Special Report of the TriBar Opinion Committee—Opinions on Secondary Sales of Securities

By the TriBar Opinion Committee*

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* The members of the TriBar Opinion Committee (the “Committee” or “TriBar”) currently are affiliated with the following organizations: (i) Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers’ Association; (ii) Corporation Law Committee, New York City Bar; and (iii) Special Committee on Legal Opinions of the Business Law Section, New York State Bar Association. Members of the state bars of California, Delaware, Georgia, North Carolina, Pennsylvania, and Texas and of the Allegheny County (Pittsburgh, PA), Boston, Chicago, and District of Columbia Bar Associations also are members of the Committee. The members of the Committee and the Reporter and Drafting Group for this report are listed in Appendix C.

This report has not been approved by the governing body or membership of any of the bar associations whose committees or members were involved in its preparation. Accordingly, the views expressed are solely those of TriBar. This report reflects a consensus of the Committee. It does not, however, necessarily reflect the views of individual members or their firms, organizations, or associations on any particular point.
1. **Scope of Report**

1.1. **Introduction**

This report discusses third-party legal opinions on the rights that a buyer of an outstanding security or an acquirer of a security entitlement with respect to an outstanding security acquires in a so-called “secondary sale.” Most secondary sales, for example sales on a stock exchange, do not involve the delivery of a legal opinion. However, some do. Underwriters in registered public offerings often request legal opinions when the offering includes outstanding securities. In addition, investors in secondary sale transactions sometimes request legal opinions when privately acquiring outstanding securities or security entitlements with respect to outstanding securities.

Secondary sale opinions address matters that are governed by Article 8 of the Uniform Commercial Code (“U.C.C.”).  

1.2. **Summary of the Opinion**

An opinion on the rights of a buyer of an outstanding security addresses whether the buyer has acquired the security free of adverse claims. An opinion on the rights of an acquirer of a security entitlement with respect to an outstanding security addresses whether the acquirer has acquired a security entitlement

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1. For convenience, this report speaks of shares in a corporation and of security entitlements with respect to shares in a corporation. Generally, the discussion also applies to secondary sales of other types of securities (such as membership interests in a limited liability company or debt securities when those interests or debt securities are subject to Article 8 (see infra note 26) and to acquisitions of security entitlements with respect to these and other types of financial assets). This report does not address sales of Treasury securities and other book entry securities issued by the federal government. Those securities are subject to the TRADES rules (31 C.F.R. pt. 357) or similar rules.

2. Unlike a “primary” sale, which involves the sale by a company of newly issued securities, a “secondary” sale involves the sale by an existing holder of securities, or security entitlements with respect to securities, that previously were issued. See text accompanying infra note 14.

3. References in this report to the U.C.C., including Articles 1, 8, and 9, are to the 2010 Official Text of the U.C.C. All emphasis in any quoted material is added.
and whether an action can be asserted against the acquirer based on an adverse claim to a financial asset (or alternatively to the “Shares” being sold). A secondary sale opinion relies in large measure on express and implied factual assumptions, including assumptions concerning the acquirer’s lack of notice of adverse claims. For purposes of this report, references to “assumptions” include stated factual conditions, such as “if [acquirer] does not have notice of an adverse claim,” that are not phrased as assumptions but have the same effect.

Appendix B provides language illustrating how secondary sale opinions and these assumptions might be worded.

1.3. Value of the Opinion

A secondary sale opinion typically requires little particularized legal analysis. The legal conclusions it expresses flow automatically from the assumptions on which it is based and these assumptions are usually as apparent to the opinion recipient as they are to the opinion giver. The acquirer in a secondary sale should consider, therefore, whether a secondary sale opinion will meaningfully assist it in the particular transaction given the time and expense involved in preparing the opinion. If not, the acquirer should consider not requesting the opinion.

1.4. Background: Direct and Indirect Holdings

Article 8 provides one set of rules for securities held directly by a holder and a different set for interests in securities held indirectly through a securities intermediary. Following the terminology of Article 8, this report refers to the bundle of rights a holder has in interests held indirectly as a “security entitlement.”

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4. This difference in the treatment of adverse claims is discussed at length below. See infra sections 2.3 & 2.4.2.
7. These rules are described in detail throughout this report.
8. An entitlement holder may also hold through a securities intermediary an indirect interest in financial assets that are not securities. An “entitlement holder” is a person that has a security entitlement. See infra notes 10 (for a discussion of “security entitlement”) and 55 (for a discussion of “financial assets”), and text accompanying infra note 56 (for a discussion of entitlement holder).
9. The meaning of “securities intermediary” is discussed below. See infra note 30.
10. As discussed in detail below, under Article 8 a “security entitlement” does not create rights in a particular security (or security entitlement) held by a securities intermediary. Rather, it is a bundle of rights consisting of (i) personal rights held by the entitlement holder against the securities intermediary, and (ii) an undivided property interest in the securities (or security entitlements) of the same type that are held by the securities intermediary. See infra note 58. An “entitlement holder” is a person that has a security entitlement. See text accompanying infra note 56 (for a discussion of entitlement holder). An entitlement holder may also hold through a securities intermediary an indirect interest in financial assets that are not securities. See infra note 55 (for a discussion of “financial assets”).
This report generally refers to a person who buys a security as the “buyer.” It refers to a person who acquires a security entitlement as the “acquirer.” It also sometimes collectively refers to a buyer of a security and the acquirer of a security entitlement as an “acquirer” or as “acquirers.” Article 8 and this report use the term “direct holding” to refer to a security held directly by a buyer and the term “indirect holding” to refer to the indirect interest with respect to a security that an acquirer has through ownership of a security entitlement.

1.5. WHAT THE OPINION COVERS

This report addresses only opinions on the rights of a buyer of an outstanding security or an acquirer of a security entitlement with respect to an outstanding security. Because the nature of the rights acquired differs in the two situations, the acquisition of a security and acquisition of a security entitlement require different forms of opinion (see Appendix B, Illustrative Opinion Language). This report does not discuss opinions on the acquisition of a security directly from the issuer or a security entitlement with respect to a newly issued security.

1.6. NO OPINION SHOULD BE REQUESTED ON TITLE

Counsel in a secondary sale is sometimes asked for an opinion that the seller has title, good title, or marketable title to the securities or the security entitlements or that the transaction contemplated by the agreement vests title in the acquirer. A lawyer cannot reasonably be expected to give a title opinion on personal property without a system for recording title that establishes ownership definitively. Such a system does not exist for securities or security entitlements. Article 8 does not require that the seller have “title” to or ownership of a security or a security

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11. An opinion on secondary sales addresses only the rights acquired under Article 8 by the initial acquirer of a security or a security entitlement. The opinion does not address the rights acquired by a subsequent acquirer. In an underwritten secondary offering, the initial acquirer would be the underwriters and the subsequent acquirers would be the acquirers of security entitlements with respect to the securities from the underwriters.

12. “Purchaser” is defined in U.C.C. § 1-201(b)(30) as “a person who takes by purchase.” “Purchase’ includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property.” U.C.C. § 1-201(b)(29). A “purchaser” includes a “buyer.” Although much of the discussion of Article 8 in this report applies to securities purchasers of all kinds, this report uses the word “buyer” because it addresses only the rights of a buyer of a security and not the rights acquired by other kinds of purchasers of a security.

13. Article 8 uses the term “acquirer” instead of “purchaser” (or buyer) to emphasize that a person who acquires a security entitlement acquires a new security entitlement, and does not “buy” or “purchase” the security entitlement held by the seller. See infra note 59. Article 8 also uses the verb “acquire” to refer to a buyer’s purchase of a security.


15. For very limited classes of personal property, such as motor vehicles, ownership for some purposes can be determined by reference to a government-operated title system. Even then, lawyers ordinarily do not give opinions on title to the personal property.
entitlement with respect to a security for a buyer of the security to acquire the security free of adverse claims or for the acquirer of the security entitlement not to be subject to the assertion of an adverse claim.\(^\text{16}\)

The Committee believes that title opinions regarding a security or a security entitlement should not be requested.\(^\text{17}\) In addition, the Committee believes that an opinion giver should not be asked to confirm that it does not have knowledge of adverse claims that might be asserted with respect to the security or the security entitlement.\(^\text{18}\)

1.7. MATTERS NOT COVERED BY SECONDARY SALE OPINION

The secondary sale opinion does not address the following matters:

i. the seller's authority to sell the security or security entitlement;

ii. the valid issuance of the security and, in the case of a share in a corporation, its nonassessability;\(^\text{19}\)

iii. the enforceability of any purchase and sale agreement; or

iv. the absence of any violation of law or breach of other agreements of the seller.\(^\text{20}\)

Opinions on the above matters are often included in the same opinion letter as a secondary sale opinion.

