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APPENDICES:
I. Statement of Opinion Practices
II. ABA Guidelines for the Preparation of Closing Opinions
I. INTRODUCTION

A. Background. This Report grew from the 2010 request of Jim Wheaton, then Chairman of the Virginia Bar Association (“VBA”) Business Law Section Council, to organize a presentation on Third-Party Legal Opinions. Council members, Alison McKee of Kaufman & Canoles and Matt Clary of the Law Offices of Matthew Clary, having substantial experience with opinion practice, volunteered. Contemporaneously, the Virginia State Bar (“VSB”) Business Law Section was seeking speakers for the Spring 2011 Virginia CLE Annual Advanced Business Law Seminar on the topic of legal opinions and contacted Matthew Clary as a potential speaker. Recognizing the dual benefit to both the VBA and the VSB Business Law Sections, Ms. McKee and Mr. Clary prepared a detailed outline on the subject of Negotiating Third-Party Legal Opinions and presented it at the 41st Annual Advanced Business Law Virginia CLE Seminar in March 2011. Building on this foundation, Chairman Wheaton asked Ms. McKee and Mr. Clary to organize and co-chair a committee to explore the potential for publishing a Virginia Report on Third-Party Legal Opinions.

Through the dedicated efforts of Committee members, Mark Jones of Troutman Sanders, David Lay of LeClairRyan, Kim MacLeod of Hunton Andrews Kurth, Charlie Menges of McGuireWoods, Tom O’Brien of Spotts Fain and Jim Wheaton, and the committee’s co-chairs (collectively, the “Committee”), an initial draft of this Report was completed in 2016 and was circulated for comment among Virginia attorneys identified by Committee members as having substantial opinion practice experience. A draft of the Report was presented as a continuing legal education seminar at the 126th VBA Annual Meeting, in Williamsburg in January of 2016.

Lawyers from across the Commonwealth commented on the draft. The Committee considered carefully all comments received and revised the draft as the Committee deemed appropriate. In January, 2018, the Report in revised form was approved by the VBA Business Law Section Council and by the VBA Real Estate Section Council.

B. Purpose of Report. This Report is intended to be a resource and practical guide for Virginia lawyers who render third-party legal opinions on behalf of a client and for lawyers who represent clients receiving third-party legal opinions from Virginia counsel. By examining commonly rendered opinions and their formats and by identifying and discussing the meanings generally ascribed to certain customarily used terms and phrases, the Report encourages a common understanding of regularly stated assumptions, exceptions, qualifications and limitations and the due diligence employed for the rendering of third-party legal opinions in business transactions in Virginia.

The Report is not intended as an exhaustive treatise on opinion practice in Virginia. It does not purport to set mandatory rules or absolute standards with regard to a minimum standard of care in the rendering of third-party legal opinions. The Committee does not intend to create standards higher than those reflected in national reports on legal opinions or to endorse or propose opinion practices that differ materially from those reflected in such national reports; rather, this report attempts to assimilate information set forth in those national reports as applicable in Virginia as a resource for our Commonwealth’s practitioners. Similarly, the examples given in this Report are not intended as the exclusive wording or means of conducting due diligence in connection with the identified opinions. Nevertheless, the Report does describe
certain procedures and investigations that, in the absence of unusual circumstances prompting further inquiry, should be sufficient, consistent with customary practice, to render the specified standard opinions.

The practice of giving legal opinions has evolved and will continue to evolve. As a result, the content of this Report may be updated from time to time. This Report, as updated from time to time, will be posted on the website pages of the VBA Business Law and Real Estate Sections.

C. Customary Practice. An understanding of the role of customary practice in the preparation and understanding of third-party legal opinions is essential for both opinion giver and opinion recipient. This role is well articulated in the Statement of Opinion Practices (the “Statement of Opinion Practices”), a report prepared by a joint committee of the Committee on Legal Opinions of the American Bar Association’s Business Law Section (the “ABA Legal Opinions Committee”) and the Working Group on Legal Opinions Foundation. The Statement of Opinion Practices is still in draft form but is nearing completion and is expected to be approved by numerous bar organizations, at the state and national levels, and published in the ABA’s Business Law Section in the Business Lawyer in 2018. The Statement of Opinion Practices will update in its entirety the Legal Opinion Principles and selected provisions of Guidelines for the Preparation of Closing Opinions, both prepared by ABA Legal Opinions Committee. In view of the importance of the Statement of Opinion Practices as the most recent comprehensive statement of the national consensus on customary opinion practice, a copy of an exposure draft of the Statement of Opinion Practices is reproduced as Appendix I to this Report. However, inasmuch as the Statement of Opinion Practice has not yet been finalized, this Report will continue to reference the ABA Principles and the ABA Guidelines.

Customary practice allows the communication of ideas between the opinion giver and counsel for the opinion recipient without lengthy descriptions of the diligence process, detailed definitions of the terms used, and lengthy recitals of standard, often unstated, assumptions and exceptions. This end result is accomplished by identifying what factual and legal work an opinion giver is expected to perform in order to render the opinion, i.e., what is “customary diligence” and by providing guidance on how certain terms and phrases commonly used in opinions should be understood, sometimes in contrast to the plain meaning of those words and phrases, i.e., what is “customary usage.”

Equally important, customary practice represents a standard by which the conduct of opinion givers will be measured in determining potential liability. In business transactions in which a third-party legal opinion is a condition to closing, the law firm giving the opinion owes a duty of care to the non-client opinion recipient to provide the recipient with an opinion that is fair and objective and that has been prepared with the competence and diligence normally exercised by lawyers in similar circumstances. The opinion operates as an assurance that it is based on legal research and analysis customary and reasonably appropriate for the

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1 53 Bus. Law. 831 (May 1998) [hereinafter ABA Principles].
2 57 Bus. Law. 875 (Feb. 2002) [hereinafter ABA Guidelines].
4 Id. § 95 cmt. c.
5 Id. § 52(1).
circumstances. What is reasonable under the circumstances is determined by the customary practice of lawyers who regularly give and who regularly represent recipients of opinions of the kind involved. To determine liability with respect to a particular opinion, a court must determine what lawyers customarily do to prepare the opinion in question and make a finding as to whether the opinion preparers in the case at bar did what was customary. In this manner, customary practice is recognized as a source of the criteria for determining whether the opinion giver has satisfied its obligations of competence and diligence. In addition to proffering expert witnesses, parties often cite bar association reports, treatises and articles to help establish the applicable customary practice.

II. STATEMENT OF POLICY

This Report identifies assumptions, qualifications, exceptions, limitations and procedures which reflect customary practice for common third-party legal opinions in business transactions in Virginia and elsewhere. Unless otherwise indicated or agreed, an opinion recipient is entitled to assume that the opinion giver has followed customary practice in rendering an opinion. The materials and the Illustrative Opinion Letters provided are for the assistance and guidance of lawyers rendering or receiving opinions relative to Virginia business transactions, recognizing that appropriate modifications may be necessary to accommodate the unique circumstances of each transaction and that the actual language used to express or qualify certain opinions may differ from lawyer to lawyer. Customary practice is nevertheless a starting point for what an opinion giver should consider when giving an opinion. To the extent language from the Report is used, it should be interpreted in accordance with the discussion set forth in the Report.

III. GENERAL CONSIDERATIONS

A. Use of Third-Party Opinion Letters. Due diligence is often cited as the principal reason for requesting opinion letters in business transactions. To be sure, a third-party opinion provides the recipient with the opinion giver’s professional judgment on legal issues concerning the opinion giver’s client, the transaction, or both, that the recipient has determined to be important in connection with the transaction. That opinion, however, addresses only specific legal issues and by design does not cover many legal matters that may bear on a decision to close the transaction. Accordingly, the principal way an opinion recipient satisfies itself about its

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6 Id. § 95 cmt. c.
8 Id. § 1.6.1, at 32 (citing Restatement Governing Lawyers § 95 cmt. a.)
9 See generally Restatement Governing Lawyers, §§ 51, 52, 95. The Restatement treats bar association reports on opinion practice as valuable sources of guidance on customary practice.
10 Glazer, supra note 7, § 1.6.1, at 32.
13 ABA Guidelines, supra note 2, § 1.1.
14 Id. § 1.2, at 876.
legal position is through the general legal advice of its own counsel.\textsuperscript{15} Some of the more common reasons for the preparation and delivery of an opinion letter include the following:\textsuperscript{16}

1. To address whether an intended course of action is lawful or that certain desirable legal consequences will follow from an intended course of action (or, conversely, that certain legal consequences will not result from the proposed course of action);

2. To satisfy contractual requirements—e.g., an opinion given by issuer’s counsel to investors in connection with the sale of securities pursuant to an underwriting agreement or by borrower’s counsel to the lender pursuant to a loan agreement;

3. To satisfy regulatory requirements—e.g., an opinion given in connection with the qualification of securities under the Virginia Securities Act or their registration under the Securities Act of 1933; and

4. To resolve questions raised by other professionals and to provide an authoritative basis for statements, reports and opinions with respect to matters on which other professionals are not qualified to make judgments—e.g., an opinion regarding local law provided to out-of-state counsel.

Although the opinion recipient generally has no affirmative responsibility to conduct due diligence to determine whether an opinion is accurate, it has no right to rely on an opinion if reliance is unreasonable under the circumstances or the opinion is known by the opinion recipient to be false.\textsuperscript{17}

**B. Ethical Considerations.** Because the rendering of a third-party legal opinion inherently embodies the communication of information about the opinion giver’s client to an outside party with interests potentially divergent from the client, many of the Rules of Professional Conduct of applicable jurisdictions are implicated and shape the appropriate conduct of counsel.

1. **Client Consent.**\textsuperscript{18} Rule 2.3 of the Virginia Rules of Professional Conduct (references herein to particular “Rules” are to the Virginia Rules of Professional Conduct unless otherwise noted) addresses the appropriateness of the issuance of opinions to third parties and provides:

\textsuperscript{15} Glazer, \textit{supra} note 7, § 1.3.1, at 10.
\textsuperscript{17} TriBar 1998 Report § 1.6.
\textsuperscript{18} In 2002, the ABA revised Rule 2.3 of its Model Rules of Professional Conduct to substantially eliminate the requirement of client consent. Instead the revised Model Rules requires a client’s informed consent to disclosure of an evaluation only when the lawyer knows or reasonably should know that the evaluation is likely to affect the client’s interests, materially and adversely. In those circumstances, without the client’s informed consent, the lawyer may not provide the evaluation to the outside party.
Rule 2.3 Evaluation For Use By Third Persons

(a) A lawyer acts as evaluator by examining a client’s legal affairs and reporting about them to the client or to others.

(b) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

1. the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer’s relationship with the client; and

2. the client consents after consultation.

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

Comment [1] to Rule 2.3(b) makes clear that third-party opinions are within the scope of the Rule: “An evaluation may be performed at the client’s direction but for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws.”

Comment [2] to Rule 2.3 states that a legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. “The question is whether the lawyer is retained by the person whose affairs are being examined,” in which case rules concerning loyalty to client and preservation of confidences apply. The lawyer must identify the person by whom he or she is retained, and this must be made clear to the person under examination and also to others to whom the results are to be made available.

A client may request delivery of a third-party legal opinion or the client’s consent may be apparent from the circumstances surrounding the transaction—e.g., the delivery of the opinion may be a closing condition under the agreement governing the transaction.

2. Competence. Rule 1.1 prohibits a lawyer from handling a matter that the lawyer knows or should know he or she is not competent to handle unless the lawyer associates a lawyer who is competent to handle the matter: Rule 1.1 states:

Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Competence requires (i) substantive knowledge of the law and (ii) an understanding of the factual issues involved.
A lawyer may need to associate special or local counsel outside of his or her firm. If the lawyer rendering the primary opinion relies on opinions of other lawyers, that fact should be disclosed in the primary opinion.

3. **Confidentiality.**

   (a) Rule 1.6 prohibits a lawyer from revealing information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or the disclosure is otherwise permitted under the Rule.

   (b) However, Rule 2.3, comment [3] recognizes a lawyer’s responsibilities to third persons for whom an evaluation is intended and the duty to disseminate findings, and the Restatement section 51, comment (e) notes that a lawyer rendering an opinion to a third party owes a duty of care to the third party.

   (c) Therefore, when an opining firm discovers a legal problem that the client wants to keep confidential, the firm faces the ethical dilemma of needing to preserve client confidentiality under Rule 1.6 while fulfilling the lawyer’s ethical obligation to communicate honestly with the third-party recipient of the opinion.

   (d) If the opinion cannot be excluded through negotiation and the client does not consent to disclosure, the information must be kept confidential, and the lawyer may not render the opinion.19

4. **Conduct.** Rule 1.2(c) prohibits a lawyer from counseling or assisting a client in conduct the lawyer knows is criminal or fraudulent. Rule 4.1 prohibits a lawyer from knowingly making a false statement of fact or law to a third person in the course of representing a client. Accordingly, a lawyer may not give a requested opinion if it is inaccurate and may not rely on a certificate of the client that he or she knows is false, inaccurate or misleading.20

C. **Due Diligence.** As previously noted, customary diligence determines the nature and extent of the factual and legal diligence to be employed by the opinion giver.

   1. **Factual diligence.** Unless reliance is unreasonable or the information is known by the opinion giver to be false or recognized as unreliable, opinion givers may rely upon factual information provided by others. Information may be unreliable if it is irregular on its face or has been provided by an inappropriate source.21 Subject to this qualification, for the factual predicates necessary to render an opinion, opinion givers may rely upon the following:

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19 See ABA Guidelines, supra note 2, § 2.4.
20 See id. § 1.5, at 876. An approach that is not acceptable is to rely on a standard exception to mask the problem. A lawyer should not give an opinion that the lawyer recognizes will mislead the recipient with regard to the matters covered.
(a) Certificates of Fact, if they are not tantamount to the legal opinion being expressed;\textsuperscript{22}

(b) Representations made by the opinion recipient;\textsuperscript{23}

(c) Representations made by the opinion giver’s client, if they are based on actual knowledge and not on surmise or risk allocation unless that is disclosed to the opinion recipient;\textsuperscript{24} and

(d) Assumptions, if they are expressly stated or are implied assumptions of general application, e.g., the genuineness of signatures and conformity of copies to original documents.\textsuperscript{25}

2. Legal diligence. This component of customary diligence is generally satisfied by the opinion giver’s review of applicable law as lawyers in similar circumstances would normally conduct,\textsuperscript{26} limited to those areas of law, both actually known and reasonably available to the opinion preparers, that are customarily understood to be covered by the opinion given.\textsuperscript{27}

D. Liability Issues. A lawyer is civilly liable for professional negligence to a person to whom the lawyer owes a duty of care if the lawyer fails to exercise care and if that failure is a legal cause of injury.\textsuperscript{28} As of the date of this Report, no reported Virginia case involving liability for erroneous third-party legal opinions has been decided. In other states, claims involving third-party legal opinions were historically rare, and early cases were sometimes summarily dismissed due to lack of privity;\textsuperscript{29} however, that is no longer the case in many states.\textsuperscript{30} Generally accepted grounds for liability might include (most often) negligent misrepresentation but also fraudulent misrepresentation, legal malpractice, breach of contract under a third-party beneficiary theory, or violation of a statute, e.g., the antifraud provisions of the federal securities laws when the transaction involves a sale of securities.\textsuperscript{31} Although, as noted earlier, there are no reported decisions involving liability for erroneous third-party legal opinions in Virginia, the Virginia Supreme Court has concluded that legal malpractice actions, although sounding in tort, are governed by the statute of limitations applicable to contract claims\textsuperscript{32} and neither punitive damages\textsuperscript{33} nor any non-pecuniary damages\textsuperscript{34} are recoverable in those actions.

\textsuperscript{22} ABA Principles, \textit{supra} note 1, § IIC, at 833.
\textsuperscript{23} TriBar 1998 Report § 2.2.1(d)(ii).
\textsuperscript{24} \textit{Id}.
\textsuperscript{25} \textit{Id}. § 2.3.
\textsuperscript{26} \textit{Id}. § 1.4(c).
\textsuperscript{27} \textit{Id}. § 1.9(n)
\textsuperscript{28} Restatement Governing Lawyers § 48.
\textsuperscript{29} See Glazer, \textit{supra} note 7, § 1.6.3, at 41-42.
\textsuperscript{30} \textit{Id}. at 42 (noting that claims against opinion givers are no longer uncommon, and the damages sought are in the tens of millions and even billions of dollars).
\textsuperscript{31} Glazer, \textit{supra} note 7, § 1.6.3, at 39-41.
\textsuperscript{32} 	extit{Oleyar} v. 	extit{Kerr}, 225 S.E.2d 398 (Va. 1976).
\textsuperscript{33} 	extit{O’Connell} v. 	extit{Bean}, 556 S.E.2d 741 (Va. 2002).
\textsuperscript{34} 	extit{Smith} v. 	extit{McLaughlin}, 769 S.E.2d 7 (Va. 2015).
IV. STRUCTURE OF THE THIRD-PARTY OPINION LETTER

A. General Format. Third-party opinions customarily take the form of a letter from the opining firm or, if a solo practitioner, the opining lawyer, on its or his stationery to the recipient. The opinion letter will generally have the following components, which will often appear in the following or a similar order:

1. Date (see Section IV.B below).
2. Addressee (see Section IV.C below).
3. Reference line/caption/description of the transaction (see Section IV.D below).
4. Salutation (see Section IV.D below).
5. Role of the opinion giver (see Section IV.F below).
6. Subject matter of, and reason for, the opinion letter (see Section IV.G below).
7. Conflicts of interest (rarely used—see Section IV.H below).
8. Definitions (see Section IV.I below).
9. Scope of inquiry (see Sections IV.J and V below).
10. Meaning of “knowledge” (see Sections IV.K and VI.D below).
11. Underlying assumptions (see Sections IV.L, VI.A and .B below).
12. Introduction to opinion paragraphs (see Section IV.M below).
13. Opinion paragraphs (see Sections IV.M, VII, VIII, and IX below).
14. Qualifications and Limitations (see Section VI.E below).
15. Covered law (see Section IV.N below).
16. Excluded areas of law (see Sections IV.O and VI.C below).
17. Limitations on third-party reliance (see Section IV.P below).
18. Limitations on duty to update (see Section IV.Q below).
19. Closing and signature (see Section IV.R below).

B. Date. Opinion letters are dated and delivered as of the date called for by agreement of the opinion giver’s client and the third-party opinion recipient. Typically, in a
transactional context, the agreed upon date will be the closing date of the transaction and will be specified in the operative transaction agreement.

Customary practice dictates that opinion letters speak as of their date.\textsuperscript{35} As a result, there is technically no need to define a separate effective date for an opinion letter. Similarly, under customary practice there is no obligation for an opinion giver to update a delivered opinion letter to reflect subsequent events or legal developments.\textsuperscript{36} While not strictly necessary, it is common nonetheless to state expressly that an opinion letter speaks only as of its date and to disclaim any obligation to update the opinion letter.\textsuperscript{37}

Certain opinions may be based on certificates of government officials that are obtained and dated before the date of the opinion letter itself. In that circumstance, the statement of the scope of inquiry in the opinion letter should identify the certificate and its date and, unless the opinion states that it speaks as of the date of the certificate, memorialize the opinion recipient’s permission to assume that the certificate remains accurate as of the date of the opinion letter.\textsuperscript{38}

C. **Addressee.** Under customary practice, the addressee and any other person expressly authorized to rely are the only persons entitled to rely on the opinion letter and only with respect to the transaction that is the subject of the opinion letter.\textsuperscript{39} Nevertheless, it is common practice to include language excluding reliance by others.\textsuperscript{40} Care should be exercised in correctly determining the appropriate addressee(s) and correct legal names and addresses.

In certain transactions, it may be appropriate to grant a party other than the addressee the right to rely on all or specified portions of an opinion letter. For example, it is common practice to grant a corporate trustee the right to rely on specified opinions in an opinion letter given to underwriters in connection with a public offering of debt securities.\textsuperscript{41} In that case, the scope of reliance granted should be clearly articulated either on the face of the opinion letter itself or in a separate letter granting reliance.\textsuperscript{42}

D. **Reference Line/Caption/Description of the Transaction.** The inclusion or omission of a reference line or caption is largely a matter of style. The inclusion (or omission) and wording of a reference line or caption should have no effect on the substantive import of an opinion letter. If a reference line or caption is included in an opinion letter, it typically will briefly describe the name of the client and/or the transaction or agreement to which the opinion letter relates. A caption could read similarly to the below examples:


\textsuperscript{36} See infra § IV.Q.

\textsuperscript{37} See id.

\textsuperscript{38} See infra § V.B.


\textsuperscript{40} Glazer, supra note 7, § 2.3.2 ; See infra § IV.P.

\textsuperscript{41} See id.

\textsuperscript{42} See id.
Merger of ABC, Inc. with and into XYZ, Inc.

Senior Notes due 20xx of ABC, Inc.

Re: Loan Agreement, dated as of xxxx, 20xx, among XYZ, Inc., the Lenders party thereto, and ABC Bank, as Administrative Agent

E. Salutation. General principles of business correspondence apply to formatting and phrasing. A gender neutral salutation, such as “Ladies and Gentlemen,” is typical when an opinion letter is addressed to an entity.

F. Role of the Opinion Giver. The first sentence of an opinion letter usually identifies the opinion giver’s client and the relationship between the opinion giver and the client. That statement reinforces the general understanding that the recipient of an opinion letter does not thereby become the client of the opinion giver and that the opinion giver is not undertaking on behalf of the recipient any of the duties owed to a client. Indeed, it is the responsibility of the opinion recipient’s counsel to advise the opinion recipient on what opinions to request, the adequacy of the opinions received and the meaning of particular opinions.

Historically, the use of “special” or “general” counsel impliedly distinguished whether the counsel represented the client on a regular basis. That distinction, however, was more apparent than real from a liability perspective, as the standard of care was the same regardless of how the relationship was labeled. The more recent trend has been to reserve the use of the term “special counsel” to situations in which the opinion giver is acting as an expert with respect to a specific area of law and the phrase “general counsel” to refer to in-house counsel with that title and position.

Today, opinion giver’s commonly use just the word “counsel” to refer to their relationship with the client. If an opinion giver has been engaged to provide limited opinions under the laws of a jurisdiction not central to the subject of the opinion letter, the opinion givers may describe themselves as “local counsel.”

The introductory sentence may also indicate the scope of counsel’s participation in the subject transaction through language such as the following:

We have acted as counsel to Company X in the preparation, execution and delivery of the Agreement, dated _____, by and between Company X and Company Y [or acted as counsel to Company X in connection with the Agreement, dated _____, by and between Company X and Company Y, and the transactions contemplated thereby].

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43 Restatement Governing Lawyers § 95 cmt. c.
44 Glazer, supra note 7, § 2.5.1, at 73.
45 Glazer, supra note 7, § 2.5.2, at 74-75.
The role of the opinion giver, and the scope of the opinion, should be further and more specifically described in later portions of the opinion letter addressing excluded opinions, exceptions, qualifications, covered law and similar matters.\textsuperscript{47}

G. Subject Matter of, and Reason for, the Opinion.

The first paragraph of an opinion letter generally describes the transaction and other matters that are the subject of the opinion to put the opinion in its proper context, including a description of the role of the opinion giver, as discussed supra at Section IV.F. Typically, delivery of an opinion letter satisfactory to the opinion recipient is a contractual condition to closing of the subject transaction. In most cases, reference to the condition(s) in the principal transactional document(s) that require the client to deliver the opinion of counsel will sufficiently indicate the client’s request for and consent to the delivery of the opinion letter.\textsuperscript{48} A typical formulation of such a reference would be similar to the following:

\textbf{This opinion letter is delivered to you at the request of Company X in accordance with Section xx of the Agreement.}

In the event that the principal transaction document(s) do not expressly call for an opinion letter, that consent ordinarily can be inferred from the circumstances of the transaction; otherwise, the opinion giver should consider obtaining a separate request and consent from its client.\textsuperscript{49} In most circumstances, regardless of whether the request is through a closing condition or handled separately, that request should be clearly referenced in the opinion letter:

\textbf{This opinion letter is delivered to you at the request of Company X.}

H. Conflicts of Interest.

Commentators disagree on the necessity of disclosing in the opinion letter the opinion giver’s financial or other interests in the client, but generally agree that liability of an opinion giver will ultimately be determined by whether the opinion giver prepared the opinion with due care.\textsuperscript{50} The ABA notes that non-disclosure is a common practice and that disclosure will not excuse those preparing the opinion letter from considering whether those relationships

\textsuperscript{47} \textit{See infra} §§ VI, VII.

\textsuperscript{48} In one case, however, a U.S. district court held that the opinion giver owed no duty of care to the lender to whom it delivered its opinion because the opinion letter was not delivered at the borrower’s request. \textit{United Bank of Kuwait v. Enventure Energy Enhanced Oil Recovery Assocs.-Charco Redondo Butane}, 755 F. Supp. 1195 (S.D.N.Y. 1989). Practitioners should not necessarily expect Virginia courts to follow this case. Both the TriBar 1998 Report, section 1.7 and the ABA Guidelines section 2.4 view a requirement in the transactional documents to deliver an opinion at closing to constitute the client’s consent to its delivery.

\textsuperscript{49} \textit{See supra} § III.B(1) (discussing the Virginia Rules of Professional Conduct).

\textsuperscript{50} Sterba has taken the position that it is imperative that any real or apparent conflicts of interest be disclosed in writing in the opinion letter, observing that while a lawyer’s judgment may not be affected, prudence dictates memorializing that disclosure to the opinion recipient. Sterba, \textit{supra} note 39, § 2.1. (citing \textit{Greycas v. Proud}, 826 F.2d 1560 (7th Cir. 1987)). Glazer, on the other hand, believes that disclosure is unnecessary and often impractical and notes that, unlike certified public accountants, attorneys are not subject to any professional mandate to maintain independence from their clients and are expected to advance their client’s interests through diligent representation. Glazer, \textit{supra} note 7, § 2.5.5.
imply their professional judgment. If an opinion giver is concerned that the nature of a relationship or interest may give the appearance that the opinion giver’s professional judgment may be compromised, disclosure may mitigate negative appearances, but should not affect standards of care or liability applicable to the opinion giver.

More generally, provisions of the Virginia Rules of Professional Conduct regarding conflicts of interest apply to the preparation and delivery of opinion letters as they would to any other representation.

I. Definitions.

Definitions in opinion letters should be clear and precise.

The definition of terms not defined in the opinion letter are often incorporated by reference by language to the effect “Capitalized terms not defined in this letter have the meanings given to them in the Agreement” (with the term “Agreement” having been previously defined in the opinion letter). The referenced “Agreement” will usually be the principal transaction document containing the condition that an opinion letter be delivered. When using this approach, the opinion giver must be careful to ensure that the meaning given a defined term in the referenced “Agreement” is also the proper meaning for such term in the different context of the opinion letter. For example, if the names of the other transaction documents as defined in the Agreement include all future amendments and supplements to those transaction documents, use of the defined terms for those documents ordinarily would not be appropriate in the opinion letter because the opinion letter should address only those documents as in existence on the date of the opinion letter.

J. Scope of Inquiry.

The opinion letter will include a brief statement of the scope of inquiry conducted by the opinion giver, including a general description or specific listing of documents reviewed and a description of any reliance by the opinion giver on certificates or opinion letters of third parties. Those issues are discussed in detail in Section V below.

K. Meaning of Knowledge.

If an opinion letter contains opinions that are qualified with the phrase “to our knowledge” or a similar phrase, the opinion letter will often contain a definition or other

51 ABA Guidelines, supra note 2, § 2.3.
52 Virginia Rule of Professional Conduct 1.7 states that a lawyer may represent a client notwithstanding the existence of a concurrent conflict of interest if, inter alia, “each affected client consents after consultation” and “the consent from the client is memorialized in writing.” Comment [20] to Rule 1.7 suggests that recitation of the conflict of interest and the consent thereto in an opinion letter would satisfy the requirement of Rule 1.7(b) that the consents be memorialized in writing: “Paragraph (b) [of Rule 1.7] requires that client consent be memorialized in writing. Preferably, the attorney should present the memorialization to the client for signature or acknowledgement; however, any writing will satisfy this requirement, including but not limited to, an attorney’s notes or memorandum, and that writing need not be signed by, reviewed with, or delivered to the client.” That recitation is not, however, required by either the Virginia Rules of Professional Conduct or customary opinion practice.
explanation of what exactly is meant by the phrase. The meaning of the term “knowledge” in an opinion letter is discussed in detail in Section VI.D below.

