion letter, those laws that are clearly not covered by any of the opinions being given should be deleted.

Our opinions above are subject to bankruptcy, insolvency, reorganization, receivership, moratorium, and other similar laws affecting the rights and remedies of creditors generally and to general principles of equity (including without limitation the availability of specific performance or injunctive relief and the application of concepts of materiality, reasonableness, good faith and fair dealing).

COMMENT

As noted in the discussion of the remedies/enforceability opinion, courts may not give effect to a party’s contractual obligations (a) in the context of bankruptcy and (b) because of the application of equitable principles. As in TriBar ‘98’s illustrative legal opinions, the illustrative paragraph applies to all the opinions in the opinion letter, not simply the remedies/enforceability opinion. (See also TriBar ‘98 §§ 1.2(c) and 3.3.1). These exceptions are understood to be implicit even if not stated. TriBar ‘98’s illustrative legal opinions use the following shorter version of this qualification: “Our opinions above are subject to bankruptcy, insolvency and other similar laws affecting the rights and remedies of creditors generally and general principles of equity.” A similar shorter statement of this qualification — but one that includes references to “fraudulent transfer, reorganization and moratorium” — is used in the Boston Bar Association’s Streamlined Form of Closing Opinion, 61 BUS LAW 389, 397 (Nov. 2005). All these formulations have the same meaning. TriBar ‘98 § 3.3.2.

For the purposes of the opinions expressed in this opinion letter, we have assumed: (a) the genuineness of all signatures on all documents; (b) the authenticity of all documents submitted to us as originals; (c) the conformity to the originals of all documents submitted to us as copies; (d) the correctness and accuracy of all facts set forth in all certificates and reports; (e) the due authorization, execution, and delivery of and the validity and binding effect of the Transaction Documents with regard to the parties to the Transaction Documents other than Sellers; and (f) the legal capacity of Sellers to enter into and perform the Transaction Documents.
COMMENT

TriBar '98 § 2.3(a) and ABA Legal Opinion Principles § III.D take the position that "assumptions of general application" (such as those set forth above) are implicit whether or not stated expressly. They also state that omitting the assumptions set forth above is common practice.

If another lawyer is giving an opinion on existence, power and authorization and/or other matters that are necessary for the opinions in the opinion letter, the opinion letter (1) should expressly assume the legal conclusions in that other lawyer’s opinion letter and (2) not comment on them. See ABA Legal Opinion Guidelines § 2.2 and TriBar '98 §§ 5.2 and 5.5.

We express no opinion as to any of the following [add any necessary exceptions]:

COMMENT

This clause provides for the list of provisions in the Transaction Documents or the legal issues they raise that are expressly excluded from the coverage of the opinion letter. No exceptions are included in the illustrative opinion letters, but the stated exceptions frequently include provisions relating to choice of law and forum (at least in some jurisdictions), broad waivers and particular indemnification provisions that may violate public policy. Although a broad public policy exception along the lines of "or to the extent otherwise contrary to or against public policy" is sometimes seen in opinion letters, the illustrative opinion letters do not contain that exception. TriBar '98 § 1.9(i) states that "[g]eneral unspecified 'public policy' exceptions are not used because they make the entire opinion unacceptably vague, requiring the opinion recipient to guess at the opinion giver's source of concern." ABA Legal Opinion Guidelines § 4.8 is to the same effect.

When to Include an Exception. See comments to the remedies/enforceability opinion for a discussion of how to determine what exceptions to include.