2. BACKGROUND CONCERNING ARTICLE 8

2.1. MEANING OF KEY TERMS

Many opinion letters that include a secondary sale opinion state that a term used in the opinion and defined in Article 8 has the meaning that it has in Article 8

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16. See text accompanying infra note 69.
17. Opinions are sometimes given on the number of outstanding shares of a closely held entity. This is not a “title” opinion. This opinion is of limited value because it ordinarily is based solely on a review of the issuer's stock transfer book and an officer's certificate. TriBar 1998 Report, supra note 5, § 6.2.5, at 651–52.
18. Those matters do not require the exercise of professional judgment. See Comm. on Legal Opinions, ABA Guidelines for the Preparation of Closing Opinions, 57 BUS. LAW. 875, 880 (2002) (§ 4.4); TriBar 1998 Report, supra note 5, § 6.8, at 663–65. Further, the notice that is relevant to the secondary sale opinion is the notice that an acquirer (the opinion recipient) may have.
19. A transferor of a security or of a security entitlement makes certain implied warranties in connection with that transfer, including, in the case of a transfer of a security, warranties regarding the validity of the security. U.C.C. §§ 8-108, 8-109.
20. The definition of “purchaser” in the U.C.C. includes a secured party. See supra note 12. A secondary sale opinion also does not cover the attachment, perfection, or priority of a security interest in a security or a security entitlement. Although many of the considerations addressed in this report may be relevant to an opinion on a security interest in a security or a security entitlement, those opinions are not discussed in this report. They are discussed in TriBar Opinion Comm., U.C.C. Security Interest Opinions—Revised Article 9, 58 BUS. LAW. 1450, 1493–1500 (2003) [hereinafter TriBar Article 9 Report].
or another relevant article\textsuperscript{21} of the U.C.C.\textsuperscript{22} Such a statement typically applies both to terms that on their face have a specialized meaning in this context (e.g., “security entitlement”) and to terms that may not (e.g., the word “notice” as part of the phrase “notice of an adverse claim”).\textsuperscript{23} Whether or not an opinion letter expressly adopts the definitions set forth in Article 8 and elsewhere in the U.C.C., an opinion giver generally is entitled to assume that the opinion recipient understands that when the terms are used in a secondary sale opinion, the terms are being used as so defined.\textsuperscript{24}

Key Article 8 terms used in opinions on secondary sales are defined throughout this report and listed with their definitions in Appendix A.\textsuperscript{25}

\section*{2.2. General}

Under Article 8, a person can hold an interest in a security\textsuperscript{26} in one of two ways:

\begin{itemize}
\item[21.] See, e.g., U.C.C. § 1-201(b)(27) (definition of “person”).
\item[22.] The Illustrative Opinion Language provides drafting suggestions. In a few instances, a term used in a secondary sale opinion, although defined in Article 8, is understood not to be used as defined in Article 8. See infra note 91.
\item[23.] The word “notice” does not have a specialized meaning with respect to securities and security entitlements, even though the phrase “notice of an adverse claim,” read as a whole, does. U.C.C. § 8-105; see infra note 48.
\item[24.] This assumption is analogous to the assumption lawyers make when giving “security interest” opinions under Article 9 of the U.C.C. See TriBar Article 9 Report, supra note 20, at 1504.
\item[25.] Opinion letters often incorporate by reference the definitions of terms used in the agreement governing the transaction. Some of those terms may be the same as those used in the secondary sale opinion. If an opinion letter incorporates the definitions of terms from an agreement, to avoid confusion the opinion giver should indicate whether, for purposes of the secondary sale opinion and related assumptions, those definitions are intended to override the definitions in Article 8 (or elsewhere in the U.C.C.). Further, the opinion may use a term, such as “the Shares,” in place of or in addition to a term defined in Article 8. See text following infra note 124.
\item[26.] “Security” is defined generally in U.C.C. § 8-102(a)(15). It includes “an obligation of an issuer or a share, participation, or other interest in an issuer or in property or an enterprise of an issuer” that meets specified criteria. A “security” under Article 8 is not necessarily a “security” under other law and vice versa. See U.C.C. § 8-102(d).
\end{itemize}
(i) directly, where the security is in bearer form or the buyer is registered or entitled to be registered as the record owner of the security on the books maintained for that purpose by or on behalf of the issuer; and

(ii) indirectly, where the acquirer’s security entitlement is reflected on the records of a securities intermediary, such as a securities broker or a bank, and the record owner of the security is typically the top-tier securities intermediary (or its nominee).

In either case, Article 8 provides protection from adverse claims to an acquirer of a security or a security entitlement for value that has no notice of adverse claims.

2.3. DIRECT HOLDINGS

When a security is held directly, the holder is entitled to be registered as the record owner on the records maintained for that purpose by the issuer or the issuer’s transfer agent. The security may be certificated or uncertificated. Article 8 treats it as a financial asset with respect to which a person (the “entitlement holder”) may have a security entitlement. See infra note 55. In addition to equity interests, Article 8 may apply to debt obligations, which may be “securities” subject to Article 8. U.C.C. §§ 3-102(a), 8-103(d).

27. As discussed below in Section 2.3, the securities may be certificated or uncertificated. See infra note 36.

28. Usually, a buyer of a security will have the security registered in the buyer’s name on records maintained for that purpose by or on behalf of the issuer or, if the security is a debt security, on similar records maintained for that purpose. Although less common in the United States for tax and other reasons, a “security” can also be in bearer form. U.C.C. § 8-102(a)(15).

29. Article 8 does not impose any particular conditions for a seller to effect a transfer of ownership of a security or security entitlement to a buyer for purposes other than Article 8. U.C.C. § 8-302 cmt. 2.

30. A “securities intermediary” is (i) a clearing corporation or (ii) a person, including a bank or broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity. U.C.C. § 8-102(a)(14). An opinion giver may assume, without stating, that a person is acting in the capacity described in clause (ii). See text accompanying infra note 110. When a person is acting in another capacity, it is not a “securities intermediary.”

31. The role of a “top-tier” securities intermediary is discussed below in Section 2.4.1. See infra note 53.

32. For publicly traded securities issued by companies incorporated in the United States, the top-tier securities intermediary is usually a clearing corporation, which is a special type of securities intermediary (such as The Depository Trust Corporation (“DTC”)). Where DTC acts in that capacity, the securities are registered on the issuer’s books in the name of Cede & Co., as nominee for DTC.

33. The protections against adverse claims that Article 8 provides to a buyer of a security differ somewhat from those that Article 8 provides to an acquirer of a security entitlement. See infra note 70.

34. Until the security (whether certificated or uncertificated) is re-registered, the seller generally will retain the ability as against the issuer to exercise the rights of an owner of the security. U.C.C. § 8-207.

35. A security also may exist in bearer form, where the issuer does not maintain a registry. U.C.C. § 8-102(a)(15)(i). Because bearer securities are unusual in the United States and are usually not the subject of secondary sale opinions, this report does not specifically address them.

36. U.C.C. § 8-102(a)(4), (15) & (18). An uncertificated security should not be confused with a security entitlement. The holder of an uncertificated security, like the holder of a certificated security, has a direct relationship with the issuer.
When buying a certificated security, the buyer normally obtains physical possession of the certificate representing the security. The certificate may be indorsed either to the buyer or in blank or it already may be registered\(^{37}\) in the buyer’s name on the records of the issuer.\(^{38}\) A buyer that takes delivery of an indorsed certificate typically presents it for registration in the buyer’s name on the records of the issuer.\(^{39}\) The buyer of an uncertificated security typically requires that the buyer be registered as the owner of the security on the issuer’s records.

Under Article 8, a certificated security is “delivered” when the buyer (or another person that is not a securities intermediary acting on the buyer’s behalf\(^{40}\)) acquires possession of the certificate representing the security.\(^{41}\) An uncertificated security is “delivered” when the issuer registers the buyer (or another person that is not a securities intermediary acting on the buyer’s behalf\(^{42}\)) as owner. A buyer that takes “delivery” of a security acquires all rights in the security that the seller had or had the power to transfer.\(^{43}\)

A “protected purchaser,” as that term is used in Article 8, in addition to acquiring the basic rights of a buyer of a directly held security (i.e., all of the rights that its seller had or had the power to transfer), also acquires its interest in the security free of any adverse claim\(^{44}\) to the security.\(^{45}\)

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\(^{37}\) Registration of the buyer of a certificated security as the owner on the issuer’s books is not a method of “delivery” of a certificated security for purposes of Article 8, but it is a method of obtaining control of a certificated security that has been delivered. U.C.C. §§ 8-106(b)(2), 8-301(a). See infra note 52.

\(^{38}\) The ownership must be indicated on records maintained for that purpose by or for the issuer. U.C.C. § 8-102(a)(15)(i).

\(^{39}\) The securities held by DTC and many other top-tier securities intermediaries typically are registered in a nominee name. See supra note 32.

\(^{40}\) U.C.C. § 8-301(a). If a securities intermediary acting on the buyer’s behalf obtains possession of the certificate, then, unless the certificate is registered in the name of the buyer or indorsed to the buyer, the buyer acquires a security entitlement rather than a direct interest in the security represented by the certificate. U.C.C. § 8-301 cmt. 2; see also U.C.C. § 8-501(d). Thus, if the securities intermediary obtains possession of a certificate indorsed in blank, the buyer acquires a security entitlement.

\(^{41}\) U.C.C. § 8-301(a). Under U.C.C. § 8-301(a), a certificated security also may be delivered in other ways. The use of the word “delivery” in secondary sale opinions is discussed below. See infra note 91 and accompanying text.

\(^{42}\) U.C.C. § 8-301(b). If a securities intermediary acting on the acquirer’s behalf has the security registered in the securities intermediary’s name, then the buyer acquires a security entitlement rather than a direct interest in the security. U.C.C. § 8-301 cmt. 2; see also U.C.C. § 8-501(d).

\(^{43}\) U.C.C. § 8-302(a).

\(^{44}\) U.C.C. § 8-303(b). An “adverse claim” to a security is a property interest in the security that would be violated if someone other than the holder of that property interest were to hold, transfer, or deal with the security. U.C.C. § 8-102(a)(1). For example, if a person owns a security and transfers it to a buyer, and a third person has an existing property interest in the security (such as a security interest), but consents to the transfer, the claim is not an “adverse claim” for this purpose because the transfer would not “violate” the rights of the third person (who consented to the transfer). If the claim with respect to the security is limited to a claim for breach of contract, an “adverse claim” may not exist because the claim is not a property interest in the security. See generally U.C.C. § 8-105 cmt. 2.

\(^{45}\) If federal law creates a property right in a security in favor of a third person, even a protected purchaser will not necessarily, in the absence of protection under federal law, acquire its interest free of that adverse claim because Article 8, as state law, cannot override federal law. See, e.g., Civil Asset Forfeiture Reform Act of 2000 (“CAFRA”), 18 U.S.C. §§ 981–987 (2006). CAFRA does, however, provide an “innocent owner” defense that is similar to the defense that Article 8 provides to a protected
To be a “protected purchaser” of a security, a buyer is required to:

(i) give value,

(ii) not have notice of any adverse claim to the security, and

(iii) obtain “control” of the security.