L. Underlying Assumptions.

An opinion letter may expressly state assumptions that are unique to the particular type of transaction giving rise to the opinion letter and that require explanation or clarification or that might give rise to misunderstanding if not expressly addressed. An opinion giver may also choose to state expressly certain assumptions of general application (e.g., the legal capacity of individuals) that the Committee believes are implicit under customary practice and need not be expressly stated to apply. The use of implicit and explicit assumptions in opinion letters is discussed in detail in Sections VI.A and VI.B below.

M. Introduction to Opinion Paragraphs; Opinion Paragraphs.

The legal opinions in an opinion letter are typically introduced by a sentence that clearly separates the substantive legal opinions from the rest of the opinion letter, while also reinforcing that the legal opinions are subject to and limited by the balance of the opinion letter. A typical introduction would be similar to the following:

On the basis of the foregoing, and in reliance thereon, and subject to the limitations, qualifications, assumptions, exceptions and other matters set forth herein, we are of the opinion that:

The opinion giver may further emphasize the difference between the substantive legal opinions and the rest of the opinion letter by making the opinion paragraphs visually distinct (e.g., via a numbered list) from non-opinion paragraphs. Specific opinions are discussed in Sections VII, VIII and IX below.

N. Covered Law.

Opinion letters customarily specify the law (or laws) upon which the opinions therein are based. For example, the opinion letter might include the following or a similar statement of covered law:

This opinion letter is based as to matters of law solely on (i) the Virginia Limited Liability Company Act of the Commonwealth of Virginia, and (ii) such internal law of the Commonwealth of Virginia (but not including any statutes, ordinances, administrative decisions, rules or regulations of any political subdivision of the Commonwealth of Virginia) and such federal law that, in each case in our experience, is normally applicable to a transaction of the type contemplated by the Transaction Documents; and (iii) present judicial interpretations of the foregoing as such interpretations are made at the highest court of the jurisdiction upon whose law our opinion on that issue is based.

The effect of such a provision is to limit the coverage of the opinion to the statutory, decisional and regulatory law at the state or federal, but not local, level of the
jurisdiction(s) named. In some transactions, such as a routine real estate loan transaction, it may be appropriate to expressly exclude federal law since the opinion giver is not likely to be checking any particular federal law, and it is doubtful that federal law even applies. As a matter of customary practice, the opinion should not be read to cover the substance or effect of the laws of an unnamed jurisdiction or local ordinances. Thus, the opinion giver is relieved of any liability resulting from the application of laws other than those specified unless the opinion giver is aware that such would be misleading to the opinion recipient.

The characteristics of the entities and the agreements involved in the subject transaction will generally indicate what law may be relevant to an opinion letter. For example, an opinion letter delivered in connection with an offering of debt securities by a Virginia corporation could involve issues of Virginia law (e.g., due authorization, execution and delivery by the Virginia corporation), New York law (e.g., enforceability of the securities, if the parties have chosen New York law to govern those securities) and federal law (e.g., exemption of the debt securities from the registration requirements of the Securities Act of 1933).

Many attorneys will decline to give an opinion with respect to the law of a jurisdiction in which they are not admitted to practice. A key principle in this regard is the attorney’s obligation to provide competent representation to a client. Giving opinions with respect to the law of jurisdictions where one is not admitted could also create a risk of allegations of the unauthorized practice of law, and/or possible submission to jurisdiction of the courts of that state, although those issues are beyond the scope of this Report.

Notwithstanding the foregoing, counsel not admitted to practice in Delaware often give opinions as to status, power and authorization, and sometimes more, with respect to Delaware corporations, if they are well-versed in the applicable Delaware law as well as the law of the state in which they practice. In those cases, opinion givers frequently state that the law applicable to those opinions is limited to the Delaware General Corporation Law. This reference may be understood to include the Delaware constitution and reported decisions interpreting the statute and the constitution, unless the opinion letter states otherwise. It is the responsibility of the attorney preparing the opinion to determine on a case-by-case basis whether he or she is competent to render that opinion based on his or her familiarity with Delaware corporation law.

A similar approach may be taken with respect to status opinions for Delaware limited liability companies or limited partnerships. However, because one of the governing documents for a limited liability company (“LLC”) or limited partnership is a contract (usually referred to as the LLC agreement in Delaware or partnership agreement) questions of status,

53 TriBar 1998 Report § 1.9(n).
54 ABA Principles, supra note 1, § II.A.
55 TriBar 1998 Report § 1.4(d); ABA Guidelines, supra note 2, § 1.5.
56 Virginia Rules of Professional Conduct; Rule 1.1: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” See supra § III.B(2).
57 Arthur Norman Field and Jeffrey M. Smith, Legal Opinions in Business Transactions, § 7.5.2 (3d ed. 2014) [hereinafter Field].
58 See Sample v. Morgan, 935 A.2d 1046 (Del. Ch. 2007).
power and authorization are also matters of Delaware contract law to the extent they require interpretation of such contracts. Thus, a statement of coverage limitation to the effect that the opinion is limited to the Delaware Limited Liability Company Act (the “Delaware LLC Act”), might be read to exclude coverage of those matters governed by Delaware contract law. However, the TriBar Opinion Committee has commented that such a statement should not be read so as to exclude from coverage by the status, power and action opinions those Delaware contract issues that are applicable to the matters covered by those opinions. It further observes that, with the exception of fiduciary duties, the contract law issues ordinarily will not be difficult or vary significantly from state to state and thus concludes that a knowledge of traditional contract law principles usually will be all that is required to give the routine status, power and action opinions on Delaware LLCs. However, many lawyers prefer to assume expressly that the LLC agreement or limited partnership agreement will be interpreted and enforced in accordance with its terms.

In contrast, however, an opinion on the enforceability of the operating agreement of a Delaware LLC is directed principally to issues of contract law. Thus, the Committee notes that non-Delaware lawyers will need to candidly evaluate whether they have sufficient knowledge of Delaware contract law (as well as the Delaware LLC Act and applicable case law) to opine as to the enforceability of a Delaware operating agreement with the requisite level of competence. If the opinion giver does not intend to cover Delaware constitutional and case law in the opinion, the Committee recommends expressly excluding such law from the scope of the opinion. Given the broader and more complex issues ordinarily raised by an enforceability opinion as compared to an opinion on status, power and action, non-Delaware lawyers are ordinarily unwilling to opine on the enforceability of the operating agreement of a Delaware LLC. It is not uncommon that the covered jurisdiction designated in the opinion letter is different from the governing law jurisdiction stated in the Agreement. In those instances, different approaches may be employed to address matters of enforceability under the governing law jurisdiction. Engagement of local counsel to issue the opinions as to matters arising under the governing law provided in the Agreement is the preferred approach, to the extent practical. If, due to cost or other considerations, it is not practical to engage local counsel in the governing law state, opinion givers sometimes modify the enforceability opinion along the following lines:

Notwithstanding the fact that the Agreement provides that [New York] law shall govern the interpretation thereof, if the Agreement were governed by the laws of the Commonwealth of Virginia, the Agreement would be a valid

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60 The TriBar Opinion Committee (“TriBar”) currently includes designees of the following organizations functioning as a single committee: (i) Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers’ Association; (ii) Corporation Law Committee, The Association of the Bar of the City of New York, 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 the District of Columbia Bar Associations are also members of TriBar.


62 Id. § 1.0 n.22.
and binding agreement, enforceable in accordance with its terms under the laws of the Commonwealth of Virginia.

The Committee notes that it is not appropriate to assume that the Agreement is governed by the laws of the Commonwealth of Virginia when the Agreement is in fact governed by the laws of another jurisdiction, because such an assumption would violate the principle of opinion practice that an opinion giver should not make an assumption known to be untrue. Instead, the opinion as stated above is expressed as a hypothetical and correctly states that the Agreement is governed by the laws of another jurisdiction. In any event, the Agreement should be reviewed carefully so that any provisions that are unique to the governing law jurisdiction or that are of questionable enforceability under Virginia law are appropriately addressed in the opinion letter. In addition, agreements such as mortgages governed by the laws of another state, which are usually creatures of that state’s laws and not readily translatable into a Virginia-law governed document, should not be the subject of such an opinion.

O. Excluded Areas of Law.

Under customary practice, certain substantive areas of law, even within the covered jurisdiction(s), are understood to be excluded from the scope of an opinion letter whether or not the exclusion is expressly stated in the opinion letter. Some practitioners will nonetheless expressly list customary exclusions in the opinion letter. This issue is discussed in detail in Section VI.C. below.

P. Limitations on Third-Party Reliance.

As noted above, under customary practice, the addressee is the only person or entity entitled to rely on the opinion letter and only with respect to the transaction that is the subject of the opinion letter. Nevertheless, it is common practice to include language that circumscribes reliance similar to the following:

Our opinions are furnished to you for your exclusive use solely in connection with the matters contemplated by the Agreement. These opinions may not be relied upon by you for any other purposes, or furnished to, quoted, referred to or relied upon by any other person, firm or corporation for any purpose, without our prior written consent in each instance.

Most financial institutions want to be able to deliver copies of the opinion to auditors, attorneys or regulators who should be able to receive a copy but not rely on the opinion.

In certain transactions, it may be appropriate to grant a party other than the addressee the right to rely on all or specified portions of an opinion letter. For example, it is common practice to grant a corporate trustee the right to rely on specified opinions in an opinion letter given to underwriters in connection with a public offering of debt securities. In that case, the scope of reliance granted should be clearly articulated either on the face of the opinion letter itself or in a separate letter granting reliance. The following is an example of such an approach:

63 Glazer, supra note 7, § 2.3; Sterba, supra note 39, § 2.3; ABA Accord § 20; N.C. Bar Report § 2.2.
Our opinions are furnished to you for your exclusive use solely in connection with the matters contemplated by the Agreement. These opinions may not be relied upon by you for any other purposes, or furnished to, quoted, referred to or relied upon by any other person, firm or corporation for any purpose, without our prior written consent in each instance [, except that a copy of this opinion letter has been delivered to the Trustee and it may rely on this opinion letter as if it were addressed and delivered to it][, except that the Trustee may rely on the opinions herein as if this opinion letter had been addressed and delivered to it].

In syndicated loan transactions involving multiple lenders in a syndicate represented by an administrative agent, an opinion letter is typically addressed to those lenders as well as the financial institution serving as administrative agent and, if applicable, the financial institution serving as collateral agent, in each case in their respective capacities as such agents. In addition, the opinion letter in such transactions usually includes language similar to the following:

At your request, we hereby consent to reliance hereon by any Lender as of the date hereof and by any successor to the Administrative Agent [and any successor to the Collateral Agent] pursuant to the terms of the Credit Agreement. We also consent to reliance hereon by any party that becomes a Lender subsequent to the date of this opinion letter in accordance with the provisions of the Credit Agreement (each an “Additional Lender”) as if this opinion letter were addressed and delivered to such Additional Lender on the date hereof, on the condition and understanding that (i) in no event shall any Additional Lender have any greater rights with respect hereto than the original addressee(s) of this letter on the date hereof nor, in the case of any Additional Lender that becomes a Lender by assignment, any greater rights than its assignor, (ii) in furtherance and not in limitation of the foregoing, our consent to such reliance shall in no event constitute a reissuance of the opinions expressed herein or otherwise extend any statute of limitations period applicable hereto on the date hereof, and (iii) any such reliance by a future assignee must be actual and reasonable under the circumstances existing at the time such Additional Lender becomes a Lender, including any circumstances relating to changes in law, facts or any other developments known to or reasonably knowable by such Additional Lender at such time.64

Q. Limitations on Duty to Update.

Authorities generally agree that an opinion giver has no duty to update a previously delivered opinion letter to reflect factual or legal developments that occur following the date of the opinion letter, whether or not that duty is expressly disclaimed.65 If the opinion

64 This is a variation of the so-called “Wachovia language.” See A. Mark Adcock, Gail Merel and Reade H. Ryan, Jr., Legal Opinions—Who May Rely?, 69 Bus. Law 957 (2014).
65 NC Bar Report § 2.1.c.; ABA Accord § 9; TriBar 1998 Report § 1.2(b).
giver wishes to make this point explicit, the opinion letter may include a disclaimer such as the following:

Our opinions expressed in this letter are as of the date of this letter, and we undertake no obligation to advise you of any changes in applicable law or any other matters that may come to our attention after the date of this letter that may affect our opinions expressed in this letter.

R. Closing and Signature.

While practice varies from firm to firm, opinion letters are customarily written on a law firm’s stationery and signed in the name of the law firm (sometimes “By” the individual attorney signing), thereby expressing the opinion of the firm and not just the opinion preparers. Of course, this option is not available to a sole practitioner who must sign individually.

Inside counsel typically signs in his or her own name and not that of the law department or employer. By doing so, they make it clear that they are acting in their professional capacity as an attorney and taking personal responsibility for the opinion they are giving. Moreover, neither the use of company letterhead nor the indication of the signer’s position with the company is understood as a matter of customary practice to change the signer’s personal responsibility for the opinion.

The signature will usually appear under a closing phrase, such as “very truly yours,” as would typically be the case in general business correspondence.

While many Virginia lawyers continue to practice together in the older traditional form of a general partnership, for tax and liability considerations the vast majority of Virginia law firms are professional corporations, LLCs or registered limited liability partnerships (“RLLP”). In light of the customary practice with respect to legal opinions that the opinion rendered speaks for the law firm, a word of caution is appropriate for those lawyers that, either in transition or more permanently, opt for office sharing arrangements that may give the appearance of some common association. Litigation has pursued the other participants in those arrangements as partners by estoppel with respect to legal opinions issued to third parties. Since the Virginia Supreme Court has recognized the viability of claims based on partnership by estoppel, counsel participating in such an arrangement would be well served to carefully examine their opinion practices and procedures in light of these decisions to avoid unanticipated liability.

66 TriBar 1998 Report § 1.8
68 Id.
69 Allison Martin-Rhodes, Robert W. Hillman and Peter Tran, Law Firms’ Entity Choices Reflect Appeal of Newer Business Forms, Business Entities, July/August 2014; See also Robert W. Hillman, Organizational Choices of Professional Services Firms: An Empirical Study, 58 Bus. Law. 1387 (2003).
V. SCOPE OF INQUIRY

A. Statement of Scope of Inquiry, Including Documents Reviewed. While the scope of inquiry is often a matter of negotiation between the parties, the following is a standard formulation of the statement of the scope of inquiry with respect to a Virginia corporation.\(^{72}\)

We have reviewed copies of the articles of incorporation of the Company as certified by the Virginia State Corporation Commission (the “Articles of Incorporation”), the bylaws of the Company (the “Bylaws”) and resolutions of the Board of Directors of the Company as certified by an appropriate officer of the Company, and such other documents, and have made such other investigation as we have deemed appropriate to render the opinions contained herein.

In the statement of the scope of inquiry, the opinion giver outlines generally what has been done to render the opinion. Regardless of customary practice, the parties to a transaction may change the scope and nature of the factual investigation an opinion giver would otherwise be required to perform.\(^{73}\) Note that the term “investigation” is understood to relate to both matters of fact and law.\(^{74}\) Examining certain documents and making additional factual and legal investigation is consistent with customary practice and the related customary diligence.

Although some opinion givers prefer the broad language “We have examined such documents and made such other investigation as we have deemed appropriate . . .” rather than listing each document reviewed, the preferred approach is to list the items reviewed, but conclude with a general scope statement. The opinion giver has responsibility to determine what is an adequate inquiry. In loan transactions, the necessary due diligence should include a review of officer’s certificates and accompanying business entity documents, but, for example, a review of a corporation’s minute book to check behind an officer’s certificate should not be required under customary practice. More complex transactions may require additional due diligence such as reviewing a corporation’s minute book to confirm certain stock issuances, but it is not customary practice for a practitioner to opine on whether a board of directors is duly constituted.

Another approach used by opinion givers is to list the specific documents reviewed, but then add language similar to the following:

In rendering the following opinions, we have relied, with your permission, solely upon our examination of the foregoing documents and have made no independent verification of facts contained in the documents.

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\(^{72}\) Although this sample language is applicable to a corporation, for other business entities, the scope of inquiry would refer to analogous organizational documents and authorizing resolutions or consents. See the illustrative opinion(s) attached to this report for additional sample language.

\(^{73}\) Glazer, supra note 7, § 4.2.2, at 128 (citing Restatement Governing Lawyers § 95 cmt. c; ABA Principles, supra note 1, § 1.C; and the TriBar 1998 Report § 1.5).

\(^{74}\) TriBar 1998 Report § 1.4(c).
There may be limited circumstances in which that approach might be acceptable to an opinion recipient particularly in a case where the opinion giver is acting as local counsel on a large transaction with little input into the documents and limited contact with the Company. Nonetheless, the opinion giver may be liable if he knew that facts existed contrary to those contained in the documents reviewed.

B. Reliance on Matters of Fact. It is customary, and in most instances necessary, for an opinion giver to rely on information provided by others as to factual matters. Those matters of fact may include, for example, the identification of material contracts, the location of a party’s principal office, or pending or threatened litigation. The following is an example of a standard formulation of the statement of reliance on information provided by others:

As to matters of fact, we have relied on the representations made by the parties in the Transaction Documents, certificates or other comparable documents of public officials, and that Officer’s Certificate executed by _____________, [insert officer title], dated as of the date hereof, without independent investigation of the accuracy or completeness of such matters of fact. With respect to the opinions in paragraph 1 regarding the valid existence and good standing of the Company as a Virginia corporation, we have relied exclusively on the certificates and information referenced above which we have assumed, with your permission and without independent inquiry, remain correct and in full force and effect on the Closing Date.

Generally an opinion giver is entitled to rely, without investigation, upon facts furnished by appropriate corporate officers, if the information furnished is not known to be untrue and is not irregular on its face.

While some opinion givers rely on the client’s representations in the transaction documents, the better practice for obtaining information from corporate officers is in the form of written certificates. Such a certificate typically identifies the signer as an officer in the introductory paragraph but is executed by the officer as an individual (regardless of whether the signature line reflects the officer’s title or not) and not in his or her representative capacity. This practice is followed because a certificate by the business entity would simply restate the business entity’s representations in the transaction documents. The officer may have personal liability for the representations made in the certificate, but that officer may be indemnified by the business entity for any such liability. An officer’s certificate often includes a statement that it is being delivered to opining counsel to be relied upon in rendering an opinion. Note that many LLCs do not have officers, but are managed by one or more managers, or by their members. In that case, reliance on a manager’s or member’s certificate (or certificate of another authorized individual) may be appropriate.

75 ABA Accord § 2.
76 ABA Guidelines, supra note 2, § 1.5.
77 Restatement Governing Lawyers § 95 cmt. c; ABA Principles, supra note 1, § III.A; Glazer, supra note 7, § 4.2.3.
78 TriBar 1998 Report § 2.5.4.
Although certificates of public officials typically contain legal conclusions, an opinion giver cannot rely on legal opinions stated in certificates of its client’s officers that are tantamount to the legal conclusions that the opinion giver is expressing in the opinion letter. An opinion giver may in appropriate circumstances (e.g., when serving as local counsel) assume legal conclusions provided in a legal opinion of other counsel if that assumption is clearly stated in the opinion letter (see infra Section V.C).

It may not always be easy to discern between factual information and legal conclusions. For example, an officer’s certificate stating that a quorum was present at a directors’ meeting might be viewed as expressing a legal opinion (i.e., that the legal requirements for a quorum were met) or as simply confirming the facts underlying that conclusion (i.e., that at least three of five directors were present throughout the meeting). Regardless of how this statement is interpreted, however, whether the opinion giver is entitled to rely on the statement depends on whether the statement is tantamount to the legal conclusions being expressed in the opinion letter or is simply an element of that conclusion.\(^{79}\)

Although practice varies, typically an officer’s certificate relied upon in an opinion is part of a closing binder but may not necessarily be attached to the opinion itself.

C. Other Opinions of Counsel. In some transactions it may be necessary to retain other counsel for matters on which the opinion giver lacks sufficient expertise or qualification. Other counsel may be required to offer expertise in a particular area of practice (e.g., Fraud and Abuse laws) or on the laws of a jurisdiction in which the primary opinion giver is not admitted to practice (see infra Section V.D, Local Counsel). In either case, this may result in the other counsel rendering only certain of the requested opinions. Frequently the other counsel is referred to as “special counsel,” suggesting that the opinion giver is not the regular or general counsel for the client but is rendering the opinion as to certain limited matters on a limited basis. The term “special counsel” does not necessarily mean that the other counsel has some special expertise in the matters as to which the opinion is directed and should be held to a higher standard.\(^{80}\)

Under current opinion practice, separate “unbundled” opinions are usually considered preferable to having one law firm issuing an “umbrella” opinion that relies upon another’s opinion. Under these circumstances, the primary opinion giver may assume legal conclusions covered by another opinion (e.g., assuming the due authorization covered by another opinion to enable one to give an enforceability opinion).

If an opinion of special or local counsel is required, the special or local counsel ordinarily will address its opinion directly to the lender or other third party rather than to primary opinion counsel. It is generally not reasonable to require the primary opining counsel to “concur” in a special or local counsel’s opinion or to have the primary opining counsel state that the special or local counsel’s opinion is “satisfactory in form and substance” or that the opinion recipient is “justified in relying upon” another opinion. It is usually prudent to obtain the lender’s approval of special or local counsel before engagement.

\(^{79}\) Glazer, supra note 7, § 4.2.4 n.65.
\(^{80}\) See Restatement (Second) of Torts § 299A (1965).
D. **Local Counsel.** Virginia attorneys may be involved in transactions involving parties or properties located in multiple states or countries. In some instances, Virginia attorneys may be asked to serve as “local” Virginia counsel in the transaction. For example, in a loan transaction to an out-of-state borrower that has operations or property in Virginia, a Virginia attorney may be retained to render an opinion on Virginia law issues. Given the limited role of the opinion giver when serving as local counsel, the opinion giver may have limited knowledge of the parties and the transaction that may affect the scope of the opinion. While this Report contains general principles applicable to most opinions (including local counsel opinions), there may be special considerations that should be taken into account in rendering an opinion as local counsel (e.g., qualification to do business, tax and choice of law issues). Issues that Virginia counsel should consider when serving as local counsel are beyond the scope of this Report. However, a report recently published on the topic of local counsel opinions in the context of real estate finance transactions provides useful guidance for real estate lawyers issuing such opinions.\(^{81}\)

**VI. UNDERLYING ASSUMPTIONS; EXCLUDED AREAS OF LAW; EXCEPTIONS, QUALIFICATIONS AND LIMITATIONS**

A. **Implicit Assumptions.** While opinions typically contain explicit assumptions, certain factual assumptions of general application ordinarily do not need to be stated in the opinion letter regardless of the type of transaction or the nature of the parties.\(^ {82}\) These include the legal capacity of individuals, the conformity of copies to original documents, that originals received are authentic, that signatures on executed documents are genuine and that parties other than the opinion giver’s client have the power to enter into the transaction.

The ABA Accord contains a lengthy list of assumptions that are incorporated by reference in opinions adopting the Accord.\(^ {83}\) By its terms, the ABA Accord is applicable only to closing opinions that expressly adopt it. While many lawyers in Virginia recognize the merits of adopting the Accord, the Accord never gained traction as originally intended and lawyers in Virginia and elsewhere rarely incorporate the ABA Accord into opinions. Nonetheless, many of the same assumptions contained in the ABA Accord are generally employed by express inclusion in the text of non-Accord closing opinions. Consistent with the ABA Accord, the Committee believes the following assumptions are implicit under customary practice and need not be expressly stated unless the opinion giver is giving an opinion on point or knows that such an assumption is incorrect:\(^ {84}\)

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\(^{82}\) See TriBar Report § 2.3(a); ABA Legal Opinion Principles § III(D).

\(^{83}\) ABA Accord § 4.

\(^{84}\) Section 4 of the ABA Accord does not permit an assumption to be unstated if “in a given case the particular assumption states, directly or in practical effect, a legal conclusion expressed in the Opinion.” This is consistent with the approach to factual representations. Neither the ABA Accord itself nor the Commentary to it states whether the list in section 4 is intended to be exclusive. However, the list is not introduced by the word “includes” as are the comparable lists of bankruptcy exceptions in section 12 and equitable principles limitations in section 13 of the Accord.
• A client who is a natural person, and natural persons who are involved on behalf of the client, have sufficient legal capacity to enter into and perform the Transaction or to carry out their role in it;

• The client has the requisite title and rights to property relevant to the opinion;

• Each party (other than the client) has satisfied legal requirements “applicable to it” to the extent necessary to make the agreement enforceable against it and has “complied with all legal requirements pertaining to its status as that status relates to its rights to enforce” the agreement;

• Documents submitted to the opinion giver for review are accurate and complete;

• Copies conform to the originals, and all signatures are genuine;\textsuperscript{85}

• Documents from public authorities are accurate, complete and authentic, and official public records are accurate and complete;

• There has been no fraud, duress, undue influence, or mutual mistake of fact or misunderstanding;

• The parties’ conduct has complied and will comply with the requirements of good faith, fair dealing and conscionability;

• The opinion recipient has acted without notice of defenses or adverse claims;

• The Transaction Documents submitted to the opinion giver have not been defined, supplemented or qualified by any agreement, understanding, usage of trade or course of dealings;

• Relevant legal authorities are generally available and are in a format that makes legal research feasible;

• The constitutionality or validity of relevant legal authorities is not in issue unless a reported decision in the covered jurisdiction has specifically addressed but not resolved, or has established, its unconstitutionality or invalidity;

• Agreements and court orders (other than the agreement on which counsel is opining) would be enforced as written;

\textsuperscript{85} While the trend appears to be to accept assumptions regarding the genuineness of all signatures as implicit particularly given the widespread use of electronic signatures, this assumption as it relates to the genuineness of the signatures of the opinion giver’s client may be subject to negotiation by the parties.
The client will not in the future take any discretionary action under the agreement that would result in a violation of law or a breach of or default under another agreement or a court order;

The client will obtain the necessary governmental approvals and take other similar necessary actions required to consummate the transaction or perform the agreement; and

All parties to the Transaction will act in accordance with, and will refrain from taking any action that is forbidden by, the terms and conditions of the Transaction Documents.

The foregoing list of implicit assumptions (regardless of whether or not they are stated in the opinion) is not intended to be exhaustive.\textsuperscript{86} It is not uncommon for opinion givers to include expressly in the opinion certain of the foregoing implicit assumptions (e.g., no opinion as to the client’s title to property). An opinion giver should include a disclaimer with respect to any generally accepted implicit assumption that he knows is not true. Of course, reliance may not be placed on assumptions the opinion giver knows to be untrue or unwarranted under the circumstances.\textsuperscript{87}

B. \textbf{Express Assumptions}. It may be necessary in certain instances to expressly state certain assumptions that go beyond generally accepted implicit assumptions. Those express assumptions should be limited to matters that are not of general application, require explanation or clarification, or might give rise to misunderstanding if not expressly addressed. Explicit assumptions that may be used in an opinion are discussed in other sections of this Report dealing with specific opinions. As noted above (See Section VI.A), many lawyers include certain implicit assumptions expressly in their opinions. The opinion giver and opinion recipient should discuss and agree upon the express assumptions to be included in any particular transaction.

C. \textbf{Excluded Areas of Law}. Under customary practice, opinions rendered by lawyers in business transactions cover laws, rules and regulations that a lawyer exercising customary professional diligence would reasonably be expected to recognize as being applicable to the client and the transaction taking into account the opinions being rendered. While opinions typically provide that the scope of the opinion is limited to Virginia laws, rules and regulations and (if applicable) federal laws, rules and regulations, certain specialized laws, rules and regulations are customarily understood to be excluded from a standard business transaction opinion. While these exclusions should be implicit, practice varies on whether to expressly state in an opinion a list of excluded laws. It is not uncommon to see language such as the following in an opinion:

\textsuperscript{86} \textit{See generally}, Glazer, \textit{supra} note 7, § 4.3.3; ABA Accord § 4; TriBar 1998 Report § 2.3.