Include Only Applicable Exceptions (a/k/a “Avoiding the Kitchen Sink”). Only those exceptions that are applicable should be included. Some opinion givers include a voluminous list of exceptions and qualifications, many of which have nothing to do with the transaction at hand. This “kitchen sink” approach is inappropriate, and opinion givers should limit exceptions to relevant issues. See ABA Legal Opinion Guidelines § 1.3 (“Closing opinions should not include assumptions, exceptions, and limitations that do not relate to the transaction and the opinions given”), TriBar '98 § 3.2 (particularly its last sentence), and TriBar '04 (Remedies Supp) § 1’s penultimate paragraph. See also Field, One Size Doesn’t Fit All: Reject ‘Kitchen-Sink’ Responses in Opinion Letters, Business Law Today, 61–62 (May/June 2002). Commentators have expressed concern that, if an opinion letter inadvertently omits a necessary exception from a long list of exceptions, the opinion giver will have more difficulty convincing a court that the exception was
Exhibit 8.6(a) Opinion Letter—Counsel to Sellers

implicit than if the opinion giver had relied on customary practice and avoided stating those exceptions.

This opinion letter shall be interpreted in accordance with the Legal Opinion Principles issued by the Committee on Legal Opinions of the American Bar Association’s Section of Business Law as published in 57 BUS. LAW. 75 (2002) [a copy of which is attached].

COMMENT

The paragraph above is taken from the Boston Bar Association’s Streamlined Form of Closing Opinion 61 BUS. LAW. 389, 397 (Nov. 2005), which states that “many firms” include language expressly incorporating the ABA LEGAL OPINION PRINCIPLES (which are only three pages long). The ABA Business Law Section’s Committee on Federal Regulation of Securities’ Subcommittee on Securities Law Opinions No Registration Opinions, 63 BUS. LAW. 187 (Nov. 2007), confirms that some lawyers are referring to the ABA LEGAL OPINION GUIDELINES in their opinion letters. By doing so, the opinion recipient is put on notice that (1) the opinions are expressions of professional judgment and not guarantees of a particular result and (2) the opinion letter was prepared and is to be interpreted in accordance with customary practice, which means, among other things, that words and phrases in the opinion letter are not always meant to be interpreted in accordance with their literal meaning (that is, an unqualified reference to “law” literally must mean “all law”) but with the meaning that customary practice has given them (in the case of “law,” a significantly narrower definition). These principles are applicable even if that reference is not included. The TriBar reports (and to a lesser extent the ABA LEGAL OPINION GUIDELINES) helpfully set forth matters that need not be stated in opinion letters, such as (a) assumptions (particularly “assumptions of general application” such as that copies are identical to originals and signatures are genuine) and (b) exclusions from covered bodies of laws (such as tax and local laws). Accordingly, incorporation of the ABA LEGAL OPINION GUIDELINES not only puts the opinion recipient on notice regarding the application of customary practice, but in the unfortunate circumstance that a judge is analyzing an opinion letter, doing so makes clear to the judge that “as a matter of customary practice” many assumptions and qualifications are implicit even though not explicitly stated.

The opinions expressed in this opinion letter (a) are limited to the matters stated in this opinion letter, and, without limiting the foregoing, no other opinions are to be inferred and (b) are only as of the date of this opinion letter, and we are under no obligation, and do not undertake, to advise Buyer or any other person or entity either of any change of law or fact that occurs, or of any fact that comes to our attention, after the date of this opinion letter, even though such change or such fact may affect the legal analysis or a legal conclusion in this opinion letter.
COMMENT
Although not necessary, a provision such as this is common and generally accepted. ABA LEGAL OPINION PRINCIPLES § IV and TriBar ’98 § 1.2(b) state that an opinion giver has no obligation to update even if the limitation is not expressly stated in the opinion letter. If a no litigation confirmation is given, some opinion givers add “and confirmations” to the above boldfaced paragraph.

This opinion letter: (1) is delivered in connection with the consummation of the sale of stock pursuant to the Stock Purchase Agreement, may be relied upon only by Buyer in connection with its purchase of stock pursuant to the Stock Purchase Agreement and may not be relied upon by Buyer for any other purpose; (2) may not be relied on by, or furnished to, any other person or entity without our prior written consent; and (3) without limiting the foregoing, may not be quoted, published, or otherwise disseminated, without in each instance our prior written consent.