In a secondary sale, a buyer of a certificated security obtains “control” of the security if the certificate has been delivered to the buyer and indorsed to the buyer or in blank pursuant to an effective indorsement. A buyer of an uncertificated security typically obtains “control” of the security by having the security registered in its name on the records of the issuer.

See 18 U.S.C. § 983(d). A request for an opinion concerning the status of an acquirer as an “innocent owner” would not be appropriate because of the highly factual nature of the issue.

Even though an opinion letter may state in its coverage limitation that it covers federal law, as a matter of customary practice, secondary sale opinions are understood to address the possibility of the acquirer’s being subject to adverse claims that are brought only under state law. See text accompanying infra notes 76 and 77; see generally TriBar 1998 Report, supra note 5, § 3.5.2(c), at 629–30. The Committee recommends that for clarity the possibility of adverse claims being brought under federal law be expressly excluded from the secondary sale opinion either by limiting the coverage of the opinion to Article 8 (see text accompanying infra note 147) or by the wording of the opinion itself (see, e.g., text accompanying infra notes 163 and 164). In addition to the possible application of federal law, other state statutes may limit the protection Article 8 provides against adverse claims. E.g., N.Y. Tax Law §§ 270–281 (McKinney 2008) (limitations on transfer of stock certificates arising from failure to pay transfer tax).

46. U.C.C. § 8-303.

47. U.C.C. § 1-204 defines “value” to include any consideration sufficient to support a simple contract. A securities intermediary that receives a security or acquires a security entitlement is generally treated as having given value for this purpose as a matter of law. U.C.C. § 8-116.

48. “Notice of an adverse claim” has a specialized meaning in Article 8. The phrase includes a circumstance where a buyer “is aware of facts sufficient to indicate that there is a significant probability that the adverse claim exists and deliberately avoids information that would establish the existence of the adverse claim,” as well as actual knowledge of the adverse claim. U.C.C. § 8-105(a)(2). The term also includes situations where the buyer has a statutory or regulatory duty to investigate whether an adverse claim exists and the investigation would establish the existence of the adverse claim. U.C.C. § 8-105(a)(3). The filing of a financing statement under Article 9 does not of itself give “notice of an adverse claim” (i.e., the secured party’s security interest). U.C.C. §§ 8-105(e), 9-331(c). See supra notes 23 (for the meaning of “notice of an adverse claim”) and 44 (for the meaning of “adverse claim,” including when a security interest or other property interest might not be an adverse claim). But see supra note 26 (for a contrary result under non-uniform New York law with respect to shares of a real estate cooperative).

49. A protected purchaser does not have to purchase in “good faith.” U.C.C. § 8-303 cmt. 4. However, concepts similar to the absence of good faith are part of the definition of “notice of an adverse claim.” See U.C.C. §§ 8-102 cmt. 10, 8-105; see also supra notes 23 and 48.

50. The security does not have to be registered in the name of the buyer.

51. U.C.C. § 8-107 describes the requirements for an effective indorsement. The indorsement may be on the security certificate itself or on a separate stock power. U.C.C. § 8-102(a)(ii). A buyer also may have control of a certificated security if the security is registered in the buyer’s name, even if the indorsement is not effective. U.C.C. § 8-106(b)(2).

52. U.C.C. § 8-106(c). See infra note 96.
2.4. INDIRECT HOLDINGS

2.4.1. Security Entitlement

When the beneficial owner of a security does not hold the security directly, typically a “top-tier”53 securities intermediary54 is the direct holder of the security and the beneficial owner is the holder of a security entitlement.55 Article 8 refers to a person holding a security entitlement as the “entitlement holder.”56 An entitlement holder has no direct rights under Article 8 against the issuer of the security.

A security entitlement is created in favor of an entitlement holder when, among other methods, a securities intermediary indicates by book entry that a security or security entitlement has been credited to the entitlement holder’s securities account.57 The failure of the securities intermediary to maintain sufficient securities (or security entitlements) has no effect on the existence of the security entitlement itself as between the entitlement holder and the securities intermediary. It also has no effect on the rights the security entitlement affords the entitlement holder under Article 8.58

In a secondary sale where the seller holds a security entitlement, the acquirer does not acquire the seller’s security entitlement. Rather, the acquirer acquires a different security entitlement from the acquirer’s securities intermediary (even if

53. DTC typically is the top-tier securities intermediary for publicly traded securities (particularly equity securities) of United States non-governmental issuers. DTC is a limited-purpose trust company under New York law and is a registered clearing agency under section 17 of the Securities Exchange Act of 1934. DTC establishes accounts for securities brokers and banks that are participants in DTC and credits securities to their accounts. Each participant usually holds positions at DTC on behalf of other securities brokers, banks, and investors, as well as on its own behalf. Because DTC is the top-tier securities intermediary in many transactions involving indirectly held securities, particularly equity securities, for convenience references in this report to DTC should be read to apply to any securities intermediary in whose name a security is registered. The U.C.C. does not require that the top-tier securities intermediary be DTC or that an interest in securities be held through a top-tier securities intermediary.

54. Securities intermediaries in between the top-tier securities intermediary and the entitlement holder are typically referred to as being “above” the ultimate entitlement holder and “below” the top-tier securities intermediary.

55. A “security entitlement” comprises “the rights and property interest of an entitlement holder with respect to a financial asset specified in Part 5 [of Article 8].” U.C.C. § 8-102(a)(17). A security is always a “financial asset.” U.C.C. §§ 8-102(a)(9)(i). A share of a corporation normally is a “security” and therefore a “financial asset.” See supra note 26; U.C.C. §§ 8-102(a)(9)(i), 8-103(a). In addition to the property described in supra note 26, “financial asset” includes any other property held by a securities intermediary for another person where the securities intermediary has agreed with that person to treat the property or type of property as a financial asset. U.C.C. § 8-102(a)(9)(iii).

56. U.C.C. § 8-102(a)(7).

57. A security entitlement comes into existence in some circumstances even if the securities intermediary does not, in fact, credit the securities or security entitlements to the entitlement holder’s securities account. U.C.C. § 8-501(b)(2) & (3).

58. U.C.C. §§ 8-501(c), 8-503 to -508. Of course, the securities intermediary’s failure to maintain the required securities or security entitlements would likely diminish the value and effectiveness of the remedies available to the entitlement holder under Article 8 and other law. See infra note 71. Generally, an entitlement holder may assert its rights only against the securities intermediary—i.e., the securities intermediary through which it holds a security entitlement—and not against the issuer or any “higher-tier” securities intermediary. U.C.C. § 8-503(c).
the acquirer’s securities intermediary is the same as the seller’s). 59 Thus, Article 8 does not refer to the acquirer’s “purchasing” or “buying” a security entitlement from the seller, because that might suggest that the acquirer is acquiring the same security entitlement that the seller had. 60 Rather, the acquirer “acquires” a different item of property, i.e., a new security entitlement, from the acquirer’s immediate securities intermediary.

The security entitlement provides the acquirer a “package of personal rights against the securities intermediary and an interest in property held by the securities intermediary,” but not “a specific property interest in any financial asset held by the securities intermediary.” 61 The acquirer of a security entitlement has

(i) an undivided property interest in all of the securities or security entitlements of the same type held by the securities intermediary, 62

(ii) the right to require the securities intermediary to satisfy its obligation to maintain securities and security entitlements with respect to a specified type of security in an aggregate amount sufficient to cover all security entitlements established by the securities intermediary with respect to that security, 63 and

(iii) the right to receive from the securities intermediary the amount of those securities that has been credited to the account of the entitlement holder. 64

An entitlement holder has these rights only against its securities intermediary. These rights may be subject to a securities account agreement. 65

A securities intermediary may or may not be a DTC participant. If it is not, its holdings will be reflected in the records of the securities intermediary or intermediaries through which it has access to DTC. Other than DTC (or another top-tier intermediary), all holders in the chain have indirect holdings.

59. U.C.C. § 8-502 cmt. 2 (“B’s [acquirer’s] security entitlement is not the same item of property that formerly was held by S [seller], it is a new package of rights that B acquired against Baker [acquirer’s securities intermediary] under Section 8-501.”); see also Article 8, Prefatory Note, III.C.1 (“Note that the broker or bank’s custodian is both an entitlement holder and a securities intermediary—but is so with respect to different security entitlements. For purposes of Article 8 analysis, the customer’s security entitlement against the broker or bank custodian is a different item of property from the security entitlement of the broker or bank custodian against the clearing corporation.”).

60. Nevertheless, the relevant transaction documents typically refer to a sale of the “Shares.”

61. U.C.C. § 8-102 cmt. 17.

62. An acquirer shares this interest with other entitlement holders that have security entitlements with respect to the same type of securities credited to their securities accounts with the same securities intermediary. U.C.C. § 8-503.

63. U.C.C. § 8-504. Subject to various limitations, some obligations of the securities intermediary, including this one, are often modified by an agreement with the holder of the security entitlement established by the securities intermediary.