\textsuperscript{87} Restatement Governing Lawyers § 95 cmt. c; TriBar 1998 Report 2.3(c).
We express no opinion regarding laws, rules and regulations relating to or of (i) securities [except as provided in paragraph ____ below], (ii) banks and other financial institutions, insurance companies and/or investment companies, (iii) pension and employee benefits, (v) antitrust and unfair competition, (vi) compliance with fiduciary duties, (vii) taxes, (viii) environmental matters, (ix) health care, (x) any municipality or any local government within any state, (xi) zoning or land use or any other matters relating to the development or use of real property, (xii) telecommunications, (xiii) racketeering or criminal or civil forfeiture, (xiv) federal contracts, (xv) commodities, (xvi) qualification of entities doing business in foreign jurisdictions, or (xvii) terrorism or money laundering.

Those lists of excluded laws may vary from firm to firm, but the inclusion or exclusion from an opinion of a list of excluded laws, or the failure to explicitly state each category of excluded laws, should not affect the exclusion of the laws that customary practice dictate are excluded implicitly.

D. Knowledge. An opinion giver’s entitlement to rely upon information from others is dependent upon what the opinion giver knows. As a matter of customary practice, a lawyer is deemed to know only those facts of which the lawyer is “consciously aware.”88 This does not include forgotten facts or facts which, under circumstances otherwise warranting reliance, the lawyer does not recognize as casting doubt on factual representations to him.

A related issue is which lawyer’s knowledge determines whether reliance is warranted. Because broad inquiries of all lawyers in a firm are often impractical, expensive, and generally of limited value, customary practice is to limit knowledge to those transactional lawyers working on the deal and preparing the opinion. Although circumstances vary widely with each transaction, it is not uncommon for a definition of what the Accord refers to as the “Primary Lawyer Group,” and thus those whose knowledge is germane, to be negotiated in the form of the opinion letter. The following is an example of a paragraph that defines “knowledge” and “our knowledge” that may be included in an opinion letter:

In basing the opinions and other matters set forth herein on “our knowledge,” the words “our knowledge” mean the actual knowledge of the particular attorneys in this firm who have represented the Company in connection with the Transaction and who have given substantive attention to the preparation and negotiation of the Transaction Documents. Except as expressly set forth herein, we have not undertaken any independent investigation (including, without limitation,  

88 Glazer, supra note 7, § 4.2.3, at 137 (noting that the ABA Accord’s definition of “Actual Knowledge” (section 6-A) means the “conscious awareness of facts or other information by the Primary Lawyer or the Primary Lawyer Group”).
conducting any review, search or investigation of any public files or records or dockets or any review of our files) to determine the existence or absence of any facts, and no inference as to our knowledge concerning such facts should be drawn from our reliance on the same in connection with the preparation and delivery of this opinion letter.

While it is preferable for an opinion giver to limit the primary lawyer group, in some transactions an opinion recipient may try to expand the primary lawyer group to include lawyers who have worked on matters on behalf of the client in a recent period (e.g., the prior twelve months). If the opinion giver agrees to that expansion, the opinion should include language to clarify that the intent is to include only lawyers who are “currently at our firm.” A decision to expand the primary lawyer group involves a cost/benefit analysis that should take into consideration the size and nature of the transaction, the scope of the opining firm’s representation of the client, and the size of that law firm. Even if the opinion giver limits the primary lawyer group in the opinion, the opinion giver should always consult with any lawyers in the firm who routinely supervise work for the client.

Although firms may use variations of “to our knowledge” such as “to the best of our knowledge,” “to the best of our actual knowledge,” “to our actual knowledge” and the like, it is not clear whether any of such phrases actually connotes a higher or different standard than “to our knowledge.” To avoid uncertainty concerning the meaning of the various formulations, the Committee recommends use of the formulation “to our knowledge,” together with a definition explaining the meaning of “knowledge.”

E. Exceptions, Qualifications and Limitations. Under customary practice, an opinion will be subject to two uniformly accepted qualifications, to the extent applicable: the bankruptcy exception and the equitable principles limitation. Often opinion givers state that the entire opinion letter is subject to these limitations. These standard exceptions are deemed to apply whether or not stated and, together with other possible exceptions to the opinion, are discussed more fully in Section VII.I. of this Report.

Beyond those exceptions are other customary and non-customary exceptions that are frequently stated in the opinion letter. Care should be exercised, however, in deciding what exceptions to include. As TriBar noted in its 2004 Remedies Opinion Report, “the value of an opinion is undercut when the opinion preparers include exceptions and assumptions that relate to issues that are not covered by the opinion or that are not raised by the agreement.” The 2004 TriBar Remedies Opinion Report provides helpful guidance with respect to the inclusion of additional exceptions by listing five questions an opinion preparer should ask in deciding whether to include a specific exception or assumption. They are as follows:

- Do any of the Company’s undertakings raise legal issues of concern?

89 TriBar 1998 Report § 3.3; Statement of Opinion Practices § 4.2.
90 TriBar 1998 Report § 1.2(a).
91 See infra Illustrative Op. Letter § X.A; see also infra § VII.I.
Does the legal issue arise under the law covered by the opinion?

Is the legal issue covered by the opinion?

Can the legal issue be resolved by factual inquiry?

Can the legal issue be avoided by restructuring the transaction or revising the agreement?93

VII. COMMON OPINIONS AND RELATED DUE DILIGENCE

A. Status. This opinion addresses the de jure status of a business entity. It is the foundation for many of the following opinions for which it is a necessary predicate. The opinions below are often expressed similarly from firm to firm and from transaction to transaction, and thus an opinion giver who wishes to limit the meaning of an opinion framed in customary terms needs to make that intention clear, ordinarily by means of an express statement in the opinion letter.94 “Company” below is used to identify the entity that is the subject of the opinion. The following are common formulations of the status opinion for corporations and LLCs, limited partnerships, RLLPs and business trusts, in each case organized under Virginia law:

For a corporation:

The Company is a corporation validly existing and in good standing under the laws of the Commonwealth of Virginia.

For an LLC, limited partnership, RLLP or business trust:

The Company is a [limited liability company] [limited partnership] [registered limited liability partnership] [business trust] validly existing under the laws of the Commonwealth of Virginia.

This opinion identifies the type of legal entity and the status of its existence. Commonly today, counsel for the opinion recipient is satisfied with a simple confirmation that the Company presently exists in the form specified (i.e., that the corporation or other entity is validly existing) and is in “good standing” (with respect to corporations) in its jurisdiction of organization.95

The statement that the Company “is a corporation” (or other entity) means simply that at some time it was incorporated (or organized) and continues to be incorporated (or organized) as of the date of the opinion. “Validly existing” means that the corporation (or other entity) has not ceased to be a corporation (or other entity) due to a conversion, merger, dissolution, consolidation or other event terminating its existence. With respect to an LLC,
limited partnership, RLLP and business trust whose term of duration is limited, it also means that the term has not expired.

The significance of being in “good standing” varies from state to state. In Virginia, “good standing” with respect to a stock corporation means 97: (i) all fees, fines, penalties and interest assessed, imposed, charged or to be collected by the Virginia State Corporation Commission (“Va. SCC”) have been paid; (ii) all required annual reports have been delivered to and accepted by the Va. SCC; and (iii) no certificate of dissolution or withdrawal, or order of reinstatement prohibiting the domestic corporation from engaging in business until it changes its corporate name has been issued, or that certificate or prohibition no longer is in effect. It is common for an opinion letter to expressly recite that a good standing opinion is based solely on a Certificate of Good Standing issued by the Va. SCC. Nonetheless, if counsel has reviewed a Certificate of Good Standing in connection with delivering a good standing opinion, the opinion is understood to be based solely on the certificate irrespective of whether the opinion makes that reliance explicit, references the certificate or states that the opinion is based solely on the certificate.

The Va. SCC does not issue a Certificate of Good Standing with respect to LLCs or certain other forms of business entities. It does, however, issue Certificates of Fact for LLCs, limited partnerships, RLLPs and business trusts. For an LLC, a Certificate of Fact generally recites that the entity is duly organized as an LLC under the laws of Virginia, the date of its organization, and that the LLC is in existence in Virginia as of the date specified. As a result, opinion givers expect opinion recipients to accept such a Certificate of Fact as sufficient evidence of the existence of the Company as an LLC (or other form of entity) as of the date of the certificate in much the same fashion as Certificates of Good Standing are treated with respect to corporations. If counsel has reviewed a Certificate of Fact in connection with delivering an opinion on the existence of an LLC (or other form of entity), the opinion is understood to be based solely on the certificate irrespective of whether the opinion makes that reliance explicit, references the certificate or states that the opinion is based solely on the certificate. Because “good standing” has no statutorily defined meaning with respect to LLCs, limited partnerships, RLLPs or business trusts organized in Virginia, a “good standing” opinion should not be requested with respect to those entities. 98

The clear trend in recent years is not to give “duly incorporated” or “duly organized” opinions. 99 Unlike the “validly existing” opinion, which looks at the present, duly incorporated or duly organized opinions refer to the past. Significant due diligence typically is required to give a “duly organized” opinion unless the opinion giver was involved in the

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98 Since “good standing” certificates are available for these entities in Delaware, a “good standing” opinion may be appropriate as it relates to Delaware entities.
99 TriBar 1998 Report § 6.1.2; Glazer, supra note 7, § 6.3, at 203; ABA Bus. Law Section, Mergers and Acquisitions Comm., Model Stock Purchase Opinion with Commentary 12 (2d ed. 2010) [hereinafter Model Stock Purchase Op.] (observing that the “due organization” opinions are rarely requested and should be avoided as entailing costs that are rarely justified, noting that in some states, older law in effect at the time of incorporation could necessitate reviewing actions of incorporators and initial directors, obtaining evidence of advertising and confirming receipt of specified capital before commencing business).
organization of the entity, and the benefit of “duly incorporated” and “duly organized” opinions is generally outweighed by the costs associated with delivering them.

If given, a “duly incorporated” opinion means that statutory requirements in effect on the date of the Company’s incorporation for the Company to be incorporated under the applicable corporation statute were complied with by the incorporators.100 “Duly formed” is the corresponding opinion for an LLC, limited partnership, or business trust.

“Duly organized” goes further and includes not only the due incorporation but also those post-incorporation steps that are necessary to complete the organization process under state law.101 Typically, these include those actions customarily addressed in the organizational meeting of the initial directors, such as the appointment of officers, adoption of the bylaws and such other business as may be appropriate.102 Because there is no Virginia statute that specifies the organizational requirements for an LLC, limited partnership, RLLP or business trust, a “duly organized” opinion with respect to those entities should not be requested.103

Due Diligence. When the opinion is limited to its simplest form, i.e., type of entity, validly existing and in good standing (with respect to corporations), it is not uncommon for the opinion recipient to agree that such an opinion may be based, without independent investigation, solely upon the Certificate of Good Standing (or Certificate of Fact, as applicable) from the Va. SCC.

Opinions on due incorporation and valid existence, however, customarily entail obtaining from the Va. SCC certified copies of the Company’s Articles of Incorporation and all amendments thereto with an attestation that these are all of the documents of record and an examination of all of the foregoing to confirm that the documents obtained relate to the subject company, that the statutorily prescribed form of Articles of Incorporation was filed with the Va. SCC and that the documents do not contain a provision that has resulted in the corporation’s dissolution (e.g., a time limitation on perpetual corporate existence).

In addition to the steps required for due incorporation, a duly organized opinion (which is rarely requested—see footnote 99) also will require the opinion giver to review applicable provisions of the Virginia Stock Corporation Act (for stock corporations) or Virginia Nonstock Corporation Act (for nonstock corporations) that were in effect at the time the corporation was organized, corporate minutes, stock journals and such other documents as may be necessary to conclude that the organizational steps mandated at the time the corporation was organized were satisfied.

100 TriBar 1998 Report § 6.1.1
101 Id. § 6.1.2
103 However, Virginia is among relatively few states that permits an LLC to be formed with no members, which places an opinion giver for an LLC in a similar position as one for a corporation who might find it necessary to review the actions of an incorporator. As noted with respect to corporations, “due organization” opinions are disfavored. See supra note 98 and accompanying text. Nevertheless, if such an opinion must be rendered for an LLC that had no members at the time of formation, either a certificate from the organizer of the LLC (the person who signed the articles of organization), or a statement of the organizer or initial members in the LLC’s records, regarding the post-formation admission of the initial member or members should suffice to establish the chain of authority to the members and/or managers of the LLC. See Va. Code Ann. § 13-1-1038.1(A)(3).
B. Authority to Transact Business in Virginia. This opinion addresses the de jure authority of a foreign business entity to transact business in Virginia. The following are common formulations of the authority opinion for corporations and LLCs, limited partnerships, RLLPs and business trusts:

*For a corporation:

The Company is authorized to transact business as a foreign corporation in the Commonwealth of Virginia.

*For an LLC, limited partnership, RLLP, or business trust:

The Company is registered to transact business as a foreign [limited liability company] [limited partnership] [registered limited liability partnership] [business trust] in the Commonwealth of Virginia.

A foreign entity may not transact business in Virginia[104] unless it has obtained from the Va. SCC a Certificate of Authority for a foreign corporation,[105] or Certificate of Registration for a foreign LLC, limited partnership, or business trust,[106] or has filed with the Va. SCC a Statement of Registration for a foreign RLLP.[107] The opinion that the entity “is authorized [registered] to transact business” means that the non-Virginia entity has obtained that Certificate or filed that Statement and that the Certificate or Statement remains effective.

The suggested opinion uses “authorized” or “registered” terminology, as applicable, to conform to the terminology used in the applicable statutes. Because the relevant statutes do not use “qualified,” the Committee recommends against opining that an entity is “qualified” to transact business in Virginia. Nonetheless, if “qualified” is used, it is understood to have the same meaning as “authorized” or “registered,” as applicable.

If the Company does significant business in states other than its jurisdiction of organization, sometimes the opinion recipient requests an opinion that the Company is duly qualified, authorized, or registered to do business in those states. Because that opinion will be based solely upon good standing certificates issued by officials of other states, both the 1998 TriBar Opinion Report at section 6.1.4 and the Guidelines at section 4.1, as well as the 2010 ABA Model M&A (Stock Purchase) Opinion at 12, observe that it is of little value and should be avoided. Also observed as inappropriate are requests for an opinion that the Company is duly qualified to do business where the nature of its business requires it to be so qualified, regardless

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[107] See Va. Code Ann. § 50-73.138. Note the requirement that the foreign limited partnership also file with the Va. SCC a certificate of status from the filing office in the jurisdiction in which the foreign RLLP is registered. *Id.*
of whether that request is qualified by “where the failure to so qualify would have a material adverse effect on the Company.” Those opinions typically should not be requested.

Due Diligence. The opinion giver should obtain and review a Certificate of Good Standing for a foreign corporation or a Certificate of Fact for a foreign LLC, limited partnership, RLLP or business trust. It is good practice to list that Certificate in the opinion as a reviewed document. The opinion giver should be entitled to rely on that Certificate, without further investigation, as the basis for the opinion. That reliance is implicit if not expressly stated in the opinion.

C. Power. This opinion addresses whether the Company has the corporate (or other entity) power to enter into and perform its obligations under the identified transaction documents. The following is a common formulation of the power opinion:

For a corporation:

The Company has the corporate power to execute, deliver and perform its obligations under the Agreement.

For an LLC, limited partnership, or business trust:

The Company has the [limited liability company] [limited partnership] [business trust] power to execute, deliver and perform its obligations under the Agreement.

The principal focus of this opinion is to confirm that the execution, delivery and performance of the Agreement are not ultra vires. In this context, the determination of whether acts may be ultra vires is based upon the Company’s Articles of Incorporation, its bylaws and the corporation law of Virginia (or the corresponding organizational documents and law if the Company is an entity other than a corporation). For instance, if a corporation’s Articles of Incorporation provided that it could borrow no more than $100,000, then it would not have the corporate power to obtain a loan for $500,000. It is commonly understood that this opinion does not address whether the Company’s actions are restricted by other laws such as statutory requirements for permits or licenses; however, it does cover statutory, Articles of Incorporation and bylaw provisions as well as judicial doctrines that might deny the Company the ability to engage in a specified activity that is reserved for entities under special statutes.

Historically, the words “power and authority” have been used in this opinion, but the term “authority” is unnecessary and could be misunderstood to refer to the authorization of the transaction documents. As such, the suggested form of opinion does not use the

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“authority” terminology, but including it in a power opinion should not affect the scope or meaning of the opinion.111

The power opinion is generally understood to be limited to the Company’s corporate (or other entity) power, and the suggested form of the opinion uses the phrase “corporate power” to make that clear. However, omitting the “corporate” (or other entity) adjective does not change the scope or meaning of the opinion.112 Also, the suggested opinion addresses “power,” not “full power,” given the uncertain meaning of the latter.113

Opinion preparers sometimes are asked to include an opinion on the Company’s power to conduct its business and own its properties. This opinion is less common than one on the Company’s power to enter into the transaction documents.114 Some discourage giving or requiring this opinion because of the potentially expansive interpretation of the opinion and the extensive due diligence that would be required if the opinion were broadly interpreted.115 Others suggest that the opinion has limited value absent special circumstances (e.g., for special purpose entities or those operating in regulated industries)116 because most entities are permitted by statute to engage in any lawful activity.117 The Committee believes that, as a general matter, it is not appropriate to request an opinion on the Company’s power to conduct its business and own its properties given the fact-intensive nature of the opinion. If nonetheless it is given, the opinion giver should clearly identify (or assume) the business activities in which the Company is engaged, including by referencing a description in a document (e.g., transaction document, certificate of an officer of the Company, or SEC filing).118

Due Diligence. In addition to performing those steps necessary to confirm the Company’s valid existence and good standing, the opinion giver should undertake the following due diligence:

(i) If the Company is a corporation, the opinion giver should review the Company’s Articles of Incorporation and bylaws as well as relevant provisions of the corporate law of Virginia relating to corporate power to confirm that there are no limitations or restraints on the Company’s corporate power.

111 FL Report at 68.
112 Glazer, supra note 7, § 8.2, at 237.
113 Id.; N.C. Report at 38.
114 Glazer, supra note 7, § 8.1, at 234.
115 FL Report at 69.
116 N.C. Report at 38.
117 See Va. Code Ann. § 13.1-626 (“Every corporation incorporated under this Act has the purpose of engaging in any lawful business unless a more limited purpose is (i) set forth in the articles of incorporation, or (ii) required to be set forth in the articles of incorporation by § 13.1-620, or any other law of this Commonwealth.”); § 13.1-1008 (“Every limited liability company formed under this chapter has the purpose of engaging in any lawful business, purpose, or activity, whether or not such business, purpose, or activity is carried on for profit, except as otherwise provided by the law of this Commonwealth, unless a more limited purpose is set forth in the articles of organization.”); § 13.1-1209 (“Every business trust formed under this chapter has the purpose of engaging in any lawful business, except as otherwise may be provided by the law of this Commonwealth, unless a more limited purpose is set forth in the articles of trust.”).
118 MD Report at 48; N.C. Report at 38.
(ii) If the Company is an LLC, limited partnership, general partnership, or business trust, then in addition to reviewing provisions of the LLC, limited partnership, general partnership, or business trust law, as applicable, of Virginia relating to power, the opinion giver should review, as applicable, the Articles of Organization and operating agreement of an LLC, the Certificate of Limited Partnership and limited partnership agreement of a limited partnership, the partnership agreement of a general partnership, and the Articles of Trust and other trust instrument of a business trust.

(iii) The opinion giver should review the applicable transaction documents to determine if actions required to be taken by the entity are within the entity’s powers. If the entity has the broadest possible power, there should not be much to check.

D. Authorization, Execution and Delivery. This opinion responds to the appropriate concern that those persons who executed the Agreement had the actual authority to act on the Company’s behalf and that the Agreement was executed in the manner required to make it a binding obligation of the Company. The following is a common formulation of this opinion:

For a corporation:

The Company has authorized the execution, delivery and performance of the Agreement by all necessary corporate action and has duly executed and delivered the Agreement.

For an LLC, limited partnership, RLLP or business trust:

The Company has authorized the execution, delivery and performance of the Agreement by all necessary [limited liability company] [limited partnership] [registered limited liability partnership] [business trust] action and has duly executed and delivered the Agreement.

The “authorization” opinion means that the Company, acting by its governing body or other requisite persons (e.g., the board of directors of a corporation119, the manager(s) and/or member(s) of an LLC, or certain partners of a limited partnership) have authorized the execution, delivery and performance of the Agreement by the required vote at a properly called and held meeting, by an effective written consent, or by express authorization in the Company’s organizational documents and that such approval remains effective.120 The opinion also means that the entity was validly existing at the time the Agreement was approved by the Company and that the Company has the power to enter into and perform its obligations under the Agreement under its organizational documents and the law of Virginia.121

The opinion that the Company has “duly executed and delivered the Agreement” means that the persons identified in the Agreement as signatories had the actual authority to

119 Depending on the nature of the transaction (e.g. the sale of all or substantially all of a corporation’s assets), shareholder approval may also be necessary for a corporation’s authorization of the execution, delivery and performance of an agreement. The opinion giver must check applicable statutes and the corporation’s organizational documents for applicable requirements.
120 Glazer, supra note 7, §9.3, at 267-68.
121 Id. at 264-66.
execute the Agreement on behalf of the Company,\textsuperscript{122} that all required signatures were obtained, that the Agreement was signed in a manner consistent with the requirements of applicable corporate (or other entity) law, contract law (e.g., statute of frauds, if applicable) and the Company’s organizational documents and authorizing resolutions\textsuperscript{123} and that the Company delivered the executed Agreement in a manner that makes it a binding obligation of the Company under applicable contract law.\textsuperscript{124}

An opinion that a document has been “delivered” generally means that the executed document has been appropriately transmitted to the opinion recipient without condition and with the intent to create a legally binding contract. The opinion giver either should be present at the delivery of the document or otherwise satisfy himself or herself that delivery has occurred (\textit{e.g.}, escrow or document transmittal letter/fax/e-mail; cross-receipt; certificate to counsel). When document delivery occurs electronically, an opinion giver may implicitly assume that an electronic exchange of signature pages together with authorization (express or implied) to attach them to the relevant documents constitutes actual delivery. Even though that assumption represents customary practice, some counsel prefer to rely explicitly on an officer’s certificate.\textsuperscript{125}

An opinion giver customarily assumes, without necessarily stating that assumption, that those who approved the Agreement did not violate the fiduciary requirements imposed upon them by the corporate law of the jurisdiction of organization and satisfied any disclosure obligations (such as the disclosure of personal interests in the transaction), without independent investigation. The opinion giver is entitled to rely on that assumption unless it is not reliable.\textsuperscript{126}

**Due Diligence.** In addition to performing those steps necessary to confirm the Company’s valid existence, good standing and power, the opinion giver should undertake the following due diligence:

(i) Review copies of the Articles of Incorporation, bylaws, any shareholders agreements, voting trusts and similar documents (or the corresponding

\textsuperscript{122} Even when the subject of an opinion is a single-member LLC, authority should not be presumed simply because the Agreement has been signed by that member. Single-member LLCs may be manager-managed with one or more managers who are not the sole member, or may have granted non-member third parties substantive rights in an operating agreement that may limit the authority of the member to take certain action. See, \textit{e.g.}, Va. Code Ann. § 13.1-1023(A)(1) (operating agreement may provide rights to those not a party to the operating agreement).

\textsuperscript{123} For instance, the Articles of Incorporation or bylaws of a corporation may require the Agreement to be signed by two officers or by certain specified officers or require that the seal of the corporation be affixed. \textit{Id.} § 9.4, at 281, 284.

\textsuperscript{124} Id. § 9.5, at 288-89.

\textsuperscript{125} See, \textit{e.g.}, FL. Report at 88-89; Opinions Committee, Business Law Section of the State Bar of California, \textit{Sample California Third-Party Legal Opinion for Venture Capital Financing Transactions}, 70 Bus. Law. 177, n.49 [hereinafter California VC Opinion]. The sample reliance language in the California VC Opinion at footnote 49 reads as follows: “In rendering the opinion set forth in Section C (“Opinions”), paragraph 3 concerning the Company’s execution and delivery of the Transaction Documents, we have not necessarily observed their execution by the Company but have relied exclusively upon representations regarding the Company’s execution and delivery of the Transaction Documents made to us in a certificate and our review of copies, facsimiles or .pdf files of executed signature pages delivered to us by representatives of the Company or their agents.”

organizational documents for the Company if it is an entity other than a corporation\(^{127}\), and applicable corporate (or other entity) law to determine any special requirements relating to authorization of, and officers empowered to execute, the Agreement.

(ii) Review certified\(^{128}\) copies of resolutions or minutes of meetings of the appropriate governing body of the Company (e.g., the board of directors\(^{129}\) of a corporation or the managers and/or members of an LLC or the requisite partners of a partnership) and, if necessary, an officer’s certificate to verify the authorization of the transaction, the form of the Agreement\(^{130}\), the execution of the Agreement, and the officers who are authorized to execute it. In the case of an LLC or partnership without a governing body and the operating agreement or partnership agreement of which expressly delegates to one or more members, managers or partners the specific authority to engage in the transaction, a separate resolution may not be necessary to evidence the authorization. With respect to the certified resolutions, the opinion preparer is entitled to rely on the “presumption of regularity” and thereby assume, absent evidence to the contrary, that a quorum was present, the requisite number of votes was obtained, and requisite notices were given, without confirming the procedural specifics underlying the resolutions\(^{131}\).

(iii) Review any filed statements of partnership authority of an RLLP.

(iv) Review the executed Agreement to insure conformity with the authorization.

(v) Review the Incumbency Certificate identifying the persons properly empowered to act on behalf of the Company. The genuineness of signatures is implicitly assumed in closing opinions, so an opinion giver does not need to verify independently that the signature appearing on the Agreement is the signature of the person identified in the Agreement or resolutions as the signatory\(^{132}\).

\(^{127}\) The partnership agreements and operating agreements of Virginia partnerships and LLCs need not be in writing. Presumably, an opinion giver’s due diligence will require the review of a written agreement and receipt of a partner’s certificate or manager’s/member’s certificate certifying to the opinion giver that the attached version of the partnership agreement or operating agreement has not been amended.

\(^{128}\) Certified as true and complete copies by an appropriate officer in an officer’s certificate to which the copies are attached.

\(^{129}\) See supra note 119.

\(^{130}\) The opinion giver must confirm that the Agreement that is covered by the opinion is the same Agreement that was approved and that any changes to the Agreement since the time of approval were authorized by such approval. Greater diligence can be required if the language of the authorizing resolution approves a referenced form of the Agreement (e.g., “the Agreement in the form attached hereto as Exhibit A is hereby approved”) without contemplating the potential for modifications to the form. Authorizing resolutions that are more broadly worded may make this confirmation more perfunctory (e.g., “the Agreement in such form as an Authorized Officer may execute is hereby approved” or “the Agreement substantially in the form attached, with such modifications as an Authorized Officer shall deem appropriate (as conclusively evidenced by his or her execution and delivery thereof), is hereby approved”).

\(^{131}\) Glazer, supra note 7, § 4.3.5, at 158, § 9.3, at 276-77; FL Report at 77.

\(^{132}\) Glazer, supra note 7, § 9.4, at 287; FL Report at 89; N.C. Report at 44 (stating that an incumbency certificate may be relied upon when execution is not observed by the opinion giver).
(vi) If delivery is not witnessed, satisfy himself or herself that delivery has occurred (e.g., escrow or document transmittal letter/fax/e-mail; cross-receipt; certificate to counsel; assumption).