COMMENT
If the acquisition is being financed, Buyer’s lender will often seek to have the benefit of the opinion letter delivered by Sellers’ counsel. Absent a consent in the opinion letter (or separately given by the opinion giver), lenders would not have the right to rely on the opinion letter. Opinion givers frequently agree to such an extension to the lenders, in which event the last sentence would be appropriate to limit reliance. If reliance by lenders is to be permitted, the following should be added:

Notwithstanding the foregoing sentence, we understand that you are delivering a copy of this opinion letter to [identify lenders to Buyer] in connection with the financing of the transactions contemplated by the Agreement, and we agree that [those lenders] may rely on this opinion letter as if it were addressed to them.

Permitting successor lenders to rely is generally permitted only if the circumstances in which they can rely are set forth in considerable detail in an additional sentence to this paragraph, essentially restricting reliance to the same extent as if the opinion letter had been addressed and delivered to them at the date the opinion letter was issued and that their reliance is otherwise reasonable. See GLAZER & FITZGIBBON § 2.3.1, n.3.

Very truly yours,

[LAW FIRM]

COMMENT
The form of the signature block will be determined by the opinion giver’s policies.
EXHIBIT 9.5(a)

Opinion Letter—
Counsel to Buyer

PRELIMINARY NOTE

As is the case with Buyer’s representations in the Model Agreement, the scope of the opinion letter required to be delivered to Sellers by Buyer’s lawyer is often limited to matters affecting the validity of the Transaction Documents. Where, as here, Buyer is delivering the Promissory Notes for a significant portion of the purchase price, however, Sellers may require additional representations from Buyer and, correspondingly, additional opinions from Buyer’s lawyer. Still other opinions might be required from Buyer’s lawyer if Buyer is issuing its stock as part of the purchase price.

It may be appropriate in some acquisitions for Sellers to ask Buyer’s lawyer for opinions on corporate status, power and authority, the need for consent or approval, and other opinions in the opinion letter of counsel to the seller or target. The appropriateness of these additional requests should turn on the nature and size of Buyer, the cost-effectiveness of the opinion, and whether consideration other than cash is being paid. Where Buyer is paying all cash at closing, little or no purpose is usually served in requiring an opinion from Buyer’s lawyer.

Reference is made to general discussions in the commentary to the various opinions in the Opinion of Counsel to Seller form, which are not repeated in this illustrative opinion letter form.
Model Stock Purchase Agreement with Commentary (Volume II)

[Opinion Giver’s Letterhead]

[Date]

[Names and Addresses of Sellers]

Re: Acquisition of ______________ (the “Company”) by ______________ (the “Buyer”) pursuant to the Stock Purchase Agreement dated ______________ __, 20__. (the “Stock Purchase Agreement”)

Ladies and Gentlemen:

We have acted as counsel for the Buyer in connection with its execution and delivery of the Stock Purchase Agreement.

This opinion letter is delivered to you pursuant to Stock Purchase Agreement § 9.5(a).

Each capitalized term in this opinion letter that is not defined in this opinion letter but is defined in the Stock Purchase Agreement is used herein as defined in the Stock Purchase Agreement.

In acting as counsel to Buyer, we have examined [copies of] the following documents and instruments (collectively, the “Transaction Documents”):

1. The Stock Purchase Agreement;
2. The Escrow Agreement; and
3. The Promissory Notes.

In addition to the Transaction Documents, we have examined:

4. The Articles [Certificate] of Incorporation of Buyer, as in effect on the date hereof, duly certified by the Secretary of State of [state];
5. The Bylaws of Buyer, certified to be true and correct by its Secretary;
6. A certificate from the Secretary of State of [state] indicating that Buyer is in good standing in the State of [state];
7. Copies of resolutions adopted by the board of directors of Buyer authorizing the execution, delivery, and performance of the Transaction Documents and certified to be true and correct by its Secretary;
8. Certificate of [title of officer] of Buyer, dated the date hereof, certifying as to certain factual matters (the “Buyer Certificate”);

9. Documents listed in the Buyer Certificate; and

10. Such other documents as we have deemed appropriate in order to render the opinions expressed below.

As to certain matters of fact relevant to the opinions in this opinion letter, we have relied on certificates of officers of Buyer and on factual representations made by the Buyer in the Stock Purchase Agreement. We also have relied on certificates of public officials. We have not independently established the facts, or in the case of certificates of public officials, the other statements, so relied upon.