64. The entitlement holder has certain additional rights as well. See U.C.C. §§ 8-504–508.

65. The terms of the agreement may be relevant to choice-of-law issues. See infra note 78. In addition, the agreement may establish the range of property held by the securities intermediary for the account holder that the securities intermediary has agreed to treat as a “financial asset,” thereby establishing a security entitlement with respect to that property. See supra note 26.
2.4.2. Assertion of Adverse Claims

Although the acquirer acquires a new security entitlement,\(^{66}\) that security entitlement could be traceable under equitable principles outside of Article 8\(^{67}\) to the security or security entitlement held by the seller prior to the sale. Consequently, an adverse claimant to the seller’s security or security entitlement might be able to assert its adverse claim against the acquirer’s security entitlement.\(^{68}\)

Section 8-502 of the U.C.C. does not allow the assertion against the acquirer of an adverse claim based on any financial asset where the acquirer gave value and did not have notice of the adverse claim\(^{69}\):

> [a]n action based on an adverse claim to a financial asset . . . may not be asserted against a person who acquires a security entitlement under Section 8-501 for value and without notice of the adverse claim.\(^{70}\)

2.4.3. The Two-Step Transaction Involving the Seller and the Acquirer

When a seller delivers a security to a top-tier securities intermediary, such as DTC, and the securities intermediary credits the security on its records to the account of an underwriter (or other securities account holder at the top-tier securities intermediary), that top-tier securities intermediary is then the only direct holder of the security and is the only person eligible to be a protected purchaser of the security. The underwriter (or other DTC securities account holder) does not buy the security but, as discussed above, acquires a security entitlement with respect to the quantity and type (i.e., the class or series) of security credited (or

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66. See supra note 59.
67. Article 8 does not provide for tracing of a property interest. The existence and applicability of tracing, if it exists at all, would be determined by non-U.C.C. law. U.C.C. § 8-502 cmt. 2.
68. See supra note 67. A detailed example is given in the first two paragraphs of Comment 2 to U.C.C. § 8-502.
69. U.C.C. § 8-502. Unlike a buyer of a security, an entitlement holder is not required under U.C.C. § 8-502 to have “control” of the security entitlement to be protected against adverse claims. However, the requirement in U.C.C. § 8-502 that the entitlement holder “acquire” the security entitlement under U.C.C. § 8-501 in effect imposes the same criteria to determine whether an acquirer has acquired a security entitlement as does U.C.C. § 8-106(d) to determine whether an acquirer has acquired “control” of a security entitlement. Another provision of Article 8, U.C.C. § 8-510(a), provides similar protection when a transferor of a limited interest in a security entitlement retains ownership of the security entitlement, such as when a borrower grants a security interest in a security entitlement to a secured party and the borrower remains the entitlement holder.
70. U.C.C. § 8-502. The acquirer of a security entitlement is protected from the assertion of a specific adverse claim if the acquirer does not have notice of “the” specific adverse claim (assuming that the acquirer meets the other requirements of U.C.C. § 8-502). Thus, notice of a particular adverse claim does not prevent the acquirer of a security entitlement from being protected from other adverse claims of which the acquirer does not have notice. U.C.C. § 8-502. Unlike an acquirer of a security entitlement, a buyer of a security with notice of any adverse claim takes the security subject to all adverse claims, even if the buyer does not have notice of the other adverse claims. Accordingly, opinions on the rights of a buyer of a security and the rights of an acquirer of a security entitlement are worded differently in the Illustrative Opinion Language. As discussed above, the acquirer may not be shielded by U.C.C. § 8-502 from adverse claims based on certain federal property rights. See supra note 45.
required to be credited) by the top-tier securities intermediary to the underwriter’s or other securities account holder’s securities account at the top-tier securities intermediary. Similarly, when it does not hold the security directly, an acquirer from the underwriter (or other securities intermediary) holds a security entitlement and not the security.

If an acquirer of a security entitlement has no notice of an adverse claim and gives value, Article 8 protects the acquirer from actions based on the adverse claim. This is true even if the claim exists against the rights of the top-tier securities intermediary in the security, the rights of the seller or another securities intermediary in the chain, or the rights of anyone else to whom a property interest in the security might arguably be traced under non-Article 8 law. Thus, for example, if the top-tier securities intermediary, such as DTC, had notice of an adverse claim to a security of the relevant type that had been delivered to it (whether the security involved in the transaction in connection with which the secondary sale opinion is being given or another security of the same type), the top-tier securities intermediary might not be a protected purchaser with respect to that security, but an action based on the adverse claim could not be asserted against the acquirer of a security entitlement unless the acquirer itself had notice of the adverse claim. 71

Because an entitlement holder’s protection from an adverse claim depends only on its lack of notice of the adverse claim and its giving of value, and not on whether DTC or another top-tier securities intermediary is a “protected purchaser” of the security transferred to it, 72 an opinion addressing the rights obtained by the top-tier securities intermediary is superfluous and should not be requested. 73 A secondary

71. The possibility of defects in the rights of DTC or another securities intermediary is an inherent risk of holding a security entitlement rather than holding a security directly. Although U.C.C. § 8-502 provides that an action based on an adverse claim to a financial asset may not be asserted against the acquirer of a security entitlement for value without notice of the adverse claim, U.C.C. § 8-502 does not mean that the pool of financial assets (e.g., the shares of the relevant corporation in which the entitlement holder has a co-property interest) could not be depleted by virtue of that adverse claim. An adverse claim might be asserted against the entitlement holder’s securities intermediary (or a higher-tier securities intermediary) if that securities intermediary does not, itself, qualify for the protections afforded by U.C.C. §§ 8-303 or 8-502. Further, if the top-tier securities intermediary (or a securities intermediary between the top-tier securities intermediary and the acquirer’s immediate securities intermediary) did not hold a sufficient number of shares (or security entitlements with respect to a sufficient number of shares) of the applicable type of security, the acquirer’s property interest as an entitlement holder with respect to those shares—together with the property interests of all other entitlement holders of the top-tier securities intermediary (or the intermediate securities intermediary) regarding that type of security—would, under U.C.C. § 8-503, be limited to a pro rata portion of the shares or security entitlements that the top-tier securities intermediary (or the intermediate securities intermediary) did hold. See supra note 58.

72. Similarly, the protection does not depend on whether an adverse claim may be asserted against any intermediate securities intermediary, and an opinion on that subject would be superfluous.

73. The fact that DTC, for example, was a “protected purchaser” that took free of any adverse claim to the securities involved in a particular transaction, or that an adverse claim could not be asserted against any intermediate securities intermediary, would not give the acquirer of a security entitlement assurance that DTC is, or would subsequently be, a protected purchaser of all like securities it holds or that adverse claims could not be asserted either at the time of the transaction or in the future against
sale opinion on an acquirer's acquisition of a security entitlement addresses only the acquisition of the security entitlement and the acquirer's freedom from actions based on adverse claims. That is so even if the opinion refers expressly to the manner in which the security was transferred from the seller to, for example, DTC (if the seller did not already hold a security entitlement with respect to the security) or expressly assumes that the transfer to DTC occurred. Accordingly, the secondary sale opinion can be given without regard to whether DTC is a protected purchaser (or whether DTC holds the security at all). In addition, it can be given without regard to whether any intermediate securities intermediary acquired its security entitlement without notice of an adverse claim (or whether the intermediate securities intermediary acquired its security entitlement at all). Consequently, the Committee believes that no opinion should be requested on those matters.

2.5. Opinion Limited to Article 8 Issues

An opinion on a secondary sale is understood to cover only the consequences of the transaction under Article 8.74 This limitation on the opinion's coverage excludes from the opinion the effect of all other state and federal laws even if they could affect the rights the acquirer obtains under Article 8. Thus, for example, the secondary sale opinion does not address the possibility that a protected purchaser may not take a security free of an adverse claim that arises under federal law.75

2.6. Which State's U.C.C. Article 8 Applies?

Section 8-110 of the U.C.C. sets forth the rules for determining which jurisdiction's law governs the rights that Article 8 provides to an acquirer of a security or a security entitlement.76 For example, in the case of a certificated security, the

any such intermediate securities intermediary against all like security entitlements that it holds. Nor do the circumstances of the acquisition of a particular security by DTC or security entitlement by an intermediate securities intermediary give the acquirer any assurance that going forward DTC (or any such intermediate securities intermediary) would meet its legal obligation to maintain a sufficient number of similar securities or security entitlements to satisfy all security entitlements with respect to that security. See U.C.C. § 8-502 cmt. 4. The secondary sale opinion does not (and realistically could not) address either the risk of future defects affecting the pool of securities or security entitlements held by a securities intermediary or the risk that the securities intermediary might not maintain sufficient securities or security entitlements. See text accompanying supra note 71.

74. The Illustrative Opinion Language provides appropriate wording.
75. A request for an opinion on these issues is not appropriate. See supra note 45.
76. Article 8 has the following choice-of-law rules:

(i) The local law of the issuer's jurisdiction governs whether an adverse claim can be asserted against a person to whom a security is registered. Usually, the issuer's jurisdiction is the place of the issuer's organization (U.C.C. § 8-110(a)(5));

(ii) The local law of the jurisdiction in which a security certificate is located at the time of delivery governs whether an adverse claim can be asserted against a person to whom the security is delivered (U.C.C. § 8-110(c)); and

(iii) The local law of the securities intermediary's jurisdiction governs the acquisition of a security entitlement from the securities intermediary and whether an adverse claim can be
law of the jurisdiction in which the certificate is physically located at the time of its delivery to the buyer governs the question of whether an adverse claim to that security can be asserted against the buyer.\textsuperscript{77} In the case of a security entitlement, the law of the “securities intermediary’s jurisdiction” governs whether an adverse claim can be asserted against a person who acquires a security entitlement.\textsuperscript{78}

From a practical standpoint, which state’s U.C.C. governs rarely, if ever, matters because no material differences now exist in the versions of Article 8 adopted by the various states.\textsuperscript{79} Many lawyers therefore give secondary sale opinions without considering which state’s U.C.C. actually governs the matters addressed in the opinion. When lawyers give secondary sales opinions without stating in the opinion which state’s law governs the matters being addressed, the U.C.C. of the state whose law is stated to be covered in the opinion letter may or may not, in fact, be the law that actually governs. When it is not, as a matter of customary practice, the opinion is understood as being given as if the matters it addresses were governed by the U.C.C. of the state whose law is covered generally by the opinion letter and not as confirming that the U.C.C. of that state, in fact, governs those matters.

The Committee recommends that, for clarity, lawyers who do not expressly address in the opinion letter the issue of which state’s U.C.C. is applicable to the secondary sale expressly refer in the opinion letter to the “as if” nature of the opinion. The Illustrative Opinion Language provides some drafting suggestions for cases where the law that actually governs the matters addressed by the secondary sale opinion has not been determined by the opinion giver to be the law covered by the opinion letter generally.