E. Equity Issuances. Purchasers of shares of stock in equity financing transactions and underwriters in public offerings often request an opinion that the shares being issued in the offering have been “duly authorized” and will be “validly issued, fully paid, and nonassessable.” This opinion is designed to provide assurances that purchasers of the shares will acquire the rights of a shareholder under the Virginia Stock Corporation Act (the “Act”) and the Company’s Articles of Incorporation and bylaws.\textsuperscript{133} Similarly, purchasers of membership interests from an LLC often request an opinion that the membership interests will be “validly issued.”\textsuperscript{134} This opinion provides comfort that the creation and issuance of the membership interests comport with the requirements of the Virginia Limited Liability Company Act (the “LLC Act”) and the LLC’s Articles of Organization and Operating Agreement.\textsuperscript{135} In both cases, the opinion only covers the Act or the LLC Act, as applicable, and not compliance with securities or other laws, with one exception. For a regulated entity that is organized under the Act or the LLC Act but is required by a non-Act or non-LLC Act statute to obtain approval from a regulatory body in order to issue stock or membership interests, the opinion does cover compliance with the approval requirements of that other statute.\textsuperscript{136}

1. Equity Issuances – Corporations. The following is a common formulation of this opinion for corporations:

The Shares have been duly authorized, and when issued, delivered and paid for in accordance with the Agreement, will be validly issued, fully paid and nonassessable.

The “duly authorized” opinion generally means that the shares being issued have been created in accordance with the Act and the Company’s Articles of Incorporation and bylaws and, as of the time of issuance, are included within the shares that the Company is permitted to issue under its Articles of Incorporation and the Act.\textsuperscript{137} Encompassed within this are matters such as whether (A) the terms of the shares meet the requirements of the Act and the issuer’s Articles of Incorporation,\textsuperscript{138} (B) the Articles of Incorporation or amendment thereto that create the shares were duly adopted by the Board of Directors and, if required, shareholders of the Company in accordance with the Act, (C) the form of the Articles of Incorporation or Articles of Amendment, including the description of the rights and preferences of the shares contained therein, comply with the requirements of the Act,\textsuperscript{139} and (D) at the time the shares were issued,

\textsuperscript{133} Glazer, supra note 7, § 10.1, at 410-11.

\textsuperscript{134} This Report does not address opinions relating to the issuance of equity by entities other than corporations or LLCs, such as the issuance of limited partnership interests by a limited partnership or beneficial interests by a business trust.

\textsuperscript{135} Supplemental TriBar LLC Opinion Report: Opinion on LLC Membership Interests, 66 Bus. Law. 1065, § 1.0 (2011) [hereinafter Op. on LLC Membership Interests]. A “validly issued” opinion does not mean that the purchaser of the membership interests is being admitted as a member to the LLC. See additional discussion infra.

\textsuperscript{136} See Glazer, supra note 7, § 10.2.1, at 412; TriBar 1998 Report § 6.2.2.

\textsuperscript{137} TriBar 1998 Report § 6.2.1.

\textsuperscript{138} Glazer, supra note 7, § 10.4.2, at 417; TriBar 1998 Report § 6.2.1.

there was an adequate number of authorized but unissued shares of the class and series of stock being issued.\textsuperscript{140} The “duly authorized” opinion does not address whether a court will give effect to the rights or preferences granted to the holders of the shares in the Articles of Incorporation\textsuperscript{141} or whether the directors complied with their fiduciary duties in authorizing the shares.\textsuperscript{142} Compliance with fiduciary duties may be assumed, absent facts known by the opinion giver that make that reliance unwarranted.\textsuperscript{143}

The “validly issued” opinion means that the shares have been issued in accordance with the requirements of the Act, the Articles of Incorporation and bylaws of the Company, and the authorizing resolutions of the board of directors, shareholders, and/or board committee, as applicable. Under section 13.1-643B of the Act, any issuance of shares must be authorized by the board of directors, except to the extent that authority is reserved to the shareholders in the Articles of Incorporation\textsuperscript{144} or is delegated by the board to a committee.\textsuperscript{145} Accordingly, the opinion giver must determine which bodies of the Company must approve the issuance and confirm that procedurally those approvals occurred in the manner required by the Articles of Incorporation, bylaws, and Act (e.g., that action was taken at a properly called and held meeting or by an effective written consent).\textsuperscript{146}

The Company must receive the consideration that is identified in the authorizing resolution in order for shares to be “validly issued.” The Committee recommends using forward-looking language similar to the sample opinion language above (“The Shares . . . when issued, delivered and paid for in accordance with the Agreement, will be validly issued, fully paid, and nonassessable.”), which avoids the need to separately confirm or assume the fact of receipt. If instead the opinion states that the shares have been validly issued, fully paid, and nonassessable, then the opinion preparer must verify or assume receipt of the designated consideration. Irrespective of whether the Committee’s suggested language is used, the opinion giver must confirm that the consideration identified in the resolution matches the consideration described in the Agreement. In addition, a good faith determination by the board\textsuperscript{147} that the consideration received or to be received is adequate is conclusive insofar as that adequacy relates to whether the shares are validly issued.\textsuperscript{148}

Shares cannot be “validly issued” unless they have been “duly authorized,”\textsuperscript{149} and thus the matters covered by the latter opinion also are covered by the former.

\textsuperscript{140} See MD Report at 70-71. Section 13.1-638 requires the Articles of Incorporation to set forth the number of shares of each class and series that the company is authorized to issue, and section 13.1-640A provides that a corporation may issue the number of shares of each class or series authorized by the Articles of Incorporation.

\textsuperscript{141} Glazer, supra note 7, § 10.4.2, at 420.

\textsuperscript{142} FL Report at 126.

\textsuperscript{143} Glazer, supra note 6, § 10.4.3, at 426.

\textsuperscript{144} Va. Code Ann. § 13.1-643A. Section 13.1-643A permits all power that is granted to the board in section 13.1-643 to be reserved to the shareholders by the Articles of Incorporation.

\textsuperscript{145} Va. Code Ann. § 13.1-689D.

\textsuperscript{146} Glazer, supra note 7, § 10.6.4, at 441-42; TriBar 1998 Report § 6.2.2; MD Report at 67.

\textsuperscript{147} Or the shareholders, if that power is reserved to them in the Articles of Incorporation. Va. Code Ann. § 13.1-643A.


\textsuperscript{149} MD Report at 67; FL Report at 127; TriBar 1998 Report § 6.2.2.
For shares to be “validly issued”, the issuance must not violate any preemptive rights that are granted pursuant to the Act or the Articles of Incorporation. Under the Act, the shareholders of a corporation incorporated after December 31, 2005, have no preemptive rights unless otherwise provided for in the Articles of Incorporation, and the shareholders of a corporation incorporated on or before December 31, 2005, have preemptive rights, subject to limitations in section 13.1-651D through G and further limitation or denial of those rights in the Articles of Incorporation. The “validly issued” opinion does not address potential violations of contracts, including preemptive rights that are granted by contract. Those violations customarily are covered, if at all, by the “no violation” opinion.

A “validly issued” opinion covers any additional steps the Company is required to take in order to confer ownership of the shares to the purchaser. Under the Act, shares do not need to be represented by certificates as a certificate is merely evidence of ownership and not a requirement to confer ownership. For shares that are represented by certificates, section 13.1-647B specifies the minimum information that must be stated on the certificates. If the Company is authorized to issue shares without certificates, then within a reasonable period of time after the issuance the Company must deliver to the purchaser a written statement containing the information that otherwise must appear on a certificate. The Committee recommends using forward-looking language similar to the sample opinion language above (“The Shares . . . when issued, delivered and paid for in accordance with the Agreement, will be validly issued, fully paid, and nonassessable.”), which avoids the need to separately confirm or assume the fact of delivery of that written statement or stock certificate. If instead the opinion states that the shares have been validly issued, fully paid, and nonassessable, then the opinion preparer must verify or assume that delivery.

The “fully paid and nonassessable” opinion means that the issuance of the shares meets the requirements of section 13.1-643C of the Act. That section provides: “A good faith determination by the board of directors that the consideration received or to be received for the shares to be issued is adequate is conclusive insofar as the adequacy of consideration relates to whether the shares are validly issued, fully paid and nonassessable. When the board of directors has made that determination and the corporation has received the consideration, the shares issued therefor are fully paid and nonassessable.” Section 13.1-643C provides that shares may be

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152 Glazer, supra note 7, § 10.6.6, at 448. The issuance-related provisions of the Act do not require the Company to reflect shares on a stock ledger in order for them to be considered “validly issued.” However, the Act does require each company, directly or through its agent, to “maintain a record of its shareholders, in a form that permits preparation of a list of the names and addresses of all shareholders, in alphabetical order by class and series, if any, of shares showing the number and class and series, if any, of shares held by each.” Va. Code Ann. § 13.1-770C. See also Va. Code Ann. § 13.1-661 (requiring preparation of a shareholders’ list for annual and special shareholders meetings).
153 Va. Code Ann. §§ 13.1-647A, 13.1-648A. See also Sylvania Indus. Corp. Lilienfeld’s Estate, 132 F.2d 887, 891 (4th Cir. 1943) (“[C]ertificates of stock, albeit they have been given by the Act certain attributes of negotiable paper, are not the stock but mere evidence of ownership, just as a negotiable promissory note is not the debt but mere evidence of the debt . . . .”).
155 In accordance with section 13.1-643A, the powers granted to the board in section 13.1-643C may be reserved to the shareholders in the Articles of Incorporation. See also Va. Code Ann. § 13.1-642C (“Shares issued pursuant to
issued for consideration consisting of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, contracts for services to be performed, or other securities of the Company. In the case of future services and promissory notes, the consideration is received by the Company for purposes of section 13.1-643 when the Company accepts the contract for future services or the promissory note, not when the services have been performed or the promissory note paid.156

**Due Diligence – Corporations.** The opinion giver should undertake the following due diligence:

(i) "**Duly Authorized**"

(a) Perform those steps necessary to confirm the Company’s valid existence, because the Company must have been in existence at the time the stock was created in order for the stock to have been “duly authorized.”157

(b) Review copies of the Articles of Incorporation and bylaws and applicable corporate law to determine any special requirements relating to authorization of the shares and to verify share characteristics and attributes.

(c) Review certified158 copies of resolutions or minutes of meetings of the appropriate governing body of the Company (the board of directors and/or shareholders) to verify that the proper procedure for creating the shares (including adopting the Articles of Incorporation or relevant amendment thereto) was followed. This includes confirming whether shareholder approval of the Articles of Incorporation or Articles of Amendment that describes the shares was necessary and, if so, properly obtained.

(d) Review an officer’s certificate that addresses the number of outstanding and reserved shares. The opinion preparer may rely on the certificate in determining the number of shares available for issuance, absent knowledge that the information contained therein is incorrect or knowledge of facts that make reliance unwarranted.159

(ii) "**Validly Issued, Fully Paid, and Nonassessable**"

(a) Perform those steps necessary to confirm the shares are “duly authorized.”

(b) Review copies of the Articles of Incorporation and bylaws and applicable corporate law to determine any special requirements relating to issuance of the shares.

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157 Glazer, supra note 7, § 10.4.1, at 416.
158 Certified as true and complete copies by an appropriate officer in an Officer’s certificate to which the copies are attached.
159 See FL Report at 125-26.
(c) Review certified\(^\text{160}\) copies of resolutions or minutes of meetings of the appropriate governing body of the Company (board of directors and/or shareholders) to verify approval of the issuance, compliance with any requirements relating to the issuance that are specified therein, and the consideration to be received, including that it matches the consideration specified in the Agreement. It is recommended that the resolutions expressly state that the consideration received or to be received for the shares is adequate, in order to conform to section 13.1-643C.

(d) Review the executed Agreement to verify that the consideration for the shares specified therein matches the consideration specified in the authorizing resolutions of the Company.

(e) Review an officer’s certificate that confirms receipt of the required consideration or otherwise verify to the opinion giver’s satisfaction that the required consideration has been received, but the certificate or verification is not essential if the sample opinion language above (“when issued, delivered and paid for in accordance with the Agreement”), or similar language, is used or receipt is explicitly assumed in the opinion.

2. **Equity Issuances – Limited Liability Companies.** The following is a common formulation of this opinion for LLCs:

The membership interests,\(^\text{161}\) when issued, delivered and paid for in accordance with the Agreement, will be validly issued.\(^\text{162}\)

LLCs in Virginia have significant flexibility in establishing their governance and capitalization structures. The LLC Act contains default rules for many of those matters, but it expressly permits most of those rules to be varied in the LLC’s Articles of Organization or Operating Agreement. Thus, the opinion language and corresponding due diligence relating to membership interest issuances must be tailored for each LLC and its organizational documents.

In many respects, an opinion that membership interests are “validly issued” is similar to an opinion that shares of stock are “validly issued.” It means that the membership interests have been created and issued in accordance with the requirements of the LLC Act, the Articles of Organization and Operating Agreement of the Company, and the authorizing resolutions of those who are required under the Articles of Organization, Operating Agreement, or Act to approve the issuance.\(^\text{163}\) The opinion confirms that the LLC has the power under the

\(^{160}\) Certified as true and compete copies by an appropriate officer in an Officer’s certificate to which the copies are attached.

\(^{161}\) An LLC has great flexibility in how it labels its membership interests. Frequently membership interests are designated as “units” or “shares” in an operating agreement.

\(^{162}\) Unlike the corresponding equity issuance opinion for a corporation, the sample LLC opinion does not include “duly authorized,” “fully paid” or “nonassessable” opinions. A “duly authorized” opinion for a corporation references the concept of authorized shares, which would be meaningless for an LLC because LLC statutes do not contemplate authorized capital that is established through and dependent upon a filing with the state filing agency. As to the “fully paid” and “nonassessable opinions,” the TriBar report on LLC opinions notes that the “validly issued” opinion incorporates compliance with the agreement providing for the issuance, including receipt by the LLC of any required consideration. See Op. on LLC Membership Interests § 1.0, at 1067.

\(^{163}\) Op. on LLC Membership Interests § 1.0.
LLC Act and its Articles of Organization and operating agreement to create and issue membership interests having the rights and preferences of those covered by the opinion. The opinion giver must determine who must approve the issuance and confirm that those approvals occurred in the manner required by the Articles of Organization, operating agreement, and/or LLC Act, as applicable. Often the Articles of Organization or operating agreement provide for management of the LLC by a manager or managers. If they do not, management is vested in the members.

The Company must receive the consideration, if any, that is identified in the authorizing resolution in order for membership interests to be “validly issued.” The Committee recommends using forward-looking language similar to the sample opinion language above (“The membership interests…when issued, delivered and paid for in accordance with the Agreement, will be validly issued.”), which avoids the need to confirm separately or assume the fact of receipt. If instead the opinion states that the membership interests have been validly issued, then the opinion preparer must verify or assume receipt of the designated consideration. Irrespective of whether the Committee’s suggested language is used, the opinion giver must confirm that the consideration identified in the resolution matches the consideration described in the Agreement.

The “validly issued” opinion does not address whether a court will give effect to the rights or preferences granted to the holders of the membership interests in the Articles of Organization or operating agreement or whether the managers or members complied with their fiduciary duties, if any, in authorizing the issuance of the membership interests. Compliance with fiduciary duties, if any, may be assumed, absent facts known by the opinion giver that make that reliance unwarranted.

The LLC Act does not contain provisions relating to preemptive rights of members. A “validly issued” opinion addresses potential violations of any preemptive rights granted in the Articles of Organization, but, like with a corporation, it does not address violations of contract rights, including the violation of preemptive (or other) rights that are granted via the

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164 Id.
165 Va. Code Ann. § 13.1-1022A. Except as provided in the LLC Act, the Articles of Organization, or Operating Agreement, members vote in proportion to their contributions to the LLC. Any action required or permitted to be taken by the members may be taken upon a majority vote of the members, and a majority vote of the members consists of the vote or other approval of members having a majority share of the voting power of all members. Va. Code Ann. § 13.1-1022B, C.
166 Under Virginia Code section 13.1-1038.1C, a person may receive a membership interest in an LLC without making a contribution or being obligated to make a contribution to the LLC.
167 A verification could take the form of a certificate from a manager, member or other authorized LLC representative, and because consideration for an LLC interest might involve future delivery of consideration or performance of services, the certificate or an opinion assumption may need to assume future performance of the obligation. See Op. on Membership Interests § 1.0 n.11, at 1067.
168 Op. on LLC Membership Interests § 1.0. See also Glazer, supra note 7, § 10.4.2, at 420.
169 See FL Report at 126 (“duly authorized” opinion does not address violation of fiduciary duties in connection with authorization of shares by a corporation).
170 Glazer, supra note 7, § 10.4.3, at 426.
Operating Agreement. Those violations traditionally would be covered, if at all, by the no breach or default opinion.

The LLC Act does not contain provisions requiring the “authorization” of the classes, series, and number of membership interests that an LLC may issue. Many operating agreements do not create a limited number of authorized membership interests. As such, and given the lack of a well-understood meaning of an opinion that membership interests have been “duly authorized,” the Committee believes that such an opinion generally should not be requested. Moreover, the Committee believes that a “validly issued” opinion is sufficiently broad to address the matters that would be covered by such an opinion. If an opinion that membership interests are “duly authorized” is nonetheless given, it should be interpreted to mean that the issuance of the membership interests has been approved in accordance with any applicable provisions of the LLC’s operating agreement and Articles of Organization and, if the operating agreement expressly creates a specified class or series and number of authorized membership interests, that the membership interests being issued are within those that the LLC is permitted to issue under its operating agreement.

A “validly issued” opinion does not mean that the purchaser of the membership interests is being admitted as a member to the LLC. A purchaser of a membership interest from the LLC becomes a member only upon compliance with the operating agreement provisions that address admission of members or, if the operating agreement is silent, upon consent of a majority of the managers of a manager-managed LLC or a majority vote of the members of a member-managed LLC. Similar requirements apply to the admission of assignees of membership interests. If an opinion is given that a purchaser has been duly admitted as a member of the LLC, that opinion means that the purchaser has been duly admitted in compliance with the provisions of the LLC Act and the requirements, if any, of the operating agreement and Articles of Organization of the LLC. If the purchase or subscription agreement for the membership interests contains conditions to the admission of the purchaser as a member, then the admission opinion addresses compliance with those conditions if they are incorporated in or made part of the LLC’s operating agreement. Out of an abundance of caution, some opinion givers assume compliance with those conditions or expressly rely on an officer’s or manager’s certificate as to compliance.

Due Diligence – Limited Liability Companies. The opinion giver should undertake the following due diligence:

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171 MD Report at 80. See also Glazer, supra note 7, § 10.6.2, at 439-40; MD Report at 49; TriBar 1998 Report § 6.2.2; FL Report at 128.
172 By contrast, section 13.1-638 of the Act requires a corporation to set forth in its Articles of Incorporation “any classes of shares and series of shares within a class, and the number of shares of each class and series, that the corporation is authorized to issue.”
173 Op. on LLC Membership Interests § 1.0.
174 Id. § 2.0. A sample opinion on the admission of a member is, “When the membership interests are issued, delivered, and paid for in accordance with the Agreement, the Purchaser will be duly admitted as a member of the Company.”
177 Op. on LLC Membership Interests § 2.0.
178 Id.
(i) Perform those steps necessary to confirm the Company’s valid existence, because the Company must have been in existence at the time the membership interests were created in order for the membership interests to have been “validly issued.”

(ii) Review copies of the Articles of Organization and operating agreement and applicable LLC law to determine any special requirements relating to authorization and issuance of the membership interests and to verify membership interest characteristics and attributes.

(iii) Review certified copies of resolutions or minutes of meetings of the appropriate governing body of the Company (or resolutions of the manager(s) and/or member(s) empowered to authorize the issuance of membership interests) to verify that the proper procedure, if any, for creating the membership interests (including adopting the operating agreement or relevant amendment thereto) was followed. This includes confirming whether additional member approval of the operating agreement or amendment thereto that describes the membership interests was necessary and, if so, properly obtained. Also review those resolutions or minutes to verify approval of the issuance, compliance with any requirements relating to the issuance that are specified in the resolutions, and the consideration to be received, including that it matches the consideration specified in the Agreement.

(iv) If the operating agreement creates only a limited number of authorized membership interests, review a manager’s or officer’s certificate that addresses the number of outstanding and reserved membership interests. The opinion preparer may rely on the certificate in determining the number of membership interests available for issuance, absent knowledge that the information contained therein is incorrect or knowledge of facts that make reliance unwarranted.180

(v) Review the executed Agreement to verify that the consideration for the membership interests specified therein matches the consideration specified in the authorizing resolutions of the Company.

(vi) Review a manager’s, member’s or officer’s certificate or otherwise verify to the opinion giver’s satisfaction that the required consideration has been received; but the certificate or verification is not essential if the sample opinion language above (“…when issued, delivered and paid for in accordance with the Agreement…”), or similar language, is used or receipt is explicitly assumed in the opinion.

(vii) Verify compliance with any membership interest certificate delivery requirements (if certificated) set forth in the LLC’s operating agreement,181 except that verification is not essential if the sample opinion language above (“when issued, delivered and

179 Certified as true and complete copies by an appropriate officer in an officer’s certificate to which the copies are attached.
180 See FL Report at 125-26 (with respect to share issuances).
181 The LLC Act does not require that membership interests be represented by certificates or that a written confirmation analogous to that required by section 13.1-648B of the Act be delivered to the purchaser of the membership interests.
paid for in accordance with the Agreement"), or similar language, is used or that matter is assumed in the opinion.

3. **Opinions on Outstanding Shares.** In addition to opinions that shares of a corporation are duly authorized, validly issued, fully paid, and nonassessable, purchasers of stock in equity financing transactions and underwriters in public offerings also sometimes request opinions on the valid issuance of outstanding shares\textsuperscript{182} or the number of authorized and outstanding shares.\textsuperscript{183}

An opinion on the valid issuance of previously issued shares is a background opinion, usually is not central to the transaction at issue and generally should not be requested. The opinion is designed to identify potential defects in issuances that might, for example, affect the validity of shareholder actions, the accuracy of disclosures or the ability to trade the shares.\textsuperscript{184} Opinion givers typically must devote significant time and expense to support this opinion and make important assumptions in delivering it. Accordingly, given the expense, assumptions, and background nature of the opinion, the parties must determine whether the benefit of the opinion outweighs the cost.\textsuperscript{185}

An opinion on the number of outstanding shares is largely a factual recitation and not a "legal opinion."\textsuperscript{186} If a party needs confirmation of the number, a certificate of an officer of the issuer or representations of the issuer in the underlying transaction documents should suffice.\textsuperscript{187}

F. **No Violation of Law.** This opinion complements the remedies opinion by addressing the legal consequences of the transaction, such as fines and government sanctions that would not prevent an opinion giver from rendering an unqualified opinion that the Agreement was enforceable, but that would, nevertheless, be significant to the opinion recipient. The following is a standard formulation of the "no violation of law" opinion:

\begin{quote}
The execution and delivery by the Company of the Agreement do not, and the consummation by the Company of the transactions provided for in the Agreement will not, violate applicable provisions of statutory laws or regulations.
\end{quote}

\textsuperscript{182} For example: "The issued and outstanding shares of the Company have been duly authorized and validly issued and are fully paid and nonassessable."

\textsuperscript{183} For example: "The authorized capital stock of the Company consists of X shares of Common Stock, \$Y par value per share, of which Z shares are issued and outstanding."

\textsuperscript{184} TriBar 1998 Report \S 6.2.5; Glazer, \textit{supra} note 7, \S 10.10, at 463-64.

\textsuperscript{185} \textit{Id.}; National Venture Capital Association, \textit{Form of Legal Opinion}, n.10 (June 2013) ("Because the opinion on the valid issuance of the outstanding shares will require a review of each issuance of shares, in many situations it will not be cost justified."). \textit{See also Special Report of the TriBar Op. Comm.: Duly Authorized Opinions on Preferred Stock}, 63 Bus. Law. 921 (2008).

\textsuperscript{186} TriBar 1998 Report \S 6.2.5; Glazer, \textit{supra} note 7, \S 10.10, at 464-65.

\textsuperscript{187} \textit{See National Venture Capital Association, Form of Legal Opinion}, n.9 (June 2013) ("Because of its factual nature, some law firms are unwilling to give an opinion on the number of outstanding shares."); Glazer, \textit{supra} note 7, \S 10.10, at 464-66 ("A good argument can be made . . . that the number of outstanding shares is not an appropriate subject for a closing opinion and that the recipient should look directly to the company or its transfer agent for comfort on that issue.").
The “no violation of law” opinion means that the closing of the transaction contemplated by the Agreement will not expose the Company to sanctions for violating a civil or criminal statutory or regulatory prohibition.\textsuperscript{188}

Another formulation of this opinion states that the “execution and delivery by the Company of the Agreement and the performance by the Company of its obligations thereunder” will not violate any laws. This formulation is broader in scope since it may include the Company’s ongoing performance of its obligations after the closing. Performance should be a function of whether a Company can perform its contractual obligations in accordance with law rather than that it will perform those obligations. Nevertheless, this is not a settled area of opinion giving and is therefore subject to negotiation by the parties.

Laws that merely result in an adverse consequence, such as an adverse tax consequence, are beyond the scope of the “no violation of law” opinion,\textsuperscript{189} as are Excluded Areas of Law (see Section VI.C of this Report). Although the typical formulation of the “no violation” opinion appears fairly broad in scope, since most opinions by Virginia lawyers specify that they are limited to the laws of the Commonwealth of Virginia, and perhaps federal laws, the opinions would apply only to the statutes and regulations of Virginia and the United States. It is understood that local laws adopted by political subdivisions below the state level are excluded from the opinion.\textsuperscript{190}

As a matter of customary practice, this opinion is understood to cover only law that, given the nature of the transaction and the parties to it, a lawyer in the relevant jurisdiction exercising customary diligence would reasonably recognize as being applicable. The scope of the opinion does not include specialized laws, such as securities and antitrust laws, unless specifically included.\textsuperscript{191}

Due Diligence. Beyond an examination of the laws of the covered jurisdiction generally applicable to a transaction of the type described in the Agreement, special attention should be directed to whether the Company operates in a regulated industry and if so, whether the transaction and contemplated post-closing performance of the Company are in conformity with those laws. That analysis may require consultation with an attorney specializing in that regulated industry or stating an express exception for those laws in the opinion letter.

G. No Violation of Organizational Documents. This opinion is regularly requested but provides the recipient with no more assurance than an opinion to the effect that the Agreement has been duly authorized and that the Company has the corporate (or other entity) power and authority to enter into the transaction.\textsuperscript{192} The following is a standard formulation of this “no violation” opinion:

\textbf{The execution and delivery of the Transaction Documents by the Company[, and the consummation of the transactions}

\begin{itemize}
\item \textsuperscript{188}ABA Accord § 16.1.
\item \textsuperscript{189}See Glazer, supra note 7, § 13.2.
\item \textsuperscript{190}TriBar 1998 Report § 6.6.
\item \textsuperscript{191}ABA Accord § 19.
\item \textsuperscript{192}Glazer, supra note 7, § 16.2.
\end{itemize}
provided for in the Transaction Documents.] do not violate any provision of the Company’s Articles of Incorporation or bylaws [or other organizational documents].

Often opinion givers request that the language of this opinion address the “performance of the Company’s obligations under the Agreement.” Consideration should be given to limiting such obligations to “payment obligations” so as to provide that the opinion does not extend to performance of obligations other than payment obligations.\footnote{See Section of Real Prop., Probate and Trust Law of the ABA, and Am. College of Real Estate Lawyers (“ACREL”), Report on Adaptation of the Legal Opinion Accord of the Section of Bus. Law of the Am. Bar Ass’n for Real Estate Secured Transactions, Real Prop. Prob. Tr. I. 569, §§ 14, 15, 29 (1994); Am. Bar Ass’n Section of Real Prop., Trust and Estate Law Comm. on Legal Opinions in Real Estate Transactions, Am. College of Real Estate Lawyers Attorneys’ Opinions Comm. & Am. College of Mortgage Attorneys (“ACMA”) Opinions Comm., Real Estate Finance Opinion Report of 2012, 47 Real Prop., Trust & Estate Law L.J. 213 (2012) (see section 3.7 of the report) [hereinafter "2012 Real Estate Finance Opinion Report"].}

If the request covers broader “obligations,” then the opinion giver should consider the scope of inquiry and due diligence necessary to render the opinion, which may include reliance on the Company’s representations and warranties. Nevertheless, this opinion should be interpreted as addressing whether the Company is legally able to perform its contractual obligations.