Based upon and subject to the foregoing and the other qualifications and limitations stated in this opinion letter, our opinions are as follows:

1. Buyer is validly existing [and in good standing] as a corporation under the law of the State of ____________.

2. Buyer (a) has the corporate power to execute and deliver, and to perform its obligations under, each Transaction Document to which it is a party, (b) has taken all necessary corporate action to authorize the execution and delivery of, and the performance of its obligations under, each Transaction Document to which it is a party, and (c) has duly executed and delivered each Transaction Document to which it is a party.

3. Neither the execution and delivery by Buyer of each Transaction Document to which it is a party nor the consummation of the Contemplated Transactions by Buyer (a) violates any provision of the Articles [Certificate] of Incorporation or Bylaws of Buyer; or (b) violates any judgment, decree, or order listed in Part ___ of the Disclosure Letter; or (d) violates any federal law of the United States or any law of the State of [the state under which the remedies/enforceability opinion is given].

4. Each of the Transaction Documents is a valid and binding obligation of Buyer, enforceable against Buyer in accordance with its terms [identify any particular clauses to be excluded].

Our opinions are limited in all respects to the law of the State of __________ and the federal law of the United States.

We express no opinion with respect to the laws of any other jurisdiction [OPTIONAL—if applicable: (or the laws of the State of [XXX] other than the [XXX corporation statutes] as provided above) END OF OPTION] [or as to any matters arising under, or the effect of any of, the following [bodies of laws]: [list bodies of law to be specifically excluded].
Our opinions above are subject to bankruptcy, insolvency, reorganization, receivership, moratorium, and other similar laws affecting the rights and remedies of creditors generally and to general principles of equity (including without limitation the availability of specific performance or injunctive relief and the application of concepts of materiality, reasonableness, good faith, and fair dealing), regardless of whether considered in a proceeding at law or in equity. [See an alternate version in the Comment to the comparable provision of the illustrative Sellers’ Counsel form.]

For the purposes of the opinions in this opinion letter, we have assumed: (a) the genuineness of all signatures on all documents; (b) the authenticity of all documents submitted to us as originals; (c) the conformity to the originals of all documents submitted to us as copies; (d) the correctness and accuracy of all facts set forth in all certificates and reports; and (e) the due authorization, execution, and delivery of and the validity and binding effect of the Transaction Documents with regard to the parties to the Transaction Documents other than Buyer.

We express no opinion as to any of the following [add any necessary exceptions]:

This opinion letter shall be interpreted in accordance with the Legal Opinion Principles issued by the Committee on Legal Opinions of the American Bar Association’s Section of Business Law as published in 57 Bus. Law. 875 (Feb. 2002) [, a copy of which is attached].

The opinions expressed in this opinion letter (a) are strictly limited to the matters stated in this opinion letter, and without limiting the foregoing, no other opinions are to be implied and (b) are only as of the date of this opinion letter, and we are under no obligation, and do not undertake, to advise the Sellers or any other person or entity either of any change of law or fact that occurs, or of any fact that comes to our attention, after the date of this opinion letter, even though such change or such fact may affect the legal analysis or a legal conclusion in this opinion letter.

This opinion letter: (1) is delivered in connection with the consummation of the sale of stock pursuant to the Stock Purchase Agreement, may be relied upon only by the Sellers in connection with the sale of stock pursuant to the Stock Purchase Agreement, and may not be relied upon by the Sellers for any other purpose; (2) may not be relied on by, or furnished to, any other person or entity without our prior written consent; and (3) without limiting the foregoing, may not be quoted, published, or otherwise disseminated, without in each instance our prior written consent.

Very truly yours,

[LAW FIRM]