Some lawyers address the governing law issue by considering which state’s U.C.C. governs the matters covered by the secondary sale opinion and either: (i) confirm that it is the U.C.C. of a state whose law is generally covered by the opinion letter,\textsuperscript{80} or (ii) if different, expressly address that state’s U.C.C. in the opinion.\textsuperscript{81} When they do, these lawyers typically make express assumptions or

\textsuperscript{77} U.C.C. § 8-110(c).
\textsuperscript{78} U.C.C. § 8-110(b). U.C.C. § 8-110(e) defines “securities intermediary’s jurisdiction.” The securities intermediary and the entitlement holder may specify the “securities intermediary’s jurisdiction” in an agreement. U.C.C. § 8-110(e)(1); see supra notes 63, 65, and 76.
\textsuperscript{79} All states of the United States, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands have adopted Article 8. This report does not address opinions on acquisitions that are not governed by Article 8.
\textsuperscript{80} When the law governing the matters covered by the secondary sale opinion is the law generally covered by the opinion letter, the opinion ordinarily does not state this conclusion.
\textsuperscript{81} When addressing the Article 8 of a state other than the state whose law is generally covered by the opinion letter, these opinions, like similar opinions under U.C.C. Article 9, are customarily based on unofficial compilations of the U.C.C. See TriBar Article 9 Report, supra note 20, at 1.
establish facts that tie into the governing law rules in section 8-110 of the U.C.C.\textsuperscript{82} These assumptions vary depending on whether securities or security entitlements are involved. The Illustrative Opinion Language provides drafting suggestions for those assumptions.

### 3. Factual Basis for Opinions—General

#### 3.1. Ownership of Securities or Security Entitlement Being Sold

A secondary sale opinion on an acquirer’s rights under Article 8 does not depend on the seller’s ownership of the security or security entitlement.\textsuperscript{83} Thus, the opinion giver does not have to base the opinion on an assumption or factual confirmation concerning the seller’s ownership.

#### 3.2. Payment of Purchase Price for a Security or Security Entitlement

Article 8 requires that an acquirer of a security or a security entitlement give “value” to be protected from adverse claims.\textsuperscript{84} Although the giving of value is usually apparent from the context of the transaction, some opinion givers address this requirement by expressly assuming payment\textsuperscript{85} of the purchase price.\textsuperscript{86}

Other opinion givers assume, without so stating, that the closing has or will have occurred according to the transaction documents and that the acquirer (usually the opinion recipient) has or will have performed the acts incident to the closing that it has agreed to perform, including the payment of the purchase price under the transaction documents. Accordingly, including an express assumption regarding payment is not necessary in a typical secondary sale opinion.\textsuperscript{87}

### 4. Matters Specific to Direct Holdings

#### 4.1. Facts

Security. Article 8 applies to a purchase of a directly held interest only if what is being purchased are “securities.”\textsuperscript{88} If what is being purchased are shares in a

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\textsuperscript{82} If an opinion were to be given on what law governs, the opinion preparers would have to confirm the relevant facts (e.g., the location of a certificated security at the time of delivery) or make assumptions concerning those facts.

\textsuperscript{83} See text accompanying supra note 73.

\textsuperscript{84} U.C.C. §§ 8-303(a)(1), 8-502.

\textsuperscript{85} “Give” is the verb used in Article 8 to refer to the transfer of value. Secondary sale opinions commonly refer to “payment,” rather than “giving value.” U.C.C. § 8-303(a)(1). An acquirer who pays the purchase price to acquire a security or security entitlement has given value for purposes of U.C.C. §§ 8-303(a)(1) or 8-502, as applicable.

\textsuperscript{86} The Illustrative Opinion Language provides drafting suggestions.

\textsuperscript{87} TriBar 1998 Report, supra note 5, § 2.3(a), at 615; TriBar Article 9 Report, supra note 20, § 3.3(b), at 1467.

\textsuperscript{88} U.C.C. § 8-102.
corporation, an express assumption that the shares being purchased are “securities” subject to Article 8 is normally not necessary because under Article 8 shares issued by a corporation are usually “securities.”

**Delivery.** When the security being sold is certificated, a secondary sale opinion requires (among other things) “delivery” of the security to the buyer. The buyer (or another person that is acting on the buyer’s behalf and is not acting as a securities intermediary) normally takes physical possession of the certificate. If the opinion preparers do not attend the closing and thus have not observed for themselves that the buyer has obtained physical possession of the certificate, they sometimes include an express assumption in the opinion letter that the certificate has been delivered to the buyer or that the buyer has obtained possession of the certificate.

An opinion on the purchase of an uncertificated security also requires “delivery” of the security to the buyer. Delivery of an uncertificated security is accomplished by registering the buyer (or another person that is acting on the buyer’s behalf and is not acting as a securities intermediary) as owner of the security on the issuer’s records. The opinion preparers can rely on a certificate from the issuer or its transfer agent confirming the registration of transfer, assume that the registration has been effected, or state in the opinion that its conclusions apply “upon registration” of the security in the name of the buyer. The opinion preparers may need to take into consideration the different choice-of-law rules applicable to uncertificated, as opposed to certificated, securities.

**Control.** An opinion that the buyer is acquiring the security free of adverse claims requires that the buyer have “control” of the security. For a buyer to obtain “control” of a certificated security, the certificate must have been indorsed by an

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89. The secondary sale opinion does not address the possibility that shares are not “securities” because they were not validly issued. See Bankhaus Hermann Lampe KG v. Mercantile Safe Deposit & Trust Co., 466 F. Supp. 1133 (S.D.N.Y. 1979). Rather, the opinion is given on the basis that the shares were validly issued. If, however, the interest being purchased is not shares of a corporation, the opinion preparers will have to consider whether they are “securities” for purposes of Article 8. See supra note 26 for a discussion of when an interest in a limited partnership or a limited liability company is a “security” and of the narrow circumstances in which courts have not applied the rule that a corporate share is a “security.”

90. U.C.C. § 8-301(a).

91. “Delivery” is defined in U.C.C. § 8-301. One might argue that because the term “delivery” has a technical meaning under the U.C.C., its use in such an assumption assumes the legal conclusion being expressed by the secondary sale opinion and therefore is inappropriate. TriBar 1998 Report, supra note 5, § 2.2.1(b), at 611–12. However, in a secondary sale opinion, use of the term “delivery” in this assumption is well established and in that context the term is understood to cover only the buyer’s obtaining physical possession of the share certificates and not the other matters included in the U.C.C. definition.

92. The Illustrative Opinion Language provides drafting suggestions. The opinion preparers also may be comfortable giving the opinion without an express assumption where they have satisfied themselves that the buyer has obtained possession of the certificate, such as by attending the closing or receiving assurances from the buyer’s counsel that counsel is holding the certificate for the buyer. TriBar 1998 Report, supra note 5, § 2.2.1(d)(iii), at 613.

93. U.C.C. § 8-301(b).

94. See supra note 76.

95. U.C.C. § 8-106(b)(1).
“appropriate person” in blank or to the buyer. An “appropriate person” is the person named on the certificate. If the person named on the certificate is a natural person, the opinion preparers can rely on their personal familiarity with the person or assume that the certificate has been effectively indorsed. If the person named is an entity, the opinion preparers customarily assume an effective indorsement or rely on the types of resolutions and certificates they would rely on when giving an opinion on the execution and delivery of an agreement.

When a security is uncertificated, “control” is accomplished by delivery, which occurs when the buyer (or another person that is acting on the buyer’s behalf and is not acting as a securities intermediary) is registered as the owner of the security on the books of the issuer.

Notice of adverse claim to security. To be protected from all adverse claims under Article 8, a buyer of a security cannot have notice of any adverse claim. Because this is a factual matter, opinion givers ordinarily should expressly assume that the buyer does not have that notice.

4.2. Content of the Opinion

Once the facts have been established, the opinion giver can give an opinion that the buyer is a protected purchaser without any reference to the fact that the buyer is acquiring the securities free of adverse claims. Because the legal effect of protected purchaser status flows automatically under Article 8, the opinion may be stated as follows in its simplest form:

[Name of buyer] [will be] [is] a protected purchaser of the [Shares].

However, for the sake of completeness, some opinion givers include the effect of the buyer’s status as a protected purchaser, i.e., freedom from adverse claims.

96. U.C.C. § 8-107. The indorsement may be on the certificate itself, or on a stock power or similar document. U.C.C. § 8-102(a)(11). These matters are often addressed in the opinion by an assumption.

97. U.C.C. § 8-107(a)(1).


99. U.C.C. § 8-106(c)(1).

100. U.C.C. § 8-301(b). Opinions often address these matters through use of an assumption. The law that governs this issue will be the law of the jurisdiction under whose law the issuer is organized. U.C.C. § 8-110(d); see supra note 76.

101. When the acquirer is part of a group of acquirers (as in an underwritten offering), the law of agency likely governs whether notice to one member of the group is treated as notice to other members. See U.C.C. § 1-103(b) (law of agency applies to transactions governed by the U.C.C., except to the extent the law of agency is “displaced” by a “particular provision” of the U.C.C.); Restatement (Third) of Agency § 5.02(i) & illus. 2 (2006) (An agreement between an agent and its principal that notice to the agent will not be attributed to the principal might not be effective against a third party if the agent has apparent authority to receive the notice.); id. § 5.03 (when notice to agent is imputed to principal). Usually, opinion givers expressly assume that none of the members of the group has notice of an adverse claim. When the acquirer is a group, the secondary sale opinion ordinarily addresses the rights acquired by the members of the group and not just the rights acquired by their agent.