H. No Violation of Agreements and Court Orders. In many transactions, the requested no violation opinion may also extend to the agreements to which the Company is a party and to court orders by which the Company is bound, as in the following sample opinion:

The execution and delivery of the Transaction Documents by the Company [and the consummation of the transactions provided for in the Transaction Documents]:

(1) do not constitute a breach of any term, condition or provision of, or constitute a default under, or give rise to any right of termination, cancellation or acceleration with respect to, or result in the creation of any lien, charge or encumbrance upon any property or asset of the Company pursuant to, any Material Contract as identified on Schedule A; and

(2) do not violate any court order to which the Company is a party as identified on Schedule B.

Whether to give the opinion that there is no breach or default with respect to material contracts or court orders should involve a cost/benefit analysis that takes into consideration the size and nature of the transaction. While some may request an opinion to the effect that “to our knowledge,” there is no violation of any material contracts or court orders and that opinion may be given, the preferable practice is to list the specific documents and court orders reviewed.

It should be noted that, historically, many “no violation” opinions addressed “conflicts” with the Articles of Incorporation and bylaws, other contracts and court orders.
trend, however, is to avoid reference to conflicts in favor of “violation,” “breach” or “default” due to the imprecision of the phrase “conflicts.” 194 Thus, the commentary to the ABA Model Stock Purchase Agreement Legal Opinions cautions opinion givers to avoid the use of “no conflict with” in favor of the more exacting terms. 195

Note that the use of the phrase “consummation of the transactions provided for in the Transaction Documents” means that the scope of the opinion only covers the performance of those obligations required to be performed through the closing in order to consummate the transactions as of the closing. In contrast, the use of the phrase “performance by the Company of its obligations under the Transaction Documents” may be construed to cover not only breach or defaults that might result from the Company’s entering into the Transaction Documents and closing, but also that could occur as a result of the Company’s performance in the future (after closing) of its obligations under the Transaction Documents. Consistent with the foregoing, the opinion language used in conjunction with “performance” typically reflects the intended future focus by stating that the performance “will not” violate or constitute a default, etc. If interpreted in this manner, the use of the forward looking “performance” language may broaden the matters the opinion giver is required to consider. 196 In particular, it requires the opinion giver to scrutinize the Agreement to distinguish between future obligations versus rights flowing from the Agreement and then to determine whether, if performed, the future obligation would result in a breach or default of other existing contracts. 197 “Performance” also expands the scope of the approvals and filings opinion to cover not only those required through closing, but also those which must be obtained in order to perform the Agreement post-closing. 198 However, there does not appear to be a consensus in the opinion literature as to whether (a) “performance of obligations” is the appropriate term that should be used for this purpose as compared to “consummation of the transactions” or simply “performance of payment obligations,” or (b) “performance” necessarily includes all future obligations under the transaction documents. 199

The sample language above with respect to no breach or default under Material Contracts addresses a legitimate concern of the opinion recipient. Under customary practice, a no violation opinion does not cover mere “adverse consequences” under a material contract that flow from entering into the Agreement. The 1998 TriBar Opinion Report expressly notes that unless the opinion specifically states that it does, the “no violation” opinion does not automatically cover the following adverse consequences: (1) termination of a credit facility commitment; (2) increase in royalty rate or interest rate; (3) creation of a lien; (4) requirement to provide additional collateral; (5) creation of “puts” resulting from a change of control; and (6) creation of right to accelerate or require prepayment by existing debt holders. 200 The limiting of which contracts and court orders are the subject of this opinion to those appearing on a particular list allows a feasible review that does not involve undue cost while at the same time addressing the legitimate concerns of the opinion recipient.

194 TriBar 1998 Report § 6.5.2.
200 TriBar 1998 Report § 6.5.3.
Companies are often parties to contracts covered by the law of many different states, including laws not covered by the opinion letter. With respect to the “no breach or default” analysis, however, customary practice allows a lawyer giving an opinion under Virginia law to assume, without so stating in the opinion letter, that the contracts reviewed should be interpreted as if governed by the laws of Virginia.

**Due Diligence.** Compare the Agreement against the Articles of Incorporation, bylaws and scheduled contracts and court orders to determine whether the execution, delivery and consummation (or performance) will result in a violation, breach or default, including any of the specifically listed adverse consequences.

I. **No Consents and Approvals.** The “no consent or approval” opinion means that the execution and delivery of the Agreement by the Company and the consummation of the transaction contemplated thereby do not require any consent, approval, authorization or other action by, or filing with, any governmental authority of the Commonwealth of Virginia (and, if applicable, the federal government). The concern is that the lack of some required consent, approval or filing could make the transaction either void or voidable. The following is a standard formulation:

Except as set forth in the Transaction Documents and the schedules thereto, no consent, approval, authorization or other action by, or filing or registration with, any governmental authority of the United States or the Commonwealth of Virginia is required for the Company’s execution and delivery of the Transaction Documents and the consummation of the transactions provided for therein, except as have been previously made or obtained.

The sample language is consistent with the 2010 ABA Model M&A (Stock Purchase) Opinion which reflects the more contemporary limitation to consummation of the transaction. Accordingly, as stated, the opinion is limited to consents required through closing. Opinion recipients who seek to broaden the opinion to include performance of the Agreement create the same difficulties in rendering this opinion as in rendering the no breach or default opinion when post-closing performance of the Agreement is included. See Section VII.G of this Report. Note that Excluded Areas of Law (see Section VI.C of this Report) are beyond the scope of this opinion. The sample language does not cover consents and approvals necessary to operate the Company’s business or the collateral that may be pledged for a loan. Explicit clarification of the issue of what government’s approvals are required is now addressed in the sample language.

**Due Diligence.** The opinion giver should obtain and review an officer’s certificate identifying: (i) the nature of the Company’s business; (ii) each agency by which the Company or its business, assets or contracts are regulated or to whom the Company must report; and (iii) any consents or approvals that must be obtained or filings required to be made that are known to the

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201 *Id.* § 6.5.6.
203 Stock Purchase Op. 16.
certifying officer. The opinion giver should also consider whether the Company is subject to any court orders or decrees. Based on the information provided, the opinion giver must also review applicable federal and state laws and regulations to determine what consents and filings are required. If the Company is subject to a court order or decree, such as a bankruptcy order for relief, court approval may be required before the transaction can be completed. The most important point to remember in rendering this opinion is that the opinion should be limited to the approval of the transaction itself rather than business activities the Company plans to undertake.

J. Enforceability/Remedies. Sometimes referred to as the “Enforceability Opinion” or the “Remedies Opinion,” this opinion assures the recipient of three things: first, that an agreement has been formed; second, that the remedies provided in the Agreement will be enforced by the courts; and third, that the courts will enforce those provisions of the agreement that are unrelated to breach. The following is an example of a standard formulation of the remedies opinion:

The Transaction Documents are legal, valid and binding obligations of the Company, enforceable against the Company in accordance with their terms.

As discussed in Section VI. E. of this Report, pursuant to customary practice, a remedies opinion is subject to the bankruptcy exception and the equitable principles limitation. Although those standard exceptions are deemed to apply whether or not stated, it is customary to include expressly those qualifications. An example of language stating the standard exceptions is as follows:

Our opinions are subject to bankruptcy, receivership, rehabilitation, forfeiture, public policy, insolvency, fraudulent conveyance, equitable subordination, reorganization, moratorium and other laws affecting the rights and remedies of creditors generally and to general principles of equity, regardless of whether considered in a proceeding in equity or at law.

Note that, although sometimes limited to the remedies opinion, the bankruptcy exception and equitable principles limitation are no longer so limited under current customary opinion practice and they should be understood to apply to all opinions, not just to the remedies opinion.

Aside from the bankruptcy exception and equitable principles limitation, it is customary practice to state expressly other limitations that may be applicable to the opinions. This is the primary reason for, and the principal focus of, the detailed listing of assumptions, (see Sections VI.A and VI.B), excluded areas of law, (see Section VI.C) and other exceptions (see Section VI.E) in the text of the opinion letter. Although many of such limitations are understood to apply regardless of whether expressly stated, many lawyers prefer to list some or all of them.

204 TriBar 1998 Report § 3.1.
205 This language is consistent with the ABA Accord sections 12, 13.
206 2012 Real Estate Finance Opinion Report § 4.1
expressly. Many opinion givers also state such limitations without identifying the remedies opinion or other specific opinions to which they apply, which technically may make the limitations overbroad. For instance, a good standing opinion is not affected by the bankruptcy exception and equitable principles limitation. However, even if the opinion letter is drafted without identifying the specific opinions to which the express limitations apply, the limitations are understood to qualify only those opinions to which they would reasonably be expected to apply. 207

In loan transactions in particular, lawyers preparing an initial draft of an opinion letter often include limitations found in their opinion forms that may be applicable to financing documents generally but that may not specifically apply to the transaction documents that are the subject of the draft opinion letter. Although the preferred practice is for an opinion giver to cull out of his or her form those limitations that are not applicable to the transaction documents in question before presenting an initial draft of the opinion letter to the opinion recipient’s counsel, it is recognized that the practice of including a more generic list of qualifications and exceptions frequently simply reflects the desire to minimize the costs of preparing an opinion letter, and that, as noted above, the inapplicable limitations do not affect the opinions given. However, if counsel for an opinion recipient identifies limitations that are clearly inapplicable and requests their removal from the draft opinion letter, the opinion giver should accommodate such requests.

Often opinion givers will decline to give opinions regarding certain types of provisions found in the Transaction Documents and incorporate a list of those provisions into the opinion letter preceded by language such as:

**Notwithstanding our opinions expressed herein, we express no opinion with respect to provisions in the Transaction Documents: [list applicable provisions—see examples below]**

Sometimes the listed provisions are identified because of the complexity of the legal issues presented regarding their enforceability or the uncertainty of their resolution, thereby making rendering an opinion expensive and risky relative to the benefit to be derived by the opinion recipient. In other instances, provisions may be listed because they relate to agreements drafted by the opinion recipient that will govern a continuing relationship between the opinion recipient and a former employee of the opinion giver’s client long after the closing. Thus, not uncommonly in an acquisition transaction, restrictive covenants in key employee retention or employment agreements, executed as a condition of closing, and thus part of the transaction documents, may be listed, since the enforceability of those provisions are more properly the province of the opinion recipient’s attorney who the recipient is paying to draft and, presumably, enforce on the recipient’s behalf in the future.

In other instances, the enforceability of a listed provision may be fact or forum dependent. In still other instances, it may be simply the effort of one counsel to shift the cost and burden of resolving an issue presented by a specific provision to the other side.

207 TriBar 1998 Report § 1.2(c) (discussing specifically the bankruptcy exception and equitable principles limitation).
Thus, the lesson to be taken from this discussion is that, unlike certain assumptions or other matters that are widely recognized to be governed by customary practice, this arena is largely up for negotiation between the parties. Since the nature of the provisions listed here should be tailored to the particular transaction documents, the exclusions in particular transactions are likely to be negotiated and the samples set forth below do not identify every possibility.

The following is a list of provisions that may be listed as exceptions to an opinion of enforceability in a loan transaction, where applicable:

Provisions:

- permitting the appointment of a receiver
- regarding any right to obtain possession of any property or the exercise of self-help remedies or other remedies without judicial process
- providing for the payment of interest on interest
- establishing a contractual rate of interest payable after judgment
- permitting the Lender, or any other party, or their respective agents to bring suit against less than all parties liable for an obligation without affecting the liability of the other parties
- prohibiting oral modifications of the Transaction Documents or requiring that waivers or amendments be made only in writing
- regarding choice of law or forum selection or purporting to affect the jurisdiction or venue of courts
- providing for the confession of or consent to any judgment
- indemnifying a party for, or releasing, exculpating or exempting a party from, liability for its own action or inaction
- concerning payment of penalties, liquidated damages, or prepayment charges
- waiving obligations of good faith, fair dealing, diligence, or commercial reasonableness
- providing that an election of remedies does not affect a party’s right to other remedies
• regarding the survival of liabilities and obligations of any party arising under any of the Transaction Documents after the effective date of termination of such document

• permitting the Lender or any other party or their respective agents to use force or otherwise breach the peace when enforcing their rights

• regarding obligations to make an agreement in the future

• purporting to reconstitute the terms of the Transaction Documents as necessary to avoid a claim or defense of usury

• providing that any unenforceable terms shall not affect the enforceability of any other terms where the unenforceable terms are an essential part of the agreement

• to the effect that the failure or delay of the Lender or any other party or their respective agents in exercising a right or remedy will not operate as a waiver of that right or remedy

• providing for standards of conduct other than reasonable commercial standards

• waiving or varying, or attempting to waive or vary, provisions of the UCC which may not be waived or varied or which may not be waived or varied prior to default

• waiving stays and any other rights under any bankruptcy, insolvency or debtor relief laws

• purporting to waive (or having the effect of waiving) rights under the Constitution or laws of the United States or the Commonwealth of Virginia, unless, and only to the extent that law expressly permits waiver

• purporting to alter the terms or rights and obligations of the parties based on course of dealing, course of performance or the like, or that provides that failure or delay in taking action may not constitute a waiver of rights

• purporting to authorize a party to act in its sole discretion or provide that any determination by a party is conclusive

• waiving statutes of limitation

• waiving notice of acceleration
• waiving or restricting access to courts or to legal or equitable remedies
• purporting to waive or otherwise affect any right to receive notice or opportunity to cure failures to perform
• waiving or limiting a person’s obligation to mitigate damages
• purporting to establish any evidentiary standards in suits or proceedings
• granting proxies or powers of attorney or authorizing a party to execute documents on behalf of another party
• purporting to grant rights to, or limit the rights of, third parties
• purporting to create a trust or constructive trust without compliance with applicable trust law
• regarding the ability of a person to receive the remedies of specific performance, injunctive relief, liquidated damages or any similar remedy
• relating to subrogation rights, marshaling of assets, or set-offs
• requiring the payment of attorneys’ fees other than reasonable attorneys’ fees

Again, this list is not intended to be exhaustive. Additional exceptions may be necessary depending on the terms of the transaction documents, particularly in secured transactions involving Article 9 of the UCC and/or real estate collateral.

In certain loan transactions, the transaction documents list a panoply of remedies some of which may be enforceable, others not, and some may be mutually inconsistent with other listed remedies. As reflected in the above sample list of possible excluded provisions, remedies that may concern an opinion giver include, for example, (i) contractual provisions that require a party to waive rights afforded by law and (ii) the agreement of a party to accept certain definite standards for potentially vague U.C.C. concepts such as “commercially reasonable manner” or “without breach of peace.” In lieu of taking the time to analyze each remedial provision in relationship to every other remedy listed, some opinion givers acknowledge the fact that some provisions may be unenforceable (sometimes referred to as the “generic unenforceability qualification”), but nevertheless opine that such provisions do not render the transaction documents invalid as a whole and that the remedies provided are adequate for the “practical realization” of the principal benefits purported to be provided thereby (sometimes referred to as the “practical realization assurance”).208 The 1998 TriBar Opinion Report

208 See N.C. Report at 66.
acknowledged that the generic unenforceability qualification, together with the practical realization assurance, had become an aspect of customary practice. But, noting the inherent ambiguity of “practical realization,” TriBar stated that the continued use of the generic unenforceability qualification should be limited to its traditional context of lease and secured finance transactions. The drafters of the 2012 Real Estate Finance Opinion Report suggest that most opinion letters in the area of real estate finance include a generic enforceability qualification to the effect that certain unspecified provisions of the transaction documents may not be enforceable, but then provide assurance that certain key rights and remedies are available such as judicial enforcement of payment obligations, acceleration upon default, and foreclosure upon a material breach of a material covenant, in lieu of the traditional (and admittedly ambiguous) “practical realization” assurance. Such a more specific affirmative assurance would be subject to all of the other limitations in the opinion letter, and the illustrative opinion attached to such report contains express language to such effect. The Committee notes that this approach does not appear to be standard practice outside of real estate financings, and the Committee believes that the “practical realization” assurance may still be appropriate in other types of secured loan transactions.

Due Diligence. In addition to confirming the due authorization, execution and delivery of the Agreement, the opinion giver should (a) confirm that the requirements for formation of a contract have been satisfied, and (b) review the Agreement and identify each promise and undertaking made by the Company and determine whether it would likely be given effect, as written, by the highest court of the governing jurisdiction designated in the agreement. It is generally contemplated that, for many common provisions, opinion preparers will rely upon their existing knowledge and experience without resort to legal research. If an issue of concern is identified, the opinion giver should determine whether it is excluded from the opinion as a result of stated qualifications to the opinion letter, i.e., the assumptions, excluded opinions or exceptions. Before taking specific exception to an issue outside of the stated qualifications, consideration should be given to whether the issue may be resolved by revising the agreement or the transaction structure.

K. Statement of No Litigation. The “no litigation” opinion was once a staple of third-party closing opinion letters, but growing concern for liability coupled with the fact that this “opinion” was really just a confirmation of fact as opposed to a legal opinion that requires legal analyses and conclusions, have made this opinion far less common. When given, the original opinion is often stated as a confirmation in the form suggested below, which is set apart from the numbered opinion paragraphs, sometimes under the separate heading entitled Confirmations. An example of this approach is as follows:

We advise you that we do not represent the Company in any action, lawsuit or proceeding now pending at law or in equity, or by or before any governmental instrumentality or agency or

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209 TriBar 1998 Report § 3.4.1
211 Id.; see also 2012 Real Estate Finance Opinion Report, Illustrative Op. attachment.
212 See infra § IV.N regarding situations in which the covered jurisdiction stated in the opinion letter is different from the governing law designated in the Agreement.
arbitral body, against the Company by a claimant, that challenges the validity or enforceability of, or seeks to enjoin the performance of, the Transaction Documents.

As historically postured, the no litigation opinion encompassed not only pending and threatened actions and proceedings that may affect the transaction that was the subject of the Agreement, but also those that, although not related to the transaction, may have a material adverse effect on the Company, its operations and its assets.

As early as 1998, however, TriBar recognized that this was not in reality an opinion, but rather a factual confirmation. At that point, the state of customary practice was to attempt to limit the opinion giver’s exposure through the use of defined limiting qualifiers such as “to our knowledge” and “material adverse effect.” The knowledge qualifier, however, was not viewed as changing the meaning of the opinion, since customary diligence did not require the opinion giver to check court or other public records. In essence, the opinion was nothing more than an assurance that the opinion giver did not know that the litigation disclosure schedules to the Agreement were unreliable. In recent years, however, following widely publicized court decisions, and heightened concerns about opinion letter liability in general and “no litigation” opinion exposure in particular, various bar associations responded with suggested changes in the form and approach toward “no litigation” opinions and confirmations and the associated customary practice. As a consequence, the traditional opinion has evolved, if given at all, to a factual confirmation stated separately from the enumerated opinions, addressing only litigation in which the opinion giver firm represents the company, directly concerning the transaction that is the subject of the Agreement. The confirmation is intended to cover only pending, not threatened, actions, lawsuits and proceedings.

Indeed, the present state of this “opinion” as captured by the sample language appears to be well recognized by both opinion givers and recipients. The commentary to the 2010 ABA Model M&A (Stock Purchase) Opinion observes that even litigation confirmations are less frequently given now due to liability concerns. The National Venture Capital Association, Form of Legal Opinion, proposing language similar to the above sample language notes that “many law firms no longer are willing to give the broader “no litigation” confirmation, and some firms are unwilling to give any confirmation relating to litigation.” As a result, this confirmation has limited application and should not be given in a typical loan transaction.

Due Diligence.

218 National Venture Capital Association, Form of Legal Opinion, n.17.
(i) Obtain and review Officer’s certificates listing all actions, or proceedings pending or overtly threatened against the Company.

(ii) Review the litigation disclosure schedules to the Agreement and the related representations and warranties of the Company with respect thereto.

(iii) Make an inquiry of those counsel identified in the “to our knowledge” definitional qualifier or, if an Accord opinion, the Primary Lawyer Group. Regardless of which model is used for the knowledge group, include in the litigation inquiry any person in the firm the opinion giver reasonably believes would have knowledge of any pending or overtly threatened litigation after reviewing firm records, including all lawyers who are billing time to the client.219

L. Choice of Law. Often business transactions involve parties from different states and documents may provide that they are to be governed by the laws of a different jurisdiction. For example, in a secured loan transaction, a deed of trust securing Virginia real property may provide that its terms are governed in whole or in part by Virginia law, but the other loan documents may provide that they are governed by the laws of another jurisdiction. Involving local counsel of the selected jurisdiction is often not cost justified. Unless the Virginia opinion giver qualifies the opinion to address the choice of law provision, the opinion would likely be interpreted to cover the enforceability of the choice of law provision.220

If Virginia counsel is asked to opine that a Virginia court would respect the selected choice of law provision and apply the law of another state to the Agreement, that opinion should be a reasoned opinion. The opinion should be based on factual assumptions that take into consideration whether there are sufficient contacts with the law of the selected jurisdiction to enable a court to apply the law of the selected jurisdiction. Opining counsel must also consider whether any public policy of the Commonwealth of Virginia would require that Virginia law control on a substantive point of law. Generally, under the laws of Virginia, the parties to a contract may stipulate the governing law. For such a stipulation to be upheld by a court sitting in Virginia, the choice of law provision must satisfy four requirements. First, the provision must have been bargained for in good faith between parties of equal strength. Wellmore Coal v. Gates Learjet Corp., 475 F. Supp. 1140, 1144 (W.D. Va. 1979). Second, the choice of law provision must not constitute an intent to commit a fraud upon the court. Tate v. Hain, 181 Va. 402, 410, 25 S.E.2d 321, 324 (1943). Third, there must be a reasonable basis for the parties’ choice of governing law. The jurisdiction selected must be reasonably related to the purpose of the agreement. Hooper v. Musolino, 234 Va. 558, 566, 364 S.E.2d 207, 211 (1988); see also Tate, 181 Va. at 411, 253 S.E.2d at 324. Fourth, the inclusion of the choice of law

219 Note that the inquiry underlying the “no litigation” confirmation is substantially different from that required to respond to Requests from Auditors due to the purpose, lead time, use of questionnaires to every lawyer who has billed time during the audit period, dollar thresholds, and lack of necessary connection to the transaction. Moreover, the ABA Committee on Audit Inquiry Responses Introductory Analysis and Guides to Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information, 31 Bus. Law. 1737 (1976), was not drafted in contemplation of, or as guidance for, closing opinions. Glazer, supra note 7, § 17.1.2.

220 However, the 2012 Real Estate Finance Opinion Report takes the position that “the proper rule should be that the choice of law opinion should not be implied as part of the enforceability opinion.” 2012 Real Estate Finance Opinion Report at 18.
provision must not have been obtained by misrepresentation, duress, undue influence or mistake, nor be contrary to public policy. *Wellmore*, 475 F. Supp. at 1144. A reasoned opinion is likely to set forth as assumptions the specific facts on which the choice of law opinion relies to establish a sufficient nexus with the selected jurisdiction. It may also contain a discussion of the principles discussed above before concluding that a Virginia court *should* give effect to the choice of law provisions in the Agreement that select the selected jurisdiction as the governing law. A reasoned opinion on this subject may take various forms. An example of such an opinion is as follows:

Based on the provisions in the Agreement providing that the laws of the State of _____ will govern the enforcement and interpretation of the Agreement, we believe that a Virginia court, if properly presented with the question, should apply the internal laws of the State of _____ as the law governing the Agreement, unless (i) the court finds that the State of _____ has no substantial relationship to the parties or the Transaction and there is no other reasonable basis for the parties’ choice, or (ii) application of the laws of the State of _____ would be contrary to public policy in the Commonwealth of Virginia. We note, however, that choice-of-law issues are decided on a case-by-case basis, depending on the facts of a particular transaction, and we are thus unable to conclude with certainty that a Virginia court would give effect to those provisions.

While sometimes an opinion recipient will try to insist on the use of the word “would” in the language above, such a request is not appropriate. The “should” formulation is preferable since one cannot predict with certainty how a Virginia court would rule.

While choice of law opinions are rendered occasionally in real estate secured transactions, they are not as common in other business transactions and opinion givers often disclaim choice of law opinions when they have not undertaken the factual analysis necessary to give such an opinion or if the size or nature of the transaction does not warrant the additional expense of the necessary due diligence.

M. **Usury.** In many commercial loan transactions, a lender will seek an opinion regarding the interest rate of the loan not being usurious in the Commonwealth. The Committee recommends the following opinion language:

The Borrower may not avail itself of the defense of usury to avoid or defeat the payment of interest or any other sum due under the Note.

Due Diligence. Virginia Code section 6.2-301.A. provides for a “legal” or implied rate of interest of six percent per year. Virginia Code section 6.2-303 further states that no contract may be made for the payment of interest on a loan greater than twelve percent per year. Nevertheless, usury is generally not a concern in Virginia for commercial loans even if the interest rate in a promissory note would exceed those limits.
Title 6.2, Chapter 3 of the Virginia Code provides numerous exceptions to the foregoing usury statutes, many of which will apply to commercial loans, including Virginia Code section 6.2-317, which states that “no person shall, by way of defense or otherwise, avail himself of the provisions of this chapter . . . to avoid or defeat the payment of interest, or any other sum, in connection with a loan made to a person for business or investment purposes, if the initial amount of the loan is $5,000 or more.” As section 6.2-317 further provides that “a loan shall be deemed to be for business or investment purposes if it is not for personal, family, or household purposes”, a borrower (even an individual) under a commercial loan cannot use the defense of usury to avoid or defeat his obligations.

Similarly, Virginia Code section 6.2-308 is applicable to loan transactions in which the borrower is a certain type of entity and would limit the affirmative defense of usury. That section provides:

No (i) corporation, (ii) partnership . . . , (iii) limited liability company, (iv) business trust, or (v) joint venture organized for the purpose of holding, developing, and managing real estate for profit, shall, by way of defense or otherwise, avail itself of any of the provisions of this chapter or any other statutory or case law relating to usury or compounding of interest to avoid or defeat the payment of any interest or any other sum that it has contracted to pay.

It is important to note that these statutes do not state that a particular interest rate is not usurious or does not otherwise violate the basic usury statute. Instead, the exemptions preclude the borrower from using the usury statute as an affirmative defense to payment.

VIII. REAL ESTATE FINANCE OPINION ISSUES

This section will focus on the types of opinions that are often required in commercial real estate loan transactions in Virginia.

The issuance of opinions in real estate finance transactions has been widely analyzed and discussed by many national and state bar groups. Although many bar groups have sought to standardize opinions and customary practice in the issuance of third party opinions, the consensus is that there is no single standard or practice nationally. Rather, customary practice differs regionally and, based on the input and feedback received by the Committee, there is no single customary practice in the Commonwealth. As such, neither the suggested form Real Estate

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221 For a summary of the extensive efforts of the ABA, the ACREL, and the ACMA, see the 2012 Real Estate Finance Opinion Report.
225 See 2012 Real Estate Finance Opinion Report ch. I § III.
Finance Opinion, nor the sample opinion language should be construed as the only acceptable practice.

An illustrative Real Estate Loan Opinion Letter is provided in Section X.B. of this Report. Although the illustrative opinion form is a good starting point for a typical commercial loan secured by real estate, the Committee recognizes that many lenders will seek certain opinions beyond the scope of those set forth in the sample form. Therefore, where appropriate, the Committee has attempted to provide the practitioner with sample language to address certain opinions commonly sought or demanded by many lenders. The Committee has not provided sample language for certain opinions that are contrary to what the Committee believes is the accepted practice in the Commonwealth.

A. Recordability of Deed of Trust; Granting of Valid Lien; Perfection. While mortgages may be used in Virginia to create a lien on real estate, they are rarely, if ever, used because the non-judicial foreclosure of a deed of trust is a more efficient procedure. Typically, creating and “perfecting” a lien on real estate in Virginia is accomplished through the execution and recordation of a deed of trust. In addition to an enforceability opinion as to a deed of trust and other loan documents, a practitioner may be requested to give an opinion whether the deed of trust can be recorded in the applicable land records and whether it grants a valid lien on the real estate described in the deed of trust. This request is made because an enforceability opinion is generally believed not to include such matters. A deed of trust may be enforceable between the parties but still defective as to some requirement for recordation. The covenants in a deed of trust may also be enforceable as a matter of contract law, but the deed of trust may fail to grant a valid lien on the real property described therein because the grantor does not actually own such property.

However, in almost every commercial real estate loan transaction, the lender will have the benefit of a lender’s title insurance policy that insures that the deed of trust has been duly recorded in the land records and that the deed of trust creates a valid lien on the real property described in the policy. As a result, opinions concerning the recordable form of a deed of trust and its ability to create a lien are generally unnecessary, and the Committee discourages opinion recipients from requesting such opinions.

Nevertheless, many lenders and their counsel will insist on those opinions. With regard to whether a deed of trust is recordable, the following is an example of an opinion that may be given:

The Deed of Trust is in appropriate form to be accepted for recordation [under the laws of the Commonwealth of Virginia] [in the Clerk’s Office of the Circuit Court of the [City][County] of ___________, Virginia].

Note that the forgoing opinion does not state that the deed of trust will be recorded, but rather that it is in appropriate form to be recorded. Among other things, recordation depends upon payment of any applicable recordation taxes and upon the Circuit Court Clerk correctly interpreting the applicable recording statutes to accept the deed of trust for recordation. The Committee recommends the use of the bracketed language “under the laws of the

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“Commonwealth of Virginia” rather than specifying the local jurisdiction in which the Deed of Trust is to be recorded. The Committee is aware that certain Circuit Court Clerk’s offices have imposed “local” requirements (such as requiring all plats, not just subdivision plats, to be stamped as approved by the locality’s planning office). The recommended language is intended to limit the opinion to the laws of the Commonwealth and is not intended to address any local custom or practice.

The following is an example of an opinion that may be given in regard to whether the deed of trust grants a valid lien:

The Deed of Trust is in appropriate form to grant a valid lien in favor of the trustee(s) named therein for the benefit of the Lender in the Borrower’s right, title and interest in the portions of the [Deed of Trust Property] constituting real property under the laws of the Commonwealth of Virginia, to secure the [Note] and other indebtedness described therein.

Again, the opinion does not state that the deed of trust actually grants a valid lien, but rather that the deed of trust is in appropriate form to grant a valid lien. The Committee would discourage the use of opinion language to the effect that “upon recordation the Deed of Trust shall constitute a valid lien on the real property described in the Deed of Trust in favor of the Lender.” That language would require assumptions concerning the borrower’s ownership of the real estate, the adequacy of the legal description, the recordation and proper indexing of the deed of trust in the land records, etc., to prevent the practitioner from becoming an “insurer” of the borrower’s title and the actual effectiveness of the deed of trust (which is the role of the lender’s title insurance policy).

Lender’s counsel may also request an opinion to the effect that the lien of a deed of trust has been “perfected.” As with an opinion as to the recordability of a deed of trust and whether a deed of trust grants a valid lien, this opinion is unnecessary if a lender’s policy of title insurance is issued with respect to the deed of trust. Moreover, the term “perfection” is a term typically used with regard to UCC security interests and is seldom used with regard to deed of trust or mortgage liens. If given at all, the opinion should address whether the deed of trust was recorded in the appropriate land records in order to provide constructive notice to third parties of the deed of trust. An example of such an opinion is the following:

The recordation of the Deed of Trust in the Clerk’s Office of the Circuit Court of _________ County, Virginia is the only recordation or filing required to provide constructive notice to subsequent purchasers and lien creditors of the lien of the

226 Alternatively, an opinion giver may include an express limitation in the opinion letter to the effect that the opinions do not cover ordinances, regulations and rules of cities, counties towns and other political subdivisions of the state. See supra § VI.C.
227 See Va. Code Ann. § 15.2-2254(2) (stating, in pertinent part: “No plat of any subdivision shall be recorded unless and until it has been submitted to and approved by the local planning commission or by the governing body or its duly authorized agent . . . ”).
Deed of Trust on the Borrower’s right, title and interest in and to the Real Property.

Note that the foregoing opinion requires the opinion giver (who may have never seen the property and is not a surveyor) to know in what county or city the real property in question is located; alternatively, an assumption may be included as to the location of the property.

The Committee does not believe that it is generally accepted practice in the Commonwealth to give opinions as to whether a deed of trust is in recordable form, grants a valid lien or is “perfected,” at least where a lender’s policy of title insurance will be issued. However, the Committee provides the foregoing illustrative language as to such opinions for those transactions in which lender’s counsel cannot be persuaded to drop its request for such opinions, which often occurs in the case of out-of-state lenders who are unfamiliar with Virginia law.

Due Diligence. A practitioner should develop and routinely update a checklist of the laws and regulations governing the recordation of documents in Virginia, as well as the form of deeds of trust. Title 17.1, Chapter 2, Article 3 of the Virginia Code entitled “Records, Recordation and Indexing Generally” establishes the general requirements for the recordation of documents by each Circuit Court Clerk, including provisions for the rejection of documents for recordation,228 the filing of cover sheets,229 indexing by tax map reference number or parcel identification number (PIN),230 etc. Title 55, Chapter 4, Article 2 (Form and Effect of Deeds of Trust; Sales Thereunder; Assignments; Releases), Chapter 5 (Fraudulent and Voluntary Conveyances, Bulk and Conditional Sales, Etc.; Writings Necessary to Be Recorded), and Chapter 6 (Recordation of Documents) each contain provisions applicable to the recordation of documents. An opinion giver should review the deed of trust (or other documents to be recorded) for compliance with those requirements. Requirements applicable to deeds of trust securing consumer loans or encumbering residential property are beyond the scope of this Report. Special care should be taken regarding the recordation of a deed of trust for a loan secured by properties in multiple counties or states; special recordation requirements, disclosures and/or tax allocations may apply.

B. Specific Assumptions and Qualifications.

Certain assumptions and exclusions are generally appropriate for inclusion in any opinion letter addressing the form or effect of a deed of trust. Even when the assumptions and exclusions are not necessary to limit a lien creation opinion, they allow a lay reader to better understand the nature and scope of the opinion.

Specific Assumptions Underlying Opinions. In addition to the “general assumptions” that should be contained in any opinion (see Sections VI A and B of this Report), the opinion giver should consider the additional assumptions that may be necessary for the real estate opinions to be given. Below are several assumptions that may be appropriate.

The [Real Property] is located entirely in the [City][County] of ________________, Virginia, and on the date hereof a correct, complete and sufficient description of the [Real Property] has been attached, and upon recordation will be attached, to the Deed of Trust.

The Borrower is and will be at the time of recordation of the Deed of Trust the fee simple owner, of record and in fact, of good and marketable title to the [Real Property] and the Fixtures, and all Fixtures described in the Deed of Trust are located on the [Real Property].

The conveyance of the [Real Property] to the trustee(s) named in the Deed of Trust will not constitute an illegal subdivision of real property.231

If a subdivision plat is to be recorded with the [Deed of Trust], that plat has been submitted to and approved by the appropriate commission, body or authorized agent of each locality wherein any part of the land lies.232

A cover sheet (if required) will be prepared for and submitted with the [Deed of Trust] [also list other documents to be recorded] pursuant to Section 17.1-227.1 of the Code of Virginia (1950, as amended), meeting the requirements of the [Clerk’s Office for the Circuit Court of the ________ of __________, Virginia].

The correct tax map reference number or parcel identification number for each parcel of land described therein is set forth on the first page of the Deed of Trust if the jurisdiction in which the Deed of Trust is to be recorded has adopted a unique parcel identification system.

Matters Excluded from Real Estate Form Opinions. In addition to the “general exclusions” that should be contained in any opinion (see Section VI C of this Report), the practitioner should consider additional exclusions that may be appropriate for the real estate opinions to be given. Below are several exclusions that may be appropriate.

231 See Va. Code Ann. § 15.2-2254 (3)-(4): “3. No person shall sell or transfer any land of a subdivision, before a plat has been duly approved and recorded as provided herein, unless the subdivision was lawfully created prior to the adoption of a subdivision ordinance applicable thereto. However, nothing herein contained shall be construed as preventing the recordation of the instrument by which such land is transferred or the passage of title as between the parties to the instrument. 4. Any person violating the foregoing provisions of this section shall be subject to a fine of not more than $500 for each lot or parcel of land so subdivided, transferred or sold and shall be required to comply with all provisions of this article and the subdivision ordinance. The description of the lot or parcel by metes and bounds in the instrument of transfer or other document used in the process of selling or transferring shall not exempt the transaction from the penalties or remedies herein provided.”

Certain Laws Governing Real Estate. The following federal and state laws, and regulations promulgated thereunder, and the effect of those laws and regulations on the opinions expressed herein: the Interstate Land Sales Act (15 USC §1701, et seq.); environmental laws; building codes; and zoning, subdivision and other laws governing the development, use and occupancy of real property.

Local Ordinances. The ordinances, statutes, administrative decisions, orders, rules and regulations of any municipality, county, special district or other political subdivision of the Commonwealth of Virginia.

Title; Lien Perfection; Lien Priority; Condition. Any opinion as to the ownership or title of any real or personal property, the perfection of any lien [except as expressly set forth in opinion paragraph(s) ___], or the priority of any liens or security interests. Further, we have not made any examination of any real or personal property or the records of federal, state or local governments or agencies thereof to ascertain whether any property (including the soil, air, surface, water, ground water, physical structures and improvements, if any) complies with or violates any environmental, safety, zoning or health laws, regulations, rules or orders.

C. Recordability of Assignment of Leases and Rents; Valid Lien; Perfection. An opinion giver may be requested to give an opinion concerning whether an assignment of leases and rents is in proper form for recordation and whether that assignment creates a lien in the borrower’s interests in the leases and rents in the real estate owned by the borrower. As noted previously with regard to deeds of trust, the general enforceability opinion (see Section VII.I of this Report) would not generally be considered to cover the recordability of an assignment of leases and rents or whether it creates a valid lien in the borrower’s interests in the leases and rents. Although such opinions are not requested in every real estate loan transaction, appropriately worded opinions can be given that are comparable to those provided for deeds of trust, such as the following:

Assignment of Leases and Rents in Recordable Form and Granting a Valid Lien:

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233 Refer to the discussion above regarding “lien perfection” or “lien creation” opinions. Also, refer to infra section VIII.E concerning the issuance of lien perfection opinions in Fixtures under Title 8.9A of the Virginia Uniform Commercial Code. Bracketed language should be removed or modified to indicate specific perfection opinions.

234 As noted above in the discussion regarding deeds of trust, such opinions with respect to deeds of trust are unnecessary if a lender’s policy of title insurance will be provided. However, unlike deeds of trust, an assignment of leases and rents is not typically listed as an “insured mortgage” in a title insurance policy, and therefore the lender does not have the benefit of title insurance to provide assurances that the assignment of leases and rents has been or will be recorded and that the assignment grants a valid lien on the rents and leases described therein. Nevertheless, opinions as to assignments of rents and leases tend to be requested less frequently than opinions as to deeds of trust.
The [Assignment of Leases and Rents] is in appropriate form (i) to be accepted for recordation [under the laws of the Commonwealth of Virginia] [in the Clerk’s Office of the Circuit Court of the [City][County] of __________, Virginia] and (ii) to grant a valid assignment in favor of the [Lender] in the [Borrower’s] right, title and interest in and to “[Leases]” and “[Rents]” (as those terms are defined in the [Assignment of Leases and Rents] to secure the indebtedness described therein.

Note that, in the case of both recordability and valid lien, the opinion addresses the “form” of the assignment of leases and rents for the same reasons that an opinion as to the recordability of a deed of trust and as to the granting of a deed of trust lien should also be so limited.

The following is an illustrative opinion as to the perfection of an assignment of leases and rents:

Perfection of Assignment of Leases and Rents

The recordation of the [Assignment of Leases and Rents] in the Clerk’s Office of the Circuit Court of _________ County, Virginia is the only recordation or filing required to perfect the interest of the Lender under the [Assignment of Leases and Rents] in the Borrower’s right, title and interest in and to collateral described therein constituting “leases, rents or profits arising from real property” within the meaning of Section 55-220.1 of the Code of Virginia (as amended).

Because section 55-220.1 of the Virginia Code specifically provides that the recordation of an instrument assigning leases, rents or profits arising from real property “shall fully perfect” the interest of the assignee, this opinion refers to “perfection” of the assignment rather than using the language typically found in an opinion as to a deed of trust, namely, “constructive notice.”

**Due Diligence.** The opinion giver should ensure that the assignment of leases and rents contains language pursuant to which the borrower grants an assignment of leases and rents for the benefit of the lender. In addition to compliance with Virginia Code section 55-220.1, the

235 Virginia Code section 55-220.1 entitled “Perfection of lien or interest in leases, rents and profits” provides as follows:

“The recordation pursuant to § 55-106, in the county or city in which the real property is located, of any deed, deed of trust or other instrument granting, transferring or assigning the interest of the grantor, transferor, assignor, pledgor or lessor in leases, rents or profits arising from the real property described in such deed, deed of trust or other instrument, shall fully perfect the interest of the grantee, transferee, pledgee or assignee as to the assignor and all third parties without the necessity of (i) furnishing notice to the assignor or lessee, (ii) obtaining possession of the real property, (iii) impounding the rents, (iv) securing the appointment of a receiver, or (v) taking any other affirmative action. The lessee is authorized to pay the assignor until the lessee receives written notification that rents due or to become due have been assigned and that payment is to be made to the assignee. This section shall apply to all instruments of record before, on or after July 1, 1992.”

64
considerations set forth above concerning opinions on the form and effect of deeds of trust should be reviewed in the context of issuing opinions on assignments of leases and rents, including compliance with the recordation standards referenced in section VIII.A of this Report.

Additional Considerations. The following additional exclusions and qualifications are appropriate for inclusion in any opinion letter addressing the form or effect of an assignment of leases and rents. Note that the exclusions and qualifications listed below assume that the assumptions, qualifications and exclusions recommended for deeds of trust will also be contained in the opinion and will address assignments of leases and rents as well.

Additional Exclusions.

Assignment of Leases and Rents. We express no opinion as to the enforceability of any provision of the [Deed of Trust] [and/or][Assignment of Leases and Rents] that purports to make an absolute assignment of the Borrower’s interest in the leases, rents and profits arising from the [Real Estate] described therein, rather than a collateral assignment for security.

Additional Qualifications and Limitations.

Leases and Rents. A lien in certain collateral identified as “leases” or “rents” may not be perfected by recordation of the [Deed of Trust] [Assignment of Leases and Rents] to the extent that collateral does not constitute “rents or profits arising from real property” within the meaning of Section 55-220.1 of the Code of Virginia (1950, as amended). 236

D. Validity and Enforceability of Deed of Trust.

The “enforceability” opinion as to transaction documents and the related assumptions, qualifications and exclusions are generally addressed in Section VII.I of this Report.

Due Diligence. Any opinion regarding the validity and enforceability of a deed of trust requires a practitioner to be familiar with, among other laws, sections 55-58 (Form of deed of trust to secure debts, etc.), 237 55-58.1 (Security trusts defined; requirements for trustees and

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236 If no opinion is given as to the “perfection” of an assignment of leases and rents, this qualification is not necessary; however, many practitioners prefer to include such a qualification anyway.

237 Virginia Code section 55-58 provides: “A deed of trust to secure debts or indemnify sureties may be in the following form, or to the same effect: ‘This deed, made the . . . day of . . . , in the year . . . , between . . . (the grantor), of the one part, and . . . (the trustee), of the other part, witnesseth: that the said . . . (the grantor) does (or do) grant unto the said . . . (the trustee), the following property (here describe it): In trust to secure (here describe the debts to be secured or the sureties to be indemnified and insert covenants or any other provisions the parties may agree upon). Witness the following signature (or signatures).’”
Additional Considerations. Additional specific exceptions to an enforceability opinion with regard to a deed of trust may include provisions such as the following:

Provisions:

- purporting to waive the right of statutory or equitable redemption
- purporting to alter the priority of any lien or security interest
- providing for the enforcement of the lien of the Deed of Trust and the sale of the Deed of Trust Property through judicial foreclosure proceedings
- characterizing any assignment of rents, leases and/or other documents, rights and interests as “absolute” rather than a collateral assignment for security purposes
- permitting partial foreclosure of the Deed of Trust
- providing for distribution of foreclosure proceeds other than in accordance with Applicable Law

As noted previously, often an opinion giver will include language to the effect that certain other, unidentified provisions of a deed of trust or other loan document also may not be enforceable but that, notwithstanding such qualification, the lender will be entitled to the “practical realization” of the principal benefits of the deed of trust or other loan document. In real estate finance opinions, there is a growing trend away from utilizing the “practical realization” language and instead setting forth a short list of the basic remedies that should be available to all deed of trust beneficiaries. For example, the illustrative opinion in the 2012 Real Estate Finance Opinion Report uses the following formulation in the generic enforceability qualification:
Subject to the other limitations set forth in this Opinion Letter, any such unenforceability will not render the Transaction Documents invalid as a whole or preclude (i) the judicial enforcement in accordance with applicable Law of the obligation of the Borrower to repay as provided in the Note the principal, together with interest thereon (to the extent not deemed a penalty), and the judicial enforcement in accordance with applicable Law of the obligation of the Guarantor to repay as provided in the Guaranty the amounts set forth in the Guaranty (to the extent not deemed a penalty and subject to defenses of a surety that have not been or cannot be waived); (ii) the acceleration of the obligation of the Borrower to repay principal, together with interest, upon a material default by the Borrower in the payment of principal or interest [or upon a material default by the Borrower in any other material provision of the Transaction Documents]; and (iii) the foreclosure in accordance with applicable Law of the lien on and security interest in the Collateral created by the Security Documents upon maturity or upon acceleration pursuant to clause (ii) above. We note, however, that the unenforceability of those provisions may result in delays in enforcement of the rights and remedies of the Lender under the Transaction Documents, and we express no opinion as to the economic consequences, if any, of such delays.

E. Deed of Trust as Security Agreement; Fixture Filings. In real estate finance transactions, lenders will generally seek to create and perfect liens in the fixtures and personal property of the Borrower. This section addresses the creation of security interests in fixtures and the recordation of a fixture filing under the Virginia Uniform Commercial Code. Section IX of the Report addresses the issuance of UCC opinions concerning goods other than fixtures. Sample opinions for the creation and perfection of security interests in fixtures and considerations for their issuance are set forth below.

Security Interest in Fixtures; Perfection under Virginia UCC:

The Deed of Trust is in proper form to create a valid security interest under the Virginia UCC in favor of the Lender in the Borrower’s right, title and interest in and to the [Fixtures] collateral described therein that constitutes “fixtures” as defined in Section 8.9A-102 of the Virginia UCC (that collateral being hereinafter referred to as the “Fixtures”). As referred to herein, the “Virginia UCC” shall refer to Title 8.9A of the Code of Virginia (1950, as amended).

242 Security interests in personal property are addressed in Article IX of this Report.
243 Some lawyers also prefer to include in their opinion a statement to the effect that “We give no opinion as to what collateral, if any, constitutes fixtures under Virginia law.”
The Deed of Trust is in proper form to be effective as a fixture filing with respect to the Fixtures, and, once the Deed of Trust is duly recorded in the [Clerk’s Office of the Circuit Court of the [City][County] of ___________, Virginia], the Lender will have a perfected security interest under the Virginia UCC in all right, title and interest of the Borrower in and to the Fixtures located on the Real Property.

As an alternative to the recordation of the deed of trust as a fixture filing, a lender may choose to record a UCC-1 Financing Statement with an attached UCC Financing Statement Addendum (UCC-1A) in the land records (collectively defined in the opinion as the “UCC Fixture Financing Statement”). The following sample language may be used for UCC Fixture Financing Statements:

The UCC Fixture Financing Statement is in proper form to be effective as a fixture filing with respect to the Fixtures, and, once the UCC Fixture Financing Statement is duly recorded in the [Clerk’s Office of the Circuit Court of the [City][County] of ___________, Virginia], the Lender’s security interest in all right, title and interest of the Borrower in and to the Fixtures located on the Real Property will be perfected under the Virginia UCC.

[Note that for purposes of the above opinion, the UCC-1 Financing Statement and the attached UCC Financing Statement Addendum (UCC-1A) must be collectively defined in the opinion as the “UCC Fixture Financing Statement”].

Due Diligence. Under the Virginia UCC, “Fixtures”\textsuperscript{244} and “Fixture Filing”\textsuperscript{245} are defined as follows:

“Fixtures” means goods that have become so related to particular real property that an interest in them arises under real property law.

“Fixture Filing” means the filing of a financing statement covering goods that are or are to become fixtures and satisfying subsections (a) and (b) of § 8.9A-502. The term includes the filing of a financing statement covering goods of a transmitting utility\textsuperscript{246} which are or are to become fixtures.

\textsuperscript{244} Va. Code Ann. § 8.9A-102(a)(41).
\textsuperscript{246} The rules governing fixture filings for a transmitting utility are beyond the scope of this Report.
Virginia Code section 8.9A-502(c) permits the recordation of a mortgage or deed of trust as a fixture filing if it:

(i) provides the name of the debtor;
(ii) provides the name of the secured party or a representative of the secured party;
(iii) indicates the collateral includes fixtures related to the real property described in the deed of trust;
(iv) provides a sufficient legal description of the real property; and
(v) is duly recorded in the land records for the real estate.

If the deed of trust meets the foregoing requirements and contains a grant of a security interest in the fixtures, the recordation of the deed of trust will satisfy the requirements of a fixture filing.

If a UCC Fixture Financing Statement is to be used, it should be reviewed carefully for compliance with subsections (a) and (b) of section 8.9A-502 of the Virginia UCC.

Although a lender may perfect an interest in Fixtures under the Virginia UCC by recording either a deed of trust or a UCC Fixture Financing Statement, the Committee believes that it is inappropriate to issue separate opinions covering both the deed of trust and the UCC Fixture Financing Statement. Although some lenders may take a “belt and suspenders” approach by recording both, the Committee recommends that the opinion should be limited to one or the other.

F. Recordation Taxes. Real estate lenders occasionally will seek an opinion regarding the extent of mortgage or recordation taxes that may be imposed in connection with

247 Virginia Code section 8.9A-102(a) (55) defines a “Mortgage” as “a consensual interest in real property, including fixtures, which secures payment or performance of an obligation.” As such, a deed of trust in Virginia is a “mortgage” for the purposes of the Virginia UCC.

248 Virginia Code section 8.9A-502 (c) also covers the recordation of a mortgage as a financing statement covering as-extracted collateral or timber to be cut. As-extracted collateral and timber to be cut are beyond the scope of this Report.


250 Virginia Code section 8.9A-502(a), (b) provide:

“(a) Sufficiency of financing statement. Subject to subsection (b), a financing statement is sufficient only if it:

(1) provides the name of the debtor;
(2) provides the name of the secured party or a representative of the secured party; and
(3) indicates the collateral covered by the financing statement.

(b) Real-property-related financing statements. Except as otherwise provided in § 8.9A-501 (b), to be sufficient, a financing statement that covers as-extracted collateral or timber to be cut, or which is filed as a fixture filing and covers goods that are or are to become fixtures, must satisfy subsection (a) and also:

(1) indicate that it covers this type of collateral;
(2) indicate that it is to be filed for record in the real property records;
(3) provide a description of the real property to which the collateral is related sufficient to give constructive notice of a mortgage under the law of this state if the description were contained in a record of the mortgage of the real property; and
(4) if the debtor does not have an interest of record in the real property, provide the name of a record owner.”
the recordation of a deed of trust. The Committee believes that this opinion is most often requested by out of state lenders who are not familiar with the Virginia recording statutes, and the Committee discourages such an opinion generally since determining the amount of taxes and fees requires mathematical calculations that are not the appropriate subject of a legal opinion. In addition, unlike certain other states, once a deed of trust is recorded in Virginia, the fact that an incorrect amount of recording taxes may have been paid does not affect the enforceability of the deed of trust or the validity of its recordation. Since loan proceeds are usually not disbursed until the lender’s title insurance policy has been issued with regard to the deed of trust (thereby insuring that the deed of trust has been recorded) and/or until the lender has otherwise confirmed that the deed of trust has in fact recorded, such an opinion serves no useful purpose.

G. Priority of Future Advances. In connection with a construction loan or other loan secured by a credit line deed of trust in which loan proceeds will be disbursed in multiple advances, a lender may seek an opinion to the effect that the lien of the deed of trust will have the same priority with respect to future advances as it has with respect to the initial advance. If required in such a loan transaction, the opinion giver may consider the following sample opinion language:

Priority of Future Advances.

The Deed of Trust complies with the requirements for a “credit line deed of trust” as provided in Section 55-58.2 of the Virginia Code, and advances of the Loan made under the Loan Agreement after the date hereof will be secured by the Deed of Trust with the same priority as advances of the Loan made as of the date of recordation of the Deed of Trust to the extent provided in, and subject to the provisions of, Section 55-58.2 of the Virginia Code.

Section 55-58.2 does not provide that future advances will have priority over all other liens that may be recorded after the credit line deed of trust is recorded. Section 55-58.2 specifically mentions amounts provided by section 55-59, mechanics’ liens under Title 43 and purchase money security interests under section 8.9A-317 as having the priority provided by such statutes. In addition, subsection D of section 55-58.2 allows a judgment creditor to have priority over discretionary future advances by notifying the credit line deed of trust beneficiary of the judgment, and subsection F allows the grantor to require a modification of the credit line deed of trust to subordinate discretionary future advances to subsequently recorded deeds of trust. Furthermore, advances secured by a credit line deed of trust, like indebtedness secured by all deeds of trust, may be subordinate to liens for unpaid real estate taxes and special assessments and perhaps other “super” liens that attach to real property after the credit line deed of trust is recorded. Some practitioners prefer to mention such items in their opinion letters so as to explain the priority of credit line deeds of trust more generally. However, the Committee believes that the illustrative opinion language is sufficiently narrow in that it only states that future advances have the same priority as the initial advance, not that future advances will have priority over all

251 See Lucas v. Clafflin, 76 Va. 269, __, 1882 WL 6022 at *7 (1882) and Va. Code Ann. § 17.1-223.D (“If the writing is accepted for recordation in the deed books, it shall be deemed to be validly recorded for all purposes.”).
liens subsequently recorded, and in that it is expressly subject to the provisions of section 55-58.2.

However, it should be noted that a lender’s title insurance policy insuring a credit line deed of trust usually can be endorsed to insure the priority of future advances (subject to certain limitations), making such an opinion unnecessary. The Committee does not believe that such an opinion should be requested in routine real estate loan transactions where title insurance is provided, but the Committee recognizes that out-of-state lenders may require this opinion due to their unfamiliarity with Virginia law.

**Due Diligence.** In addition to the requirements for a deed of trust generally, an opinion giver must carefully review the deed of trust for compliance with section 55-58.2 of the Virginia Code, which requires that a credit line deed of trust (a) set forth on the front page either in capital letters or in language underscored, the words “THIS IS A CREDIT LINE DEED OF TRUST,” (b) specify the maximum aggregate amount of principal to be secured at one time, and (c) set forth the name of the beneficiary and the address to which communications may be mailed or delivered to the beneficiary. Often all of such information is included in a special legend on the front page of a credit line deed of trust, but only the statement, “This Is A Credit Line Deed of Trust” (underscored or in all capital letters), is required to be on the front page. Even if no opinion is given as to the priority of future advances, it may be prudent to confirm compliance with these requirements for a deed of trust securing future advances, inasmuch as section 55-58.2 states that a “credit line deed of trust” (defined as a deed of trust securing advances or other extensions of credit to be made in the future) shall satisfy these requirements.