102. See supra note 70.

103. The Illustrative Opinion Language provides drafting suggestions.
Other opinion givers state only that the buyer has acquired the security free of adverse claims without stating that the buyer is a protected purchaser, which is the basis for that opinion. 104

If the opinion letter does not include a statement limiting the secondary sale opinion to the effect of Article 8 and the opinion goes beyond stating that the buyer is a protected purchaser, for clarity 105 the opinion preparers should consider adding language to address the possibility of an adverse claim under federal law. 106 If the opinion states only that the buyer is a protected purchaser, but does not expressly address adverse claims, a statement limiting the opinion to Article 8 or excluding adverse claims arising under federal law would not be necessary because the opinion that the buyer is a “protected purchaser” by its terms means only that the buyer has the rights of a protected purchaser under Article 8.

5. Matters Specific to Indirect Holdings

5.1. Facts

Security entitlement. Part 5 of Article 8 collects the rules that apply when a person acquires a security entitlement. A security entitlement is generally established when a security or other financial asset has been credited to a securities account. 107 Therefore, an opinion on a security entitlement with respect to shares of a corporation requires the opinion giver to confirm or assume that the securities intermediary has credited the securities to the acquirer’s securities account.

Financial asset. An assumption that corporate shares are a “financial asset” usually is not necessary because shares in a corporation ordinarily are “securities” 108 and therefore by definition are “financial assets.” 109

Crediting to securities account. As a matter of customary practice, when giving an opinion on a security entitlement, an opinion giver is entitled to assume without stating that (i) the person creating the security entitlement is a securities intermediary, 110 (ii) the securities intermediary has credited the securities

104. The Illustrative Opinion Language provides drafting suggestions for these alternatives. Each of the approaches should be acceptable. As previously discussed, the opinion giver should not be asked to give an opinion on the seller’s ownership of the securities being sold. See text accompanying supra note 16.

105. As a matter of customary practice, an opinion on adverse claims is understood not to address adverse claims that might arise under federal law. Thus, even if an opinion letter states that it is covering federal law, it is understood not to cover federal law on this issue. See supra note 45 and text accompanying supra notes 74 and 75.

106. The Illustrative Opinion Language provides drafting suggestions.


109. In rare circumstances shares may not be securities. See supra note 26. If the subject of a secondary sale opinion is not shares of a corporation or a security entitlement with respect to shares of a corporation, the opinion preparers should establish the facts necessary to support the conclusion that the interest is subject to Article 8 (either as a security or as a financial asset) or base the opinion on an assumption to that effect.

110. See text accompanying supra note 30.
or security entitlements to the securities account of the acquirer, 111 and (iii) the securities or security entitlements are held by the securities intermediary in its name and not in the entitlement holder's name. 112

Notice of adverse claim. To be protected from an adverse claim under Article 8, an acquirer 113 of a security entitlement cannot have notice of the adverse claim. 114 Because this is a factual matter, opinion givers ordinarily should expressly assume that the acquirer does not have that notice. 115

5.2. CONTENT OF THE OPINION

Like the opinion on the rights of a buyer of a security, the opinion on the rights of an acquirer of a security entitlement does not address the seller's ownership of a security entitlement (or the security to which it relates). 116 A form of opinion that closely tracks the language of Article 8 may be stated in its simplest form as follows:

[Name of acquirer] has acquired a security entitlement with respect to [insert number] of securities [describe type] and, if [name of acquirer] does not have notice of any adverse claim to a financial asset 118 to which the security entitlement relates, no

111. See U.C.C. § 8-501(d). Some opinion givers state this assumption expressly. Drafting suggestions are included in the Illustrative Opinion Language. When a seller “sells” a security entitlement, the seller communicates an entitlement order to its own securities intermediary directing that securities intermediary to cause corresponding shares or security entitlements to be credited to the acquirer’s securities intermediary with instructions that they are for the credit of the acquirer. The crediting to the securities account of the acquirer has the effect of establishing a new security entitlement in favor of the acquirer. The seller’s securities intermediary also debits the securities account of the seller, which has the effect of reducing the seller’s security entitlement by the amount sold. If the seller and the acquirer have the same securities intermediary, these debits and credits are made internally at the securities intermediary. If the seller and acquirer have different securities intermediaries, debits and credits to the securities accounts of the two securities intermediaries ordinarily will be made at one or more higher-tier securities intermediaries. U.C.C. §§ 8-102(a)(8) & cmt. 8, 8-107(a)(3); see supra note 59.

112. If the acquirer’s securities intermediary holds a security (or other financial asset) in the acquirer’s name, then the securities intermediary is not acting in the capacity of a securities intermediary and the acquirer does not hold a security entitlement. See U.C.C. §§ 8-301(a)(3), 8-501(d).

113. When the acquirer is part of a group of acquirers (as in an underwritten offering), the question of whether one group member’s notice is attributed to other members of the group would likely be addressed by the law of agency. See supra note 101.

114. See supra note 70.

115. The Illustrative Opinion Language provides drafting suggestions.

116. See text accompanying supra note 16.

117. The opinion may also be stated by reference to “any” adverse claim as follows:

[Name of acquirer] has acquired a security entitlement with respect to [insert number] of securities [describe type] and, if [name of acquirer] does not have notice of any adverse claim to any financial asset, no action based on an adverse claim may be asserted against [name of acquirer] with respect to the security entitlement.

118. The reference to a “financial asset” refers to any security or security entitlement to which the acquirer’s interest might be traced under non-Article 8 law. See supra note 67. As noted above, under Article 8 an entitlement holder that holds a security entitlement with respect to a particular type of security does not have a traceable property interest in any particular security or security entitlement of that type held by its securities intermediary or any securities intermediary higher in the chain. Rather, the entitlement holder holds, among other things, a co-property interest in all of the securities and
action based on the adverse claim\textsuperscript{119} may be asserted\textsuperscript{120} against [name of acquirer] with respect to the security entitlement.\textsuperscript{121}

This opinion is worded generally and states that no claim based on an adverse claim to “a” financial asset can be asserted against a person acquiring the security entitlement, because: (i) the security entitlement does not relate to a specific security, and (ii) in theory an adverse claim to any security or security entitlement of the same type could be traced under non-Article 8 law to the acquirer’s security entitlement.\textsuperscript{122}

Many opinion givers and opinion recipients are not familiar with references to a “financial asset.” As a result, the portion of the opinion that deals with notice of adverse claims is often expressed in terms of the securities or security entitlement held by the seller prior to the sale without reference to “financial assets.” An example of opinion language taking this approach might read as follows:

[Name of acquirer] has acquired a security entitlement with respect to [insert number] of securities [describe type] and, if [name of acquirer] does not have notice of any adverse claim to the [Shares]\textsuperscript{124}, no action based on the adverse claim may be asserted against [name of acquirer] with respect to the security entitlement.

Many opinion recipients find a specific reference to the “Shares” more understandable than a general reference to “financial assets” and opinion recipients have often accepted opinions that refer to the “Shares.” These recipients are primarily

security entitlements of that type held by the securities intermediary, together with all other entitlement holders with security entitlements with respect to that security credited to securities accounts with the same securities intermediary. See supra note 58. Even though an entitlement holder has a co-property interest, a claim cannot be asserted against its security entitlement on the basis of an adverse claim to the co-property interest of another entitlement holder. See supra note 71.

\textsuperscript{119} Some opinions add the words: “, whether framed in conversion, replevin, constructive trust, equitable lien or other theory.” These words (which appear in U.C.C. § 8-502), while unobjectionable, are not necessary.

\textsuperscript{120} Some opinion givers state in their opinions that an adverse claim may not be “successfully” asserted. The word “successfully” is not in Article 8 and is not necessary. Article 8 uses the word “asserted” to exclude adverse claims that are unsuccessful. See U.C.C. § 8-502 cmt. 1.

\textsuperscript{121} Unlike a person who buys securities directly, the acquirer of a security entitlement should not be referred to as a “protected purchaser.” Under Article 8 the concept of a “protected purchaser” does not apply to the acquirer of a security entitlement. U.C.C. § 8-502 cmt. 1; see text accompanying supra note 60. If the acquirer of a security entitlement has given value and has no notice of an adverse claim, the adverse claim could not be asserted against the acquirer even if it could be asserted against a securities intermediary above the acquirer (because, for example, the securities intermediary had notice of the adverse claim). The fact that an adverse claim might be asserted against such a securities intermediary could, however, dilute the pool of assets held by the securities intermediary in which the acquirer has a co-property interest on account of its security entitlement. See supra note 71.

\textsuperscript{122} See supra note 67.

\textsuperscript{123} The opinion may also be stated by reference to “any” adverse claim as follows:

[Name of acquirer] has acquired a security entitlement with respect to [insert number] of securities [describe type] and, if [name of acquirer] does not have notice of any adverse claim to the Shares, no action based on an adverse claim to the Shares may be asserted against [name of acquirer] with respect to the security entitlement.

\textsuperscript{124} The reference to “Shares” would be based on a defined term in the transaction documents. See supra note 25.
concerned about the risk that defects in the seller’s ownership might be asserted against them and find a reference to the “Shares” adequate to address that concern.

The term used in the transaction documents to refer to the particular securities or security entitlement being sold (e.g., the “Shares”) is also often used in the opinion to refer to the securities and to describe the security entitlement that the acquirer acquires. This practice is well established and, if the opinion uses the contractually defined term to describe the security entitlement acquired, it should be understood in this context to refer to the specified quantity and type (i.e., class or series) of such securities and security entitlement (if any) and not to imply that the acquirer acquires a traceable property interest in the shares or security entitlement that the seller previously held.

6. Conclusion

A secondary sale opinion is based on particular facts that typically are assumed in the opinion or implied. The most important of these are the acquirer’s giving of value and its lack of notice of adverse claims. The legal conclusions that flow from these facts permit lawyers to give an opinion that the acquirer is acquiring the security or security entitlement without being subject to adverse claims. The lawyers can do so without having to determine whether the seller had title to or another interest in the security or security entitlement.

The facts on which a secondary sale opinion is based are at least as apparent to the acquirer (or its counsel) as they are to the opinion giver and are typically assumed by the opinion giver. Additionally, Article 8 is the same for all practical purposes in every state.125 As a result, before requesting this opinion, recipients should consider whether it adds sufficient value to justify the time and expense involved in preparing it.126

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125. If the transaction involves a jurisdiction in which Article 8 is not in effect, different considerations will apply. See supra note 79.