**H. Loans as Transacting Business in Virginia.** In some loan transactions secured by real estate, an out-of-state lender may seek an opinion regarding whether the making of the loan will require the lender to register or to qualify to do business in the Commonwealth (i.e., obtain a certificate of authority to transact business). The Committee discourages issuing that opinion generally as it should not be the role of borrower’s counsel to advise a lender on matters of its own compliance with Virginia law. Moreover, borrower’s counsel would not necessarily know whether the lender has taken other actions in connection with the making of the loan that might require the lender to register to do business (such as having a loan officer routinely making calls and operating within the Commonwealth).

**I. Adequacy of Documents Opinion.** In loan transactions secured by real estate, an out-of-state lender may seek an opinion to the effect that its deed of trust contains all of the customary provisions found in similar documents for comparable real estate loan transactions in the Commonwealth of Virginia. The Committee believes that such a request is inappropriate and should be rejected. Among other things, deeds of trust prepared by different lawyers or prepared in different regions of the Commonwealth often differ significantly, and therefore what are customary provisions in a deed of trust are often in the eye of the beholder. Moreover, if a lender is genuinely concerned whether its deed of trust contains all of the “bells and whistles” that a prudent lender should expect in Virginia, the lender should retain its own counsel for that purpose rather than asking borrower’s counsel to advise it on the subject, especially if revising the deed of trust to incorporate additional provisions would be contrary to the interest of the opinion giver’s client, the borrower.
J. Permits. In some real estate loan transactions, a lender may seek an opinion regarding whether the Borrower possesses all permits necessary to own and operate the property. Because issuing that opinion would necessitate a review of the Borrower’s operations and broad array of applicable federal, state and local laws and regulations, the costs attendant with performing the required due diligence would generally preclude an opinion giver from being able to provide a “permit” opinion in a typical real estate finance opinion. Therefore, the Committee believes that it is not accepted practice in the Commonwealth to ask for or provide that opinion in routine real estate loan transactions.

K. Zoning, Subdivision and Land Use Opinions. Land use opinions require a substantive expertise that is beyond the scope of most practitioners. Moreover, the cost of performing the necessary due diligence would likely far outweigh the benefits to a lender in most commercial loan transactions secured by real estate. Therefore, the Committee believes that it is not accepted practice in the Commonwealth to ask for or provide opinions pertaining to land use matters in routine real estate loan transactions.

L. Title Opinions. Although the Committee recognizes that lawyers were historically called upon to examine title to real property and issue opinions concerning the state of title to real property, the widespread availability of title insurance has generally replaced title opinion letters in most areas of the Commonwealth. Therefore, the Committee believes that it is not generally accepted practice in the Commonwealth to ask for or provide title opinion letters in real estate loan transactions.

M. Environmental Opinions. The Committee believes that, as a general rule in real estate loan transactions, no opinion should be requested or given concerning either the environmental condition of the real estate or the compliance of that real estate with environmental laws. Indeed, any opinion should expressly exclude those matters.

IX. SECURED TRANSACTIONS OPINIONS UNDER ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE

A. Introduction, Background and Scope of Opinions.

1. The discussion in this Report regarding security interests in personal property is not intended to be an exhaustive resource on a very complex topic. For a detailed discussion of issues related to opinions on security interests in personal property under Article 9 of the Uniform Commercial Code (“Article 9”), an opinion giver is encouraged to consult The TriBar UCC Opinion Report. All section references in this section of the Report are, unless otherwise indicated, to Article 9.

2. In giving any particular security interest opinion, the opinion giver must determine if the type of collateral covered by the opinion is subject to Article 9, what method of perfection is mandated (e.g., filing, possession or control) and what law governs creation and perfection and then ensure that the proper steps for perfection have been taken.

253 Article 9 of the UCC as adopted in Virginia is codified as Title 8.9A of the Virginia Code.
3. The opinion giver may wish to obtain from the borrower a form of “perfection certificate” addressing the operative facts upon which an opinion giver may rely in giving an opinion under Article 9. Whether an opinion giver uses a certificate or otherwise independently confirms the relevant facts, it is important to be certain about the facts on which the controlling law will depend.

4. The specific qualifications to be included in an opinion depend heavily on both the scope of the opinion and nature of the collateral. Express exclusions are appropriate for collateral types subject to local filing rules (e.g., as extracted collateral and minerals) and for collateral that requires a more specific description (e.g., commercial tort claims).

5. Article 9 includes several special rules for consumer goods and consumer transactions, which are not addressed in this Report.

B. Parties

1. Under Article 9, the “debtor” is the person with an interest in the collateral or the power to transfer an interest in the collateral and the grantor of the security interest (e.g., the owner of the collateral or another person authorized by the owner). The debtor may or may not be obligated to pay the indebtedness secured by the security interest in the collateral.

2. Special rules may apply to debtors that are governmental entities, requiring potential modifications to opinions.

3. The “secured party” is typically the person in whose favor a security interest is created or provided for under a security agreement.

4. Article 9 provides that any type of agent or representative can be the secured party (e.g., a trustee, indenture trustee or collateral agent), with or without mention of its representative capacity appearing on the face of any financing statements filed. See section 9-102(72)(E).

C. Scope of Article 9 Generally

1. A consensual grant of an interest in personal property to secure the payment or performance of an obligation might take several forms under state law. Whether a transaction creates a lease or a security interest is determined based on the facts. See section 1-201(37). Article 9 of the UCC substantially covers the field of consensual security interests, but several types of transactions are not covered or are covered only in part (e.g., Article 9 enforcement rules apply but perfection rules do not). Consequently, except in special instances where an opinion giver explicitly addresses transactions that have both Article 9 and non-Article 9 aspects (such as creating and perfecting security interests in titled vehicles, aircraft, U.S. patents or U.S. registered trademarks or copyrights), an opinion should be limited to security interests that are subject to the creation and perfection rules of Article 9.

2. Article 9 also applies to (i) transactions involving the sale of accounts, chattel paper, payment intangibles and promissory notes (subject to certain exceptions), (ii) consignments, (iii) agricultural liens arising under statute, (iv) security interests arising under
Article 2 (sales) and Article 2A (leases), and (v) certain security interests arising under Article 4 (Bank Deposits and Collections) and Article 5 (Letters of Credit). See section 9-109.

3. A security interest in certain types of collateral cannot be perfected by filing a financing statement. For example, a security interest in deposit accounts and letter of credit rights may be perfected only by “control.” Security interests in other types of collateral, such as motor vehicles, may only be perfected under other applicable state law. Additionally, federal law preempts Article 9 with respect to perfecting liens on certain assets, such as aircraft, ships and certain types of intellectual property. Certain categories of collateral are excluded from the scope of Article 9 entirely (see section 9-109).

4. Any opinion on non-UCC collateral can be given only after additional due diligence and consideration of the applicable non-UCC law. It is not customary practice to request or give such an opinion in loan transactions.

D. Governing Law.

1. Under Article 9, the issue of what law governs creation of a security interest is based on section 1-105 of the UCC (the “reasonable relation” test). See section 9-301, comment 2.

2. The choice of law rules of Article 9 distinguish in some cases between the law governing perfection, the effect of perfection or nonperfection and priority. See sections 9-301 through 9-306.

3. Typically, legal opinions deal only with creation and perfection. The law governing creation, as specified in the governing law clause of the security agreement, can be different from the law governing perfection (e.g., where to file a financing statement).

4. The choice of law rules for perfection by filing (except for real-estate related collateral and certain other limited exceptions) are based on the “location” of the debtor—e.g., in the case of a “registered organization” such as a corporation or LLC, the law of the jurisdiction in which such entity is organized. However, the choice of law rule for a non-possessory security interest separates the questions of (i) perfection and (ii) the result of perfection (or non-perfection) and priority with respect to most types of tangible personalty (goods, tangible chattel paper, instruments, negotiable documents and money). See section 9-301. In those cases, perfection remains governed by the filing rule but the rights of competing claimants are resolved by reference to the law of the jurisdiction where the collateral is located from time to time. See section 9-301, comment 7.

5. The law governing a possessory security interest, including perfection, is the law where the collateral is located while the collateral is located in that jurisdiction. See section 9-301(2).

6. The law of the jurisdiction where the collateral is located also governs perfection and priority for fixtures, timber to be cut and as-extracted collateral. See section 9-301(4).
7. The choice of law rules dictate additional caution if an opinion on priority is required to be given. Priority opinions, which should be given in very limited circumstances, are discussed in section IX.F.3 of this Report.

E. Security Interest Opinions.

1. Unless otherwise stated, an opinion recipient is not entitled to rely on the general enforceability opinion on transaction agreements given in connection with a secured transaction for assurances that security interests, pledges or other liens that an applicable document purports to create have been created. The creation, attachment and perfection of security interests and the characterization of a transaction as one involving creation of a lien, if intended to be covered in an opinion letter, are issues that should be expressly addressed as coverage of those issues may not be inferred from an enforceability opinion. Opinion givers who are not comfortable with this understanding frequently exclude explicitly matters relating to those security interests.

2. The security interest opinion is qualified by enforceability exceptions applicable generally to the transaction documents, but it also should include (or be qualified by reference to) all enforceability disclaimers that might be required due to the provisions of the security agreement.

3. There are a number of specific limitations and qualifications relating to the security interest opinion. Accordingly, it is appropriate to address those issues in addition to the limitations and qualifications applicable to a general enforceability opinion. Typically, creation and perfection are addressed in separate paragraphs for convenience of reference and because the actions necessary for creation and perfection differ.

F. Perfection and Priority Opinions.

1. Perfection opinions often are limited to collateral in which a security interest can be perfected by filing a financing statement in accordance with Article 9. In certain cases, however, an opinion may cover perfection by possession (e.g., certificated securities) or control (e.g., deposit accounts).

2. Before issuing a “perfection by filing” opinion, the opinion giver should review forms of financing statements carefully to ensure that the requirements of Article 9 have been met and that the information contained therein is accurate. Note that there are different standards for sufficiency of a collateral description for purposes of a granting clause in a security agreement (where Article 9 requires reasonable identification of collateral) versus a financing statement (where an “all assets” designation may be used). See section 9-108.

3. While a lender may request an opinion that its security interest has priority over all other interests in the collateral, it is unusual for an opinion giver to render such an opinion with regard to security interests that are perfected by filing. It is more common for an opinion giver to render such an opinion, if at all, with regard to the priority of a security interest perfected by possession or control.
1. Special attention must be paid to transactions involving investment property (e.g., securities, security entitlements, securities accounts, commodities contracts and commodities accounts). Security interest opinions with respect to these types of collateral may involve both Article 8 and Article 9 of the UCC.

2. Investment property is subject to a special choice of law rule in Article 9 (see section 9-305). Although perfection in investment property is permitted by filing section 9-312), because perfection-by-filing can be “trumped” by perfection-by control, a secured party looking to investment property should seek to perfect by obtaining control under section 9-106 (referring to section 8-106 as to securities and security entitlements) and to maintain perfection by maintaining control as described in section 9-314(c). Accordingly, an opinion giver is likely to be asked for opinions that address perfection effected by control, rather than by filing.

3. Additional rules come into play when securities are held through or in the name of a securities intermediary (so-called “securities entitlements” under Article 8).

4. Note the special rules determining whether an interest in an LLC or partnership is a “security” (and therefore subject to Article 8). Article 9 defers to the definition of “security” in section 8-102. In most cases (e.g., non-traded LLC or partnership interests — see section 8-103(c)), those interests will not be “securities” (whether certificated or uncertificated) — and therefore not “investment property” under Article 9, unless the appropriate entity document (e.g., LLC operating agreement, partnership agreement) specifies that those interests are to be considered securities governed by Article 8. In order for an LLC or partnership interest to be a “security” under this “opt-in” method, it is the issuer of the security, not the holder/debtor, that must elect to have the interests governed by Article 8.

5. If the LLC or partnership interests are not securities and are held directly by the owner, they are general intangibles, and a security interest in them must be perfected by filing, even if a membership or partnership certificate is created.

6. Note that because filing is a permissible method for perfecting a security interest in a security, if the opinion giver opines on perfection based on filing, the opinion giver need not determine whether an LLC interest or a membership interest is a security or a general intangible.

7. While the effect of the anti-assignment provisions of sections 9-406 and 9-408 on security interests in LLC and partnership interests is the subject of debate in many jurisdictions, Virginia is one of a small group of states in which the issue has been resolved by statute. Virginia Code sections 50-73.84C and 13.1-1001.1.B, derived from Delaware, state that the UCC provisions do not apply to LLC and partnership interests and that contractual provisions that restrict assignments of interests prevail over the contrary UCC provisions. Again, following Delaware, Virginia’s UCC has been modified (See sections 8.01A-406(k) and 8.9A-408(g)). Because the anti-assignment provisions do not apply in Virginia, the opinion giver’s due diligence should include a review of the operating or partnership agreement to determine if it restricts voluntary liens (as it often does).
X. ILLUSTRATIVE OPINION LETTERS

Included in this section of the Report are three illustrative opinion letters for a real estate loan transaction, a secured commercial loan transaction, and a share issuance transaction, respectively. The illustrative opinion letters are examples only; they are not intended to suggest mandatory language or content. A lawyer should consider the specific facts and issues raised in a particular transaction to determine what opinions can be given and what assumptions, qualifications, and limitations are appropriate. In addition, the form of opinion letters and the specific language that lawyers use to express certain opinions, assumptions, qualifications and limitations often vary from law firm to law firm or from lawyer to lawyer. Simply put, there is no one right form of opinion letter, inasmuch as an opinion letter is the professional work product of the lawyer who issues it, not a transaction document that is the subject of the opinion letter. However, despite varying practices in how opinions are expressed, the Committee believes that it is important for Virginia lawyers to understand the substantive issues discussed in this Report (and in other opinion literature), to the extent applicable, before undertaking to draft an opinion letter for a specific transaction.

[THREE ILLUSTRATIVE OPINION LETTERS APPEAR ON THE FOLLOWING PAGES]
A. Illustrative Real Estate Finance Opinion Letter.

SAMPLE FORM OPINION FOR REAL ESTATE FINANCE TRANSACTIONS
[LAW FIRM LETTERHEAD]

[January __, 20__]

XYZ Bank, N.A.
[Address]

RE: $20,000,000 Loan (the “Loan”) from XYZ Bank, N.A. (the “Lender”) to ABC Company, LLC, a Virginia limited liability company (the “Borrower”), guaranteed by John M. Smith (the “Guarantor”).

Ladies and Gentlemen:

We have acted as counsel to the Borrower and the Guarantor in connection with the preparation, execution and delivery of the following documents relating to the Loan transaction:

(i) the Loan Agreement, dated as of January __, 20__, executed by the Borrower and the Lender (the “Loan Agreement”);
(ii) the Promissory Note, dated as of January __, 20__, in the original principal amount of $20,000,000 made by the Borrower payable to the Lender (the “Note”);
(iii) the Deed of Trust, dated as of January __, 20__, executed by the Borrower in favor of ______________ and ______________, as trustees (the “Trustees”), for the benefit of the Lender (the “Deed of Trust”) with respect to certain property including real property located in the City of ______________, Virginia and more particularly described in the Deed of Trust (such real property, the “Real Property”), to be recorded in the Clerk’s Office of the Circuit Court of the City of __________, Virginia (the “Clerk’s Office”);
(iv) the Assignment of Leases and Rents Agreement, dated as of January __, 20__, executed by the Borrower for the benefit of the Lender (the “Assignment of Leases and Rents”);
(v) the Guaranty Agreement, dated as of January __ 20__, executed by the Guarantor for the benefit of the Lender;
(vi) Certified copy of the Borrower’s Articles of Organization (the “Articles”);
(vii) Certified copy of the Borrower’s Operating Agreement (the “Governing Instrument”);
(viii) Certificate of Fact, dated as of January __, 20__, regarding the Borrower issued by the State Corporation Commission of the Commonwealth of Virginia (the “Certificate of Fact”);
(ix) Certified copy of the Consent in Lieu of Special Meeting of Manager and Members of the Borrower dated as of January __, 20__; and
(x) Certificate of John M. Smith, dated as of January __, 20__, individually and as Manager of the Borrower.
Items (i) through (vi) listed above are hereinafter referred to, collectively, as the “Loan Documents” and each, individually, as a “Loan Document.”

This letter is being delivered to you at the request of the Borrower and the Guarantor pursuant to Section _____ of the Loan Agreement. Capitalized terms not defined in this letter have the meanings ascribed to them in the Loan Agreement.

For purposes of our opinions, we have reviewed and examined originals, copies of originals, facsimiles or electronic portable document format or other files of originals, identified to our satisfaction, of the Loan Documents and such other documents as we have deemed necessary for the execution and delivery of this opinion letter.

We express no opinion as to any document not specifically described above as a Loan Document (even if such other document is specifically referenced in, or refers to, any of the Loan Documents described above).

As to matters of fact, we have relied exclusively on (1) the representations and warranties made by the parties in the Loan Documents, (2) certificates of public officials, and (3) the information and representations provided to us by the representatives of the Borrower and the Guarantor in the certificates described above. We have assumed the truthfulness of all statements of fact contained in the Loan Documents and such certificates and have made no independent investigation of the accuracy or completeness of such matters of fact. With respect to the opinion in opinion paragraph 1 regarding the valid existence of the Borrower, we have relied exclusively on the Certificate of Fact, which we have assumed, with your permission and without independent inquiry, remains correct and in full force and effect on the Closing Date.

The opinions expressed in this opinion letter are limited to such internal laws of the Commonwealth of Virginia (but not including any statutes, ordinances, administrative decisions, rules or regulations of any political subdivision of the Commonwealth of Virginia); such Federal law that, in each case in our experience, are normally applicable to a transaction of the type contemplated by the Loan Documents; and present judicial interpretations of the foregoing as such interpretations are made at the highest court of the jurisdiction upon whose law our opinion on that issue is based (collectively, the “Applicable Law”).

In rendering the following opinions, we have relied, without independent investigation, upon the following assumptions:

(a) Each party to the Loan Documents that is an entity rather than a natural person (other than the Borrower) is duly organized, validly existing and in good standing in its jurisdiction of organization;

(b) Each party to the Loan Documents (other than the Borrower) has full power and authority to execute, deliver and perform its obligations under the Loan Documents, and the Loan Documents have been duly authorized by all necessary action on its part and have been duly executed and delivered by it;

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(c) The Loan Documents constitute the valid and binding obligations of each party to the Loan Documents (other than the Borrower and the Guarantor), enforceable against such party in accordance with their terms;

(d) Each natural person executing the Loan Documents or any document referred to herein is legally competent to do so;

(e) Each party to the Loan Documents (other than the Borrower and the Guarantor) has complied with all legal requirements pertaining to its status as such status relates to its rights to enforce the Loan Documents against the Borrower and the Guarantor;

(f) Each document submitted to us for review is accurate and complete, each such document that is an original is authentic, each such document that is a copy conforms to an authentic original, and all signatures on each such document are genuine;

(g) There has not been any mutual mistake of fact or misunderstanding, fraud, duress or undue influence relating to the negotiation, preparation, execution or delivery of any of the Loan Documents;

(h) The Loan Documents will be enforced in circumstances and in a manner in which it is commercially reasonable to do so, and the conduct of the parties complies with any requirement of good faith and fair dealing;

(i) There are no agreements or understandings among the parties, written or oral, and there is no usage of trade or course of prior dealing among the parties that would, in either case, define, supplement or qualify the terms of the Loan Documents;

(j) Each person who has taken any action relevant to any of our opinions in the capacity of manager, director or officer was duly elected to that manager, director or officer position and held that position when such action was taken;

(k) The Real Property is located entirely within the City of ______________, Virginia, and on the date hereof a correct, complete and sufficient description of the Real Property has been attached, and upon recordation will be attached, to the Deed of Trust;

(l) The Borrower is and will be at the time of recordation of the Deed of Trust the fee simple owner, of record and in fact, of good and marketable title to the Real Property and the Fixtures (as defined below), and all Fixtures described in the Deed of Trust are located on the Real Property; and

(m) The conveyance of the Real Property to the Trustees will not constitute an illegal subdivision of real property.

Notwithstanding our opinions expressed herein, we express no opinion with respect to the enforceability of any of the following provisions in the Loan Documents:

(a) Choice-of-law provisions;
(b) Provisions for indemnification of a party for its own gross negligence, willful misconduct, recklessness or other wrongful conduct;

(c) Provisions mandating contribution towards judgments or settlements among various parties;

(d) Waivers of (i) legal or equitable defenses, (ii) rights to damages, (iii) rights to counter claim or set off, (iv) statutes of limitations, (v) rights to notice, (vi) the benefits of statutory, regulatory, or constitutional rights, unless and to the extent the statute, regulation, or constitution explicitly allows waiver, (vii) unknown future defenses, (viii) obligations of good faith, fair dealing, diligence and reasonableness; and (ix) other benefits to the extent they cannot be waived under Applicable Law;

(e) Provisions providing for forfeitures or the recovery of amounts deemed to constitute penalties or for liquidated damages;

(f) Provisions regarding a creditor’s use of force or breach of the peace or relating to the sale or deposition of collateral or the requirements of a commercially reasonable sale;

(g) Agreements to submit to the jurisdiction of any particular court or other governmental authority; provisions restricting access to courts; provisions limiting the right to trial by jury; waiver of service of process requirements which would otherwise be applicable; and provisions otherwise purporting to affect the jurisdiction and venue of courts;

(h) Provisions that attempt to change or waive rules of evidence or fix the method or quantum of proof to be applied in litigation or similar proceedings;

(i) Provisions regarding arbitration;

(j) Confidentiality and nondisclosure provisions;

(k) Provisions concerning the availability of specific performance, injunctive relief and/or other equitable remedies;

(l) Provisions granting remedies in connection with a breach of representation, warranty or covenant or other default that is not material;

(m) Provisions permitting modifications only if in writing;

(n) Provisions pursuant to which one party appoints another as attorney-in-fact or otherwise authorizes a party to take actions on behalf of another;

(o) Provisions regarding (i) severability, (ii) cumulations, non-exclusivity, or availability of remedies or the enforcement of contractual provisions to the extent contrary to public policy, (iii) non-waiver of remedies by failure or delay of exercise or (iv) performance requirements, to the extent such requirements are beyond the control of the performer;
(p) Purporting to waive the right of statutory or equitable redemption;

(q) Purporting to alter the priority of any lien or security interest;

(r) Providing for the enforcement of the lien of the Deed of Trust and the sale of the Deed of Trust Property through judicial foreclosure proceedings;

(s) Characterizing any assignment of rents, leases and/or other documents, rights and interests as “absolute” rather than a collateral assignment for security purposes;

(t) Permitting partial foreclosure of the Deed of Trust; and

(u) Providing for distribution of foreclosure proceeds other than in accordance with Applicable Law.

In addition, we express no opinion as to the ownership or title of any real or personal property, the creation or perfection of any lien, except as expressly set forth in opinion paragraphs 7 and 8, or the priority of any liens or security interests. Further, we have not made any examination of any real or personal property or the records of federal, state or local governments or agencies thereof to ascertain whether any property (including the soil, air, surface, water, ground water, physical structures and improvements, if any) complies with or violates any environmental, safety, zoning or health laws, regulations, rules or orders.

We also express no opinion regarding laws, rules and regulations relating to (i) securities, (ii) banks and other financial institutions, insurance companies and/or investment companies, (iii) pension and employee benefits, (v) antitrust and unfair competition, (vi) compliance with fiduciary duties, (vii) taxes, (viii) environmental matters, (ix) health care, (x) any municipality or any local government within any state, (xi) zoning or land use or any other matters relating to the development or use of real property, (xii) telecommunications, (xiii) racketeering or criminal or civil forfeiture, (xiv) Federal contracts, (xv) commodities, (xvi) qualification of entities doing business in foreign jurisdictions, or (xvii) terrorism or money laundering.

Based on and subject to the foregoing, and subject to the exceptions, qualifications and limitations hereinafter set forth, we express the following opinions:

1. The Borrower is a limited liability company validly existing under the laws of the Commonwealth of Virginia as of the date of the Certificate of Fact.

2. The Borrower has the limited liability company power to execute, deliver and perform its obligations under the Loan Documents to which it is a party.

3. The Borrower has authorized the execution, delivery and performance of the Loan Documents to which it is a party by all necessary limited liability company action.

4. The execution and delivery by the Borrower and the Guarantor of the Loan Documents to which each is a party, and the consummation by the Borrower and the Guarantor of the transactions provided for in the Loan Documents: (a) do not violate any provision of the Articles or the Governing Instrument; (b) do not violate or constitute a default under, or give rise
to any right of termination, cancellation or acceleration with respect to, any contract, agreement
or other instrument to which the Borrower or the Guarantor is a party, or any order, decree or
judgment of any government authority or court by which the Borrower or the Guarantor is
bound, in each case as identified on Schedule _____ to the Loan Agreement (each, a “Reviewed
Document”), or result in the creation of any lien, charge or encumbrance upon any property or
asset of the Borrower or the Guarantor pursuant to, any Reviewed Document; and (c) do not
violate any statute or regulation of Applicable Law that is applicable to the Borrower or the
Guarantor.

5. No consent, approval, authorization or other action by, or filing or registration
with, any governmental authority of the United States or the Commonwealth of Virginia is
required to be obtained or made by the Borrower or the Guarantor pursuant to any statute or
regulation of Applicable Law for the execution and delivery by the Borrower and the Guarantor
of the Loan Documents and for consummation of the transactions provided for therein, except
for (i) consents, approvals, authorizations, actions, filings and registrations which have been
obtained or made and (ii) filings and recordings which are necessary to perfect security interests
and liens granted under the Loan Documents or to terminate or release security interests and
liens not permitted by the Loan Documents.

6. The Loan Documents have been duly executed and delivered by the Borrower and
the Guarantor, as applicable, and are valid and binding obligations of the Borrower and the
Guarantor, as applicable, enforceable against them in accordance with the terms of the Loan
Documents.

7. The Deed of Trust is in an appropriate form to create a valid security interest
under the Virginia Uniform Commercial Code, Title 8.9A of the Code of Virginia (the “Virginia
UCC”), in favor of the Lender in the Borrower’s right, title and interest in and to the collateral
described therein that constitutes “fixtures” as defined in Section 8.9A-102 of the Virginia UCC
(that collateral being hereinafter referred to as the “Fixtures”). The Deed of Trust is in proper
form to be effective as a fixture filing with respect to the Fixtures, and, once the Deed of Trust is
duly recorded in the Clerk’s Office, the Lender will have a perfected security interest under the
Virginia UCC in all right, title and interest of the Borrower in and to the Fixtures located on the
Real Property.

8. The Assignment of Leases and Rents is in an appropriate form to grant a valid
assignment in favor of the Lender in the Borrower’s right, title and interest in and to the “Leases”
and “Rents” (as those terms are defined in the Assignment of Leases and Rents), to secure the
indebtedness described therein.

9. The Borrower may not avail itself of the defense of usury to avoid or defeat the
payment of interest or any other sum due under the Note.

Our opinions are subject to the effect of bankruptcy, receivership, insolvency, fraudulent
conveyance, reorganization, moratorium and other laws affecting the rights and remedies of
creditors generally and to general principles of equity, regardless of whether considered in a
proceeding in equity or at law.
In addition to expressing the opinions set forth above, we advise you that we do not represent the Borrower or the Guarantor in any action, lawsuit or proceeding now pending at law or in equity, or by or before any governmental instrumentality or agency or arbitral body, against the Borrower or the Guarantor by a claimant, that challenges the validity or enforceability of, or seeks to enjoin the performance of, the Loan Documents.

Our opinion on each legal issue addressed herein represents our opinion concerning how that issue would be resolved were it to be considered by the highest court of the jurisdiction upon whose law our opinion on that issue is based. The manner in which any particular issue would be treated in any actual court case would depend in part on facts and circumstances peculiar to the case, and our opinions are not a guaranty of an outcome of any legal dispute that may arise with regard to the Loan Documents.

Our opinions expressed in this letter are as of the date of this letter, and we undertake no obligation to advise you of any changes in Applicable Law or any other matters that may come to our attention after the date of this letter that may affect our opinions expressed in this letter.