126. See text accompanying supra note 6.
APPENDIX A—LIST OF TERMS

[adverse claim]

“Adverse claim” means a claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant for another person to hold, transfer, or deal with the financial asset.\(^{128}\)

[appropriate person]

“Appropriate person” means:

(1) with respect to an indorsement, the person specified by a security certificate or by an effective special indorsement to be entitled to the security;

(2) with respect to an instruction, the registered owner of an uncertificated security;

(3) with respect to an entitlement order, the entitlement holder;

(4) if the person designated in paragraph (1), (2), or (3) is deceased, the designated person’s successor taking under other law or the designated person’s personal representative acting for the estate of the decedent; or

(5) if the person designated in paragraph (1), (2), or (3) lacks capacity, the designated person’s guardian, conservator, or other similar representative who has power under other law to transfer the security or financial asset.\(^{129}\)

[certificated security]

“Certificated security” means a security that is represented by a certificate.\(^{130}\)

[control]

(a) A purchaser has “control” of a certificated security in bearer form if the certificated security is delivered to the purchaser.

(b) A purchaser has “control” of a certificated security in registered form if the certificated security is delivered to the purchaser, and:

(1) the certificate is indorsed to the purchaser or in blank by an effective indorsement; or

(2) the certificate is registered in the name of the purchaser, upon original issue or registration of transfer by the issuer.

(c) A purchaser has “control” of an uncertificated security if:

(1) the uncertificated security is delivered to the purchaser; or

(2) the issuer has agreed that it will comply with instructions originated by the purchaser without further consent by the registered owner.

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\(^{127}\) For ease of reference, the defined terms have been italicized. They are not italicized in the text of Article 1 or 8. The footnotes in this Appendix A do not appear in Article 1 or 8.

\(^{128}\) U.C.C. § 8-102(a)(1).

\(^{129}\) Id. § 8-107(a).

\(^{130}\) Id. § 8-102(a)(4).
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(d) A purchaser has “control” of a security entitlement if:

(1) the purchaser becomes the entitlement holder; or

(2) the securities intermediary has agreed that it will comply with entitlement orders originated by the purchaser without further consent by the entitlement holder.

(e) If an interest in a security entitlement is granted by the entitlement holder to the entitlement holder’s own securities intermediary, the securities intermediary has control. 131

[delivery]

(a) Delivery of a certificated security to a purchaser occurs when:

(1) the purchaser acquires possession of the security certificate;

(2) another person, other than a securities intermediary, either acquires possession of the security certificate on behalf of the purchaser or, having previously acquired possession of the certificate, acknowledges that it holds for the purchaser; or

(3) a securities intermediary acting on behalf of the purchaser acquires possession of the security certificate, only if the certificate is in registered form and is (i) registered in the name of the purchaser, (ii) payable to the order of the purchaser, or (iii) specially indorsed to the purchaser by an effective indorsement and has not been indorsed to the securities intermediary or in blank.

(b) Delivery of an uncertificated security to a purchaser occurs when:

(1) the issuer registers the purchaser as the registered owner, upon original issue or registration of transfer; or

(2) another person, other than a securities intermediary, either becomes the registered owner of the uncertificated security on behalf of the purchaser or, having previously become the registered owner, acknowledges that it holds for the purchaser. 132

[effective]

An indorsement, instruction, or entitlement order is effective if:

(1) it is made by the appropriate person;

(2) it is made by a person who has power under the law of agency to transfer the security or financial asset on behalf of the appropriate person, including, in the case of an instruction or entitlement order, a person who has control under Section 8-106(c)(2) or (d)(2); or

(3) the appropriate person has ratified it or is otherwise precluded from asserting its ineffectiveness. 133

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131. Id. § 8-106.
132. Id. § 8-301.
133. Id. § 8-107(b).
**entitlement holder**

“Entitlement holder” means a person identified in the records of a securities intermediary as the person having a security entitlement against the securities intermediary. If a person acquires a security entitlement by virtue of Section 8-501(b)(2) or (3), that person is the entitlement holder.\(^\text{134}\)

**financial asset**

“Financial asset,” except as otherwise provided in Section 8-103, means:

(i) a security;

(ii) an obligation of a person or a share, participation, or other interest in a person or in property or an enterprise of a person, which is, or is of a type dealt in or traded on financial markets, or which is recognized in any area in which it is issued or dealt in as a medium for investment; or

(iii) any property that is held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under this Article.

As context requires, the term means either the interest itself or the means by which a person’s claim to it is evidenced, including a certificated or uncertificated security, a security certificate, or a security entitlement.\(^\text{135}\)

**indorsement**

“Indorsement” means a signature that alone or accompanied by other words is made on a security certificate in registered form or on a separate document for the purpose of assigning, transferring, or redeeming the security or granting a power to assign, transfer, or redeem it.\(^\text{136}\)

**notice of an adverse claim**

(a) A person has notice of an adverse claim if:

(1) the person knows of the adverse claim;

(2) the person is aware of facts sufficient to indicate that there is a significant probability that the adverse claim exists and deliberately avoids information that would establish the existence of the adverse claim; or

(3) the person has a duty, imposed by statute or regulation, to investigate whether an adverse claim exists, and the investigation so required would establish the existence of the adverse claim.

(b) Having knowledge that a financial asset or interest therein is or has been transferred by a representative imposes no duty of inquiry into the rightfulness of a transaction and is not notice of an adverse claim. However, a

\(^{134}\) Id. § 8-102(a)(7).

\(^{135}\) Id. § 8-102(a)(9).

\(^{136}\) Id. § 8-102(d)(11).
person who knows that a representative has transferred a financial asset or interest therein in a transaction that is, or whose proceeds are being used, for the individual benefit of the representative or otherwise in breach of duty has notice of an adverse claim.

(c) An act or event that creates a right to immediate performance of the principal obligation represented by a security certificate or sets a date on or after which the certificate is to be presented or surrendered for redemption or exchange does not itself constitute notice of an adverse claim except in the case of a transfer more than:

(1) one year after a date set for presentment or surrender for redemption or exchange; or

(2) six months after a date set for payment of money against presentation or surrender of the certificate, if money was available for payment on that date.

(d) A purchaser of a certificated security has notice of an adverse claim if the security certificate:

(1) whether in bearer or registered form, has been indorsed “for collection” or “for surrender” or for some other purpose not involving transfer; or

(2) is in bearer form and has on it an unambiguous statement that it is the property of a person other than the transferor, but the mere writing of a name on the certificate is not such a statement.

(e) Filing of a financing statement under Article 9 is not notice of an adverse claim to a financial asset. 137

[protected purchaser]

“Protected purchaser” means a purchaser of a certificated or uncertificated security, or an interest therein, who:

(1) gives value;

(2) does not have notice of any adverse claim to the security; and

(3) obtains control of the certificated or uncertificated security. 138

[purchase]

“Purchase” means taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property. 139

[purchaser]

“Purchaser” means a person that takes by purchase. 140

137. Id. § 8-105.
138. Id. § 8-303(a).
139. Id. § 1-102(b)(29).
140. Id. § 1-102(b)(30).
[securities account]

“Securities account” means an account to which a financial asset is or may be credited in accordance with an agreement under which the person maintaining the account undertakes to treat the person for whom the account is maintained as entitled to exercise the rights that comprise the financial asset.\(^{141}\)

[securities intermediary]

“Securities intermediary” means:

(i) a clearing corporation; or

(ii) a person, including a bank or broker, that in the ordinary course of its business maintains securities accounts for others and is acting in that capacity.\(^{142}\)

[security]

“Security,” except as otherwise provided in Section 8-103, means an obligation of an issuer or a share, participation, or other interest in an issuer or in property or an enterprise of an issuer:

(i) which is represented by a security certificate in bearer or registered form, or the transfer of which may be registered upon books maintained for that purpose by or on behalf of the issuer;

(ii) which is one of a class or series or by its terms is divisible into a class or series of shares, participations, interests, or obligations; and

(iii) which:

(A) is, or is of a type, dealt in or traded on securities exchanges or securities markets; or

(B) is a medium for investment and by its terms expressly provides that it is a security governed by this Article.\(^{143}\)

[security—certain obligations]

(a) A share or similar equity interest issued by a corporation, business trust, joint stock company, or similar entity is a security.

. . . .

(c) An interest in a partnership or limited liability company is not a security unless it is dealt in or traded on securities exchanges or in securities markets, its terms expressly provide that it is a security governed by this Article, or it is an investment company security. However, an interest in

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\(^{141}\) Id. § 8-501(a).
\(^{142}\) Id. § 8-102(d)(14).
\(^{143}\) Id. § 8-102(a)(15).
a partnership or limited liability company is a financial asset if it is held in a securities account. 144

[security entitlement]

“Security entitlement” means the rights and property interest of an entitlement holder with respect to a financial asset specified in Part 5. 145

[uncertificated security]

“Uncertificated security” means a security that is not represented by a certificate. 146
APPENDIX B—ILLUSTRATIVE OPINION LANGUAGE

GENERAL STATEMENTS APPLICABLE TO ALL SECONDARY SALE OPINIONS

The opinions expressed in paragraph ___ are limited to the effect of Article 8 of the Uniform Commercial Code 147 of [insert name of state]. 148

The opinions expressed in paragraph ___ are expressed as if Article 8 of the Uniform Commercial Code of [insert name of state] applies to those opinions. 149

All terms that are used in the opinions expressed in paragraph ___ (and the related assumptions) that are (i) defined in the Uniform Commercial Code and (ii) not defined in the [Agreements] 150 have the meanings set forth in Article 8 of the Uniform Commercial Code or in the definitions appearing elsewhere in the Uniform Commercial Code and used in Article 8. 151

BUYER BUYS A CERTIFICATED OR UNCERTIFICATED SECURITY

General Statements

[Include General Statements, above] 152

Assumptions

[Choice of law]

[Name of buyer] is taking possession of the certificate(s) representing the [Shares] in the state of _______. 153

or

147. This statement limits the coverage of the opinion to matters covered by Article 8. See text accompanying supra note 74. If this scope limitation is not included, opinion preparers should use one of the forms of the illustrative opinion provided below that (i) refers to the buyer being a “protected purchaser” (see text following supra note 106), or (ii) expressly limits the opinion to Article 8.

148. If the secondary sale opinion is being given with regard to the law covered by the opinion letter generally, the reference to a state is not necessary. See text accompanying supra note 80.

149. See text accompanying supra note 81. This reference is understood not to include the choice-of-law rules of Article 8. It should be omitted if the opinion preparers have determined which state’s law governs the matters addressed by the secondary sale opinion and that state is the state whose law is covered either by the opinion letter generally or by the secondary sale opinion specifically. See supra note 80.

150. Some opinion preparers may choose to adopt the definitions in the relevant agreements or to adopt those definitions generally, but to have the Article 8 definitions override the definitions of the same terms in the agreements for purposes of the secondary sale opinion. If so, this statement should be modified accordingly. See supra note 25. Some of the Illustrative Opinion Language below refers to “the Shares” on the assumption that the transaction agreements define that term.

151. See Appendix A for a list of Article 8 terms.

152. If the General Statement that limits the coverage of the secondary sale opinion to Article 8 is not included, opinion preparers should use a form of illustrative opinion below that expressly refers to Article 8.

153. To be used for certificated securities. This assumption may be omitted if (i) the opinion is given “as if” the laws of the jurisdiction generally covered by the opinion letter apply to the matters addressed by the secondary sale opinion, or (ii) the opinion preparers have otherwise established where the certificate is physically located at the time that the buyer takes physical possession of it. See supra note 80.
[Name of issuer] of the [Shares] has been incorporated under the laws of the state of _______.

[Notice]

[Name of buyer] does not have notice of any adverse claim to the [Shares].

[Delivery]

The [Shares] have been effectively indorsed to [name of buyer] or in blank. [Name of buyer] has obtained possession of the certificates representing the [Shares].

or

The [Shares] have been registered in the name of [name of buyer].

[Value]

Opinion

[Name of buyer] [will be] [is] a protected purchaser of the [Shares].

or

[Name of buyer] [will acquire] [has acquired] the [Shares] free of any adverse claim.

or

[Name of buyer] [will be] [is] a protected purchaser of the [Shares] and [will acquire] [has acquired] the [Shares] free of any adverse claim.

or

154. To be used for uncertificated securities. This assumption may be omitted if (i) the opinion is given “as if” the laws of the jurisdiction generally covered by the opinion letter apply to the issues addressed by the secondary sale opinion, or (ii) the opinion preparers have otherwise established where the issuer is incorporated. See supra note 80.

155. The assumption that the indorsement is “effective” means that it was made by or on behalf of an “appropriate person.” U.C.C. § 8-107(b).

156. To be used for certificated securities. An alternative would be to begin the opinion with “Upon the indorsement of the [Shares] to the buyer or in blank by an appropriate person . . . .” See supra note 96.

157. To be used for certificated securities. An alternative would be to begin the opinion with “Upon [name of buyer] obtaining possession of the certificate(s) representing the [Shares] . . . .” Other alternatives would be necessary if someone else were taking possession on behalf of the buyer. Opinion givers often draft the assumption to refer to “delivery” of the certificates to the buyer. That phrasing is understood to have the same meaning as the Illustrative Opinion Language. See supra note 91.

158. To be used for uncertificated securities. Alternatives would be to begin the opinion with “Upon the registration of the [Shares] in the name of [name of the buyer] . . . .” or to rely on a certificate from an appropriate person as to registration. Appropriate modifications would be necessary if someone else were holding the securities on behalf of the buyer.

159. Although not required, many opinion givers include the following assumption: “The [name of buyer] has paid the purchase price for the [Shares].” See text accompanying supra note 87. An alternative would be to begin the opinion with “Upon payment by [name of buyer] of the purchase price for the [Shares] . . . .” or to rely on a certificate from an appropriate person as to the payment.

160. This form may be used without a scope limitation. See supra note 106.

161. This form should be used only if a scope limitation that limits the coverage of the secondary sale opinion to Article 8 is included. See text accompanying supra note 147.

162. This form should be used only if a scope limitation that limits the coverage of the secondary sale opinion to Article 8 is included. See text accompanying supra note 147.
[Name of buyer] [will acquire] [has acquired] the [Shares] free of any adverse claim to the extent [name of buyer]'s rights are governed by Article 8 of the Uniform Commercial Code.\(^{163}\)  

or  

[Name of buyer] [will be] [is] a protected purchaser of the [Shares] and [will acquire] [has acquired] the [Shares] free of any adverse claim to the extent the [name of buyer]'s rights are governed by Article 8 of the Uniform Commercial Code.\(^{164}\)

**ACQUIRER ACQUIRES A SECURITY ENTITLEMENT**

**General Statements**

[Include General Statements, above]\(^{165}\)

**Assumptions**

**[Choice of Law]**

The agreement that governs the securities account to which the [Shares have] [security entitlement has] been credited provides that the law of the state of ___ is the securities intermediary’s jurisdiction for purposes of Uniform Commercial Code Article 8.\(^{167}\)  

or  

The securities intermediary’s jurisdiction\(^{168}\) for purposes of Article 8 of the Uniform Commercial Code is the state of ___.\(^{169}\)

**[Notice]\(^{170}\)**

**[Crediting to securities account]**

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\(^{163}\) This form should be used only if a scope limitation that limits the coverage of the secondary sale opinion to Article 8 is not included. If a scope limitation is included, use one of the forms of illustrative opinion above that do not refer to Article 8.

\(^{164}\) This form should be used only if a scope limitation that limits the coverage of the secondary sale opinion to Article 8 is not included. If a scope limitation is included, use one of the forms of illustrative opinion above that do not refer to Article 8.

\(^{165}\) If the General Statement that limits the coverage of the secondary sale opinion to Article 8 is not included, opinion preparers should use a form of illustrative opinion below that expressly refers to Article 8.

\(^{166}\) This refers to the immediate securities intermediary through which the buyer will hold its security entitlement.

\(^{167}\) This assumption may be omitted if (i) the opinion is given “as if” the laws of the jurisdiction generally covered by the opinion letter applied to the issues addressed by the secondary sale opinion, or (ii) the opinion preparers have otherwise established the “securities intermediary’s jurisdiction” with respect to the applicable securities account. See *supra* note 78. The law governing a security entitlement also may be addressed in other ways, but this assumption is often used.

\(^{168}\) See *supra* note 76.

\(^{169}\) See *supra* note 76.

\(^{170}\) The acquirer’s lack of notice of adverse claims to the Shares or any financial assets to which the acquired security entitlement relates is often not phrased as an assumption, but as a condition in the body of the opinion. See text following *supra* note 4.
[Insert number of securities] [describe type] have been credited to [name of acquirer’s] securities account at [securities intermediary].

[Value]

Opinion

[Name of acquirer] has acquired a security entitlement with respect to [insert number] of securities [describe type] and, if [name of acquirer] does not have notice of an adverse claim to the [Shares] [a financial asset to which the security entitlement relates], no action based on the adverse claim may be asserted against [name of acquirer] with respect to the security entitlement.

or

[Name of acquirer] has acquired a security entitlement with respect to [insert number] of securities [describe type] and, if [name of acquirer] does not have notice of an adverse claim to the [Shares] [any financial asset to which the security entitlement relates], no action based on the adverse claim may be asserted against [name of acquirer] with respect to the security entitlement to the extent [name of acquirer]’s rights are governed by Article 8 of the Uniform Commercial Code.

171. Many opinion givers rely on this assumption without stating it. An alternative would be to begin the opinion with “Upon the crediting of the securities to [name of acquirer]’s securities account at [securities intermediary] . . . .”

172. Although not required, many opinion givers include the following assumption: “[Name of acquirer] has paid the purchase price for the [security entitlement] [Shares].” See text accompanying supra note 87. An alternative would be to begin the opinion with “Upon payment by [name of acquirer] of the purchase price for the [Shares] [security entitlement]” or to rely on a certificate from an appropriate person as to the payment.

173. The opinion, whether it refers to “Shares” or “financial assets,” may also refer to “any” adverse claim:

[Name of acquirer] has acquired a security entitlement with respect to [insert number] of securities [describe type] and, if [name of acquirer] does not have notice of any adverse claim to any financial asset to which the security entitlement relates, no action based on an adverse claim may be asserted against [name of acquirer] with respect to the security entitlement.

or

[Name of acquirer] has acquired a security entitlement with respect to [insert number] of securities [describe type] and, if [name of acquirer] does not have notice of any adverse claim to the Shares, no action based on an adverse claim to the Shares may be asserted against [name of acquirer] with respect to the security entitlement.

174. Article 8 does not provide for the tracing of property interests. A reference to “a financial asset to which the security entitlement relates” includes any financial asset that might, under non-Article 8 law, be traced to the acquirer’s security entitlement. See supra section 5.2.

175. This form should be used only if a scope limitation that limits the coverage of the secondary sale opinion to Article 8 is included. See text accompanying supra note 76. If it is not included, use the form of illustrative opinion below, which expressly refers to Article 8.

176. The following form should be used only if a scope limitation that limits the coverage of the secondary sale opinion to Article 8 is not included. If a scope limitation is included, preparers should use the form of illustrative opinion above, which does not refer to Article 8.
APPENDIX C

MEMBERS OF THE TRIBAR OPINION COMMITTEE

New York City Bar
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David A. Brittenham
Douglas R. Davis
Petrina R. Dawson
Gregory A. Fernicola
Linda Hayman
Jerome E. Hyman
B. Robbins Kiessling
John D. Lobrano
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A. Mark Adcock

Pennsylvania Bar Association
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