Our opinions are furnished to you for your exclusive use solely in connection with the matters contemplated by the Loan Agreement. These opinions may not be relied upon by you for any other purpose or furnished to, quoted, referred to or relied upon by any other person, firm or corporation for any purpose, without our prior written consent in each instance.

Very truly yours,

LAW FIRM NAME
B. Illustrative Article 9 Secured Transaction Opinion Letter.

SAMPLE FORM OPINION FOR COMMERCIAL LOAN TRANSACTION
[Law Firm Letterhead]

[January __, 20__]

XYZ Bank, N.A.
[Address]

RE: $50,000,000 Loan (the “Loan”) from XYZ Bank, N.A. (the “Lender”) to ABC Corporation, a Virginia corporation (the “Borrower”), guaranteed by John M. Smith (the “Guarantor”).

Ladies and Gentlemen:

We have acted as counsel to the Borrower and the Guarantor in connection with the preparation, execution and delivery of the following documents relating to the Loan transaction:

(i) the Loan Agreement, dated as of January __, 20__, executed by the Borrower and the Lender (the “Loan Agreement”);
(ii) the Promissory Note, dated as of January __, 20__, in the original principal amount of $50,000,000 made by the Borrower payable to the Lender (the “Note”);
(iii) the Guaranty Agreement, dated as of January __ 20__, executed by the Guarantor for the benefit of the Lender;
(iv) the Security Agreement, dated as of January __, 20__, made by the Borrower in favor of the Lender (the “Security Agreement”) with respect to the grant of a security interest in the personal property collateral described in the Security Agreement (the “Personal Property Collateral”);
(v) the financing statement to be filed with the Office of the Clerk of the State Corporation Commission of the Commonwealth of Virginia (the “UCC Filing Office”) naming the Borrower as debtor and the Lender as secured party and describing the Personal Property Collateral (the “UCC Financing Statement”);
(vi) Certified copy of the Borrower’s Articles of Incorporation (the “Articles”);
(vii) Certified copy of the Borrower’s Bylaws (the “Bylaws and, together with the Articles, the “Governing Documents”);
(viii) Certificate of Good Standing, dated as of January __, 20__, regarding the Borrower issued by the State Corporation Commission of the Commonwealth of Virginia (the “Good Standing Certificate”);
(ix) Certified copy of the Consent in Lieu of Special Meeting of the Members of the Board of Directors of the Borrower dated as of January __, 20__; and
(x) Certificate of ________________, dated as of January __, 20__, individually and as Secretary of the Borrower.
Items (i) through (iv) listed above are hereinafter referred to, collectively, as the “Loan Documents” and each, individually, as a “Loan Document.”

This letter is being delivered to you at the request of the Borrower and the Guarantor pursuant to Section _____ of the Loan Agreement. Capitalized terms not defined in this letter have the meanings ascribed to them in the Loan Agreement.

For purposes of our opinions, we have reviewed and examined originals, copies of originals, facsimiles or electronic portable document format or other files of originals, identified to our satisfaction, of the Loan Documents and such other documents as we have deemed necessary for the execution and delivery of this opinion letter.

We express no opinion as to any document not specifically described above as a Loan Document (even if such other document is specifically referenced in, or refers to, any of the Loan Documents described above).

As to matters of fact, we have relied exclusively on (1) the representations and warranties made by the parties in the Loan Documents, (2) certificates of public officials, and (3) the information and representations provided to us by the representatives of the Borrower and the Guarantor in the certificates described above. We have assumed the truthfulness of all statements of fact contained in the Loan Documents and such certificates and have made no independent investigation of the accuracy or completeness of such matters of fact.

The opinions expressed in this opinion letter are limited to such internal laws of the Commonwealth of Virginia (but not including any statutes, ordinances, administrative decisions, rules or regulations of any political subdivision of the Commonwealth of Virginia) and to such Federal laws that, in each case in our experience, are normally applicable to a transaction of the type contemplated by the Loan Documents; and to present judicial interpretations of the foregoing as such interpretations are made at the highest court of the jurisdiction upon whose law our opinion on that issue is based (collectively, the “Applicable Law”).

In rendering the following opinions, we have relied, without independent investigation, upon the following assumptions:

(a) Each party to the Loan Documents that is an entity rather than a natural person (other than the Borrower) is duly organized, validly existing and in good standing in its jurisdiction of organization;

(b) Each party to the Loan Documents (other than the Borrower) has full power and authority to execute, deliver and perform its obligations under the Loan Documents, and the Loan Documents have been duly authorized by all necessary action on its part and have been duly executed and delivered by it;

(c) The Loan Documents constitute the valid and binding obligations of each party to the Loan Documents (other than the Borrower and the Guarantor), enforceable against such party in accordance with their terms;
(d) Each natural person executing the Loan Documents or any document referred to herein is legally competent to do so;

(e) Each party to the Loan Documents (other than the Borrower and the Guarantor) has complied with all legal requirements pertaining to its status as such status relates to its rights to enforce the Loan Documents against the Borrower and the Guarantor;

(f) Each document submitted to us for review is accurate and complete, each such document that is an original is authentic, each such document that is a copy conforms to an authentic original, and all signatures on each such document are genuine;

(g) There has not been any mutual mistake of fact or misunderstanding, fraud, duress or undue influence relating to the negotiation, preparation, execution or delivery of any of the Loan Documents;

(h) The Loan Documents will be enforced in circumstances and in a manner in which it is commercially reasonable to do so, and the conduct of the parties complies with any requirement of good faith and fair dealing;

(i) There are no agreements or understandings among the parties, written or oral, and there is no usage of trade or course of prior dealing among the parties that would, in either case, define, supplement or qualify the terms of the Loan Documents;

(j) Each person who has taken any action relevant to any of our opinions in the capacity of director or officer was duly elected to that director or officer position and held that position when such action was taken; and

(k) The Borrower is and will be at the time of filing of the UCC Financing Statement the owner of, or has or will have rights in or the power to transfer rights in, the Personal Property Collateral.

Notwithstanding our opinions expressed herein, we express no opinion with respect to the enforceability of any of the following provisions in the Loan Documents:

(a) Choice-of-law provisions;

(b) Provisions for indemnification of a party for its own gross negligence, willful misconduct, recklessness or other wrongful conduct;

(c) Provisions mandating contribution towards judgments or settlements among various parties;

(d) Waivers of (i) legal or equitable defenses, (ii) rights to damages, (iii) rights to counter claim or set off, (iv) statutes of limitations, (v) rights to notice, (vi) the benefits of statutory, regulatory, or constitutional rights, unless and to the extent the statute, regulation, or constitution explicitly allows waiver, (vii) unknown future defenses, (viii) obligations of good faith, fair dealing, diligence and reasonableness; and (ix) other benefits to the extent they cannot be waived under Applicable Law;
(e) Provisions providing for forfeitures or the recovery of amounts deemed to constitute penalties or for liquidated damages;

(f) Provisions regarding a creditor’s use of force or breach of the peace or relating to the sale or disposition of collateral or the requirements of a commercially reasonable sale;

(g) Agreements to submit to the jurisdiction of any particular court or other governmental authority; provisions restricting access to courts; provisions limiting the right to trial by jury; waiver of service of process requirements which would otherwise be applicable; and provisions otherwise purporting to affect the jurisdiction and venue of courts;

(h) Provisions that attempt to change or waive rules of evidence or fix the method or quantum of proof to be applied in litigation or similar proceedings;

(i) Provisions regarding arbitration;

(j) Confidentiality and nondisclosure provisions;

(k) Provisions concerning the availability of specific performance, injunctive relief and/or other equitable remedies;

(l) Provisions granting remedies in connection with a breach of representation, warranty or covenant or other default that is not material;

(m) Provisions permitting modifications only if in writing;

(n) Provisions pursuant to which one party appoints another as attorney-in-fact or otherwise authorizes a party to take actions on behalf of another;

(o) Provisions regarding (i) severability, (ii) cumulations, non-exclusivity, or availability of remedies or the enforcement of contractual provisions to the extent contrary to public policy, (iii) non-waiver of remedies by failure or delay of exercise or (iv) performance requirements, to the extent such requirements are beyond the control of the performer; and

(p) Purporting to alter the priority of any lien or security interest.

In addition, we express no opinion as to the ownership or title of any personal property, the creation or perfection of any lien, except as expressly set forth in opinion paragraphs 7 and 8, or the priority of any liens or security interests. Further, we have not made any examination of any real or personal property or the records of federal, state or local governments or agencies thereof to ascertain whether any property (including the soil, air, surface, water, ground water, physical structures and improvements, if any) complies with or violates any environmental, safety, zoning or health laws, regulations, rules or orders.

We also express no opinion regarding laws, rules and regulations relating to (i) securities, (ii) banks and other financial institutions, insurance companies and/or investment companies, (iii) pension and employee benefits, (v) antitrust and unfair competition, (vi) compliance with
fiduciary duties, (vii) taxes, (viii) environmental matters, (ix) health care, (x) any municipality or any local government within any state, (xi) zoning or land use or any other matters relating to the development or use of real property, (xii) telecommunications, (xiii) racketeering or criminal or civil forfeiture, (xiv) Federal contracts, (xv) commodities or commodities laws, including any document or provision constituting a “swap” within the meaning of the Commodity Exchange Act of 1936, as amended, or any part thereof, (xvi) qualification of entities doing business in foreign jurisdictions, (xvii) terrorism or money laundering, or (xviii) the Dodd-Frank Wall Street Reform and Consumer Protection Act, as amended, or any rules or regulations thereunder.

Based on and subject to the foregoing, and subject to the exceptions, qualifications and limitations hereinafter set forth, we express the following opinions:

1. The Borrower is a corporation validly existing and in good standing under the laws of the Commonwealth of Virginia as of the date of the Good Standing Certificate.

2. The Borrower has the corporate power to execute, deliver and perform its obligations under the Loan Documents to which it is a party.

3. The Borrower has authorized the execution, delivery and performance of the Loan Documents to which it is a party by all necessary corporate action.

4. The execution and delivery by the Borrower and the Guarantor of the Loan Documents to which each is a party, and the consummation by the Borrower and the Guarantor of the transactions provided for in the Loan Documents: (a) do not violate any provision of the Governing Documents; (b) do not violate or constitute a default under, or give rise to any right of termination, cancellation or acceleration with respect to, any contract, agreement or other instrument to which the Borrower or the Guarantor is a party, or any order, decree or judgment of any government authority or court by which the Borrower or the Guarantor is bound, in each case as identified on Schedule _____ to the Loan Agreement (each, a “Reviewed Document”), or result in the creation of any lien, charge or encumbrance upon any property or asset of the Borrower or the Guarantor pursuant to, any Reviewed Document; and (c) do not violate any statute or regulation of Applicable Law that is applicable to the Borrower or the Guarantor.

5. No consent, approval, authorization or other action by, or filing or registration with, any governmental authority of the United States or the Commonwealth of Virginia is required to be obtained or made by the Borrower or the Guarantor pursuant to any statute or regulation of Applicable Law for the execution and delivery by the Borrower and the Guarantor of the Loan Documents and for consummation of the transactions provided for therein, except for (i) consents, approvals, authorizations, actions, filings and registrations which have been obtained or made and (ii) filings and recordings which are necessary to perfect security interests and liens granted under the Loan Documents or to terminate or release security interests and liens not permitted by the Loan Documents.

6. The Loan Documents have been duly executed and delivered by the Borrower and the Guarantor, as applicable, and are valid and binding obligations of the Borrower and the Guarantor, as applicable, enforceable against them in accordance with the terms of the Loan Documents.
7. The Security Agreement is effective to create a valid security interest in favor of the Lender in the Borrower’s right, title and interest in and to such portion of the Personal Property Collateral (the “Article 9 Collateral”) in which a security interest may be created under the Virginia Uniform Commercial Code, Title 8.9A of the Code of Virginia of 1950, as amended (the “Virginia UCC”).

8. Upon the proper filing of the UCC Financing Statement with and acceptance by the UCC Filing Office, the Lender will have a perfected security interest in such portion of the Article 9 Collateral in which a security interest may be perfected by filing a financing statement under the Virginia UCC, except that we express no opinion in this Paragraph 8 as to any Article 9 Collateral that is a fixture, farm products, or “as-extracted collateral” (as each such term is defined in the Virginia UCC) or timber. We call your attention to the fact that a security interest in certain items or types of the Personal Property Collateral may not be perfected by filing a financing statement in the UCC Filing Office.

9. The Borrower may not avail itself of the defense of usury to avoid or defeat the payment of interest or any other sum due under the Note.

Our opinions are subject to the effect of bankruptcy, receivership, insolvency, fraudulent conveyance, reorganization, moratorium and other laws affecting the rights and remedies of creditors generally and to general principles of equity, regardless of whether considered in a proceeding in equity or at law.

In addition to expressing the opinions set forth above, we advise you that we do not represent the Borrower or the Guarantor in any action, lawsuit or proceeding now pending at law or in equity, or by or before any governmental instrumentality or agency or arbitral body, against the Borrower or the Guarantor by a claimant, that challenges the validity or enforceability of, or seeks to enjoin the performance of, the Loan Documents.

We note that the perfection of any security interest that has been perfected by the filing of the UCC Financing Statement with the UCC Filing Office will expire upon the earliest to occur of (i) the expiration of four months after the debtor so changes its name that the financing statement becomes seriously misleading under § 9-506 and § 9-507 of the Virginia UCC as to any collateral acquired more than four months after such change, unless within such four-month period an amendment which renders the financing statement not seriously misleading is filed, (ii) the expiration of the four-month period after a new debtor whose name is seriously misleading under § 9-506 and § 9-508 of the Virginia UCC becomes bound under § 9-203(d) of the Virginia UCC as to any collateral acquired by the new debtor after the expiration of the four-month period, unless an initial financing statement providing the name of the new debtor is filed before the expiration of the four-month period; (iii) with respect to collateral, a security interest in which has not attached on or prior to the date of change of location, the expiration of the four-month period after a change of the debtor’s location, unless the secured party becomes perfected within such four-month period under the law of the debtor’s new jurisdiction, or (iv) the expiration of one year after the transfer of collateral by the debtor to a person that becomes a debtor and is located in another jurisdiction within the meaning of § 9-307 of the Virginia UCC, unless the secured party becomes perfected as to the transferred collateral within the one-year period under the laws of the location of the transferee debtor. To the extent that Virginia law
continues to govern the effect of the UCC Financing Statement, continuation statements complying with the UCC as in effect in Virginia must be filed in the UCC Filing Office in order to maintain the effectiveness of the UCC Financing Statement.

The opinions set forth in Paragraphs 7 and 8 above also are subject to the following additional limitations and exclusions:

(a) We express no opinion as to the validity, perfection or enforceability of a security interest arising out of any transaction not subject to Article 9 of the Virginia UCC, including those described in §§ 9-109(c) and (d) of the Virginia UCC, or as to the priority of any security interest or as to what law governs perfection of the security interests granted under any Loan Document.

(b) We express no opinion with respect to any “commercial tort claim,” “letter-of-credit-right,” collateral arising from a “consumer transaction,” a “deposit account,” a “health-care-insurance-receivable,” an “agricultural lien,” “farm products” or “as-extracted collateral,” any “investment property” or any “manufactured home collateral” (as those terms are defined in Article 9 of the Virginia UCC), collateral subject to a certificate of title, goods consigned by or to the Borrower, documents or goods covered by documents, electronic chattel paper (other than perfection by filing as set forth in Paragraph 8), or standing timber.

(c) Under §§ 9-315 of the Virginia UCC, the continuation of perfection of a security interest in proceeds is limited to the extent set forth in such section.

(d) Under § 9-316 of the Virginia UCC, the continuation of perfection of a security interest following a change in the jurisdiction, the laws of which govern perfection, the effect of perfection and non-perfection and priority, is limited to the extent set forth in such section.

(e) In the case of property that becomes Personal Property Collateral after the date hereof, Section 552 of the Federal Bankruptcy Code limits the extent to which property acquired by a debtor after the commencement of a case under the Federal Bankruptcy Code may be subject to a security interest arising from a security agreement entered into by the debtor before the commencement of such a case.

(f) The UCC Financing Statement might become ineffective due to events that cause it to be “seriously misleading” under §§ 9-506 through § 9-508 of the Virginia UCC.

(g) We note that the Lender’s rights against account debtors will be subject to the terms of the assigned account, chattel paper or general intangible, to dealings between such account debtor and the Borrower, and to the other limitations provided in §§ 9-403, 9-404, 9-405 and 9-406 of the Virginia UCC, and will be subject to defenses as provided in § 9-404 of the Virginia UCC.

(h) We express no opinion as to the effect of any prohibitions against assignment that may be contained in any account, lease agreement, promissory note, chattel paper, payment intangible, health-care receivable or letter-of-credit-right included in the Personal Property Collateral. We note that prohibitions on assignment contained in any account, lease
agreement, promissory note, chattel paper, payment intangible, health-care- insurance-receivable and letter-of-credit-right are subject to the limitations contained in §§ 9-406, 9-407, 9-408 and 9-409 of the Virginia UCC.

(i) We express no opinion as to the effectiveness of the Lender’s security interest as to any rights (including rights of payment) under any account or other obligation on which the United States government or any other federal, state, local, foreign or other government or any agency, department or subdivision thereof is an obligor.

(j) We express no opinion as to whether provisions in the Loan Documents granting an absolute assignment of rights or interests will be construed as effecting an absolute assignment rather than a collateral assignment or security interest.

(k) We note that pursuant to §§ 9-203(f) and (g) and §§ 9-308(d) and (e) of the Virginia UCC, (i) perfection of a security interest in collateral also perfects a security interest in any supporting obligation (as defined in the Virginia UCC) for such collateral and (ii) perfection of a security interest in a right to payment or performance also perfects a security interest in any security interest, mortgage or other lien on personal or real property securing such right to payment or performance (a “Supporting Lien”). Except to the extent that any such supporting obligation or Supporting Lien constitutes Article 9 Collateral, we express no opinion as to the creation or perfection, respectively, of a security interest therein.

(l) We express no opinion with respect to the enforceability of a security interest in any security entitlement credited to a securities account or any commodity contract credited to a commodities account.

(m) We express no opinion as to the enforceability of any security interest in goods that are not manufactured in accordance with the provisions of the federal Fair Labor Standards Act.

For the purposes of the opinions in Paragraphs 7 and 8, we also have assumed that:

(a) The Borrower has not changed its name, identity, legal structure, or its location (as determined pursuant to § 9-307 of the Virginia UCC), whether by amendment of its Articles of Incorporation, reorganization or otherwise, within the past four months, and we have assumed that the Borrower is not a “transmitting utility” as defined in § 9-102 of the Virginia UCC;

(b) The UCC Financing Statement correctly states (i) the name of the Lender and (ii) the mailing address of the Borrower and an address of the Lender from which information concerning such financing statement[s] can be obtained; and

(c) None of the Personal Property Collateral has been leased by the Borrower to any third party in what would be characterized as a lease intended as security.

We express no opinion with respect to the Borrower’s title to or rights in any property, including any Personal Property Collateral.
Our opinion on each legal issue addressed herein represents our opinion concerning how that issue would be resolved were it to be considered by the highest court of the jurisdiction upon whose law our opinion on that issue is based. The manner in which any particular issue would be treated in any actual court case would depend in part on facts and circumstances peculiar to the case, and our opinions are not a guaranty of an outcome of any legal dispute that may arise with regard to the Loan Documents.

Our opinions expressed in this letter are as of the date of this letter, and we undertake no obligation to advise you of any changes in Applicable Law or any other matters that may come to our attention after the date of this letter that may affect our opinions expressed in this letter.

Our opinions are furnished to you for your exclusive use solely in connection with the matters contemplated by the Loan Agreement. These opinions may not be relied upon by you for any other purpose or furnished to, quoted, referred to or relied upon by any other person, firm or corporation for any purpose, without our prior written consent in each instance.

Very truly yours,

LAW FIRM NAME
C. Illustrative Equity Issuance Opinion Letter

SAMPLE FORM OPINION FOR SHARE ISSUANCE
[LAW FIRM LETTERHEAD]

[January __, 20__]

Purchasers listed on Schedule I

RE: XYZ, Inc. Series A Preferred Stock Purchase Agreement

Ladies and Gentlemen:

We have acted as counsel to XYZ, Inc., a Virginia corporation (the “Company”), in connection with the transactions effected under the Series A Preferred Stock Purchase Agreement (the “Purchase Agreement”), of even date herewith, among the Company and the purchasers listed on Schedule I hereto (collectively, the “Purchasers”). This opinion is given to you in accordance with the requirements of Section __ of the Purchase Agreement. Capitalized terms used herein, but not defined, shall have the meanings ascribed to such terms in the Purchase Agreement.

For purposes of the opinions contained in this letter, we have examined and reviewed the following documents:

(a) Purchase Agreement;

(b) Amended and Restated Shareholders Agreement, of even date herewith, by and among the Company, the Purchasers, and the other shareholder parties thereto (together with the Purchase Agreement, the “Transaction Documents”);

(c) Amended and Restated Articles of Incorporation of the Company, certified by the Virginia State Corporation Commission on January __, 20__ (the “Amended and Restated Articles of Incorporation”);

(d) Bylaws of the Company, certified as correct and complete pursuant to the Secretary’s Certificate (as defined below) (the “Bylaws”);

(e) A Certificate of Good Standing of the Company issued by the Virginia State Corporation Commission on January __, 20__ (the “Good Standing Certificate”);

(f) Unanimous Written Consent of the Directors in Lieu of a Special Meeting of the Directors, effective as of January __, 20__, certified as correct and complete pursuant to the Secretary’s Certificate;

(g) Action by Written Consent of the Shareholders of the Company, effective as of January __, 20__, certified as correct and complete pursuant to the Secretary’s Certificate;
(h) Certificate of the Secretary of the Company dated as of January __, 20__, pertaining to the governing documents of the Company, the Company’s approval of the transactions in connection with the Purchase Agreement, and certain other matters (the “Secretary’s Certificate”); and

(i) Such other instruments, documents, resolutions, agreements, records and certificates of public officials and officers of the Company as we have deemed necessary or appropriate for the purposes of rendering the opinions set forth below.

For purposes of our opinions, we have reviewed and examined originals, copies of originals, facsimiles or electronic portable document format or other files of originals, identified to our satisfaction, of the Transaction Documents and such other documents as we have deemed necessary for the execution and delivery of this opinion letter.

We express no opinion as to any document not specifically described above as a Transaction Document (even if such other document is specifically referenced in, or refers to, any of the Transaction Documents described above).

As to matters of fact, we have relied exclusively on (1) the representations and warranties made by the parties in the Transaction Documents, (2) certificates of public officials, and (3) the information and representations provided to us by the representatives of the Company in the Secretary’s Certificate. We have assumed the truthfulness of all statements of fact contained in the Transaction Documents and such certificates and have made no independent investigation of the accuracy or completeness of such matters of fact.

As used in this opinion letter, the words “known to us” mean the actual knowledge of the particular attorneys in this firm who have represented the Company in connection with the Transaction Documents and who have given substantive attention to the preparation and negotiation of the Transaction Documents. Except as expressly set forth herein, we have not undertaken any independent investigation (including, without limitation, conducting any review, search or investigation of any public files or records or dockets or any review of our files) to determine the existence or absence of any facts, and no inference as to our knowledge concerning such facts should be drawn from our reliance on the same in connection with the preparation and delivery of this opinion letter.

The opinions expressed in this opinion letter are limited to such internal laws of the Commonwealth of Virginia (but not including any statutes, ordinances, administrative decisions, rules or regulations of any political subdivision of the Commonwealth of Virginia); such Federal laws that, in each case in our experience, are normally applicable to a transaction of the type contemplated by the Transaction Documents; and present judicial interpretations of the foregoing as such interpretations are made at the highest court of the jurisdiction upon whose law our opinion on that issue is based (collectively, the “Applicable Law”).

In rendering the following opinions, we have relied, without independent investigation, upon the following assumptions:
(a) Each party to the Transaction Documents that is an entity rather than a natural person (other than the Company) is duly organized, validly existing and in good standing in its jurisdiction of organization;

(b) Each party to the Transaction Documents (other than the Company) has full power and authority to execute, deliver and perform its obligations under the Transaction Documents, and the Transaction Documents have been duly authorized by all necessary action on its part and have been duly executed and delivered by it;

(c) The Transaction Documents constitute the valid and binding obligations of each party to the Transaction Documents (other than the Company), enforceable against such party in accordance with their terms;

(d) Each natural person executing the Transaction Documents or any document referred to herein is legally competent to do so;

(e) Each party to the Transaction Documents (other than the Company) has complied with all legal requirements pertaining to its status as such status relates to its rights to enforce the Transaction Documents against the Company;

(f) Each document submitted to us for review is accurate and complete, each such document that is an original is authentic, each such document that is a copy conforms to an authentic original, and all signatures on each such document are genuine;

(g) There has not been any mutual mistake of fact or misunderstanding, fraud, duress or undue influence relating to the negotiation, preparation, execution or delivery of any of the Transaction Documents;

(h) The Transaction Documents will be enforced in circumstances and in a manner in which it is commercially reasonable to do so, and the conduct of the parties complies with any requirement of good faith and fair dealing;

(i) There are no agreements or understandings among the parties, written or oral, and there is no usage of trade or course of prior dealing among the parties that would, in either case, define, supplement or qualify the terms of the Transaction Documents; and

(j) Each person who has taken any action relevant to any of our opinions in the capacity of director or officer was duly elected to that director or officer position and held that position when such action was taken.

Notwithstanding our opinions expressed herein, we express no opinion with respect to the enforceability of any of the following provisions in the Transaction Documents:

(a) Choice-of-law provisions;

(b) Provisions for indemnification of a party for its own gross negligence, willful misconduct, recklessness or other wrongful conduct;
(c) Provisions mandating contribution towards judgments or settlements among various parties;

(d) Waivers of (i) legal or equitable defenses, (ii) rights to damages, (iii) rights to counter claim or set off, (iv) statutes of limitations, (v) rights to notice, (vi) the benefits of statutory, regulatory, or constitutional rights, unless and to the extent the statute, regulation, or constitution explicitly allows waiver, (vii) unknown future defenses, (viii) obligations of good faith, fair dealing, diligence and reasonableness; and (ix) other benefits to the extent they cannot be waived under Applicable Law;

(e) Provisions providing for forfeitures or the recovery of amounts deemed to constitute penalties or for liquidated damages;

(f) Agreements to submit to the jurisdiction of any particular court or other governmental authority; provisions restricting access to courts; provisions limiting the right to trial by jury; waiver of service of process requirements which would otherwise be applicable; and provisions otherwise purporting to affect the jurisdiction and venue of courts;

(g) Provisions that attempt to change or waive rules of evidence or fix the method or quantum of proof to be applied in litigation or similar proceedings;

(h) Provisions regarding arbitration;

(i) Confidentiality and nondisclosure provisions;

(j) Provisions concerning the availability of specific performance, injunctive relief and/or other equitable remedies;

(k) Provisions granting remedies in connection with a breach of representation, warranty or covenant or other default that is not material;

(l) Provisions permitting modifications only if in writing;

(m) Provisions pursuant to which one party appoints another as attorney-in-fact or otherwise authorizes a party to take actions on behalf of another; and

(n) Provisions regarding (i) severability, (ii) cumulations, non-exclusivity, or availability of remedies or the enforcement of contractual provisions to the extent contrary to public policy, (iii) non-waiver of remedies by failure or delay of exercise or (iv) performance requirements, to the extent such requirements are beyond the control of the performer.

In addition, we express no opinion as to (i) the ownership or title of any personal property, the creation or perfection of any lien or the priority of any liens or security interests or (ii) compliance with fiduciary duties by the Company’s Board of Directors or shareholders or with safe harbors for disinterested Board of Director or shareholder approvals.

We also express no opinion regarding laws, rules and regulations relating to (i) securities (except as expressly provided in opinion paragraph 8 below), (ii) banks and other financial
institutions, insurance companies and/or investment companies, (iii) pension and employee benefits, (v) antitrust and unfair competition, (vi) compliance with fiduciary duties, (vii) taxes, (viii) environmental matters, (ix) health care, (x) any municipality or any local government within any state, (xi) zoning or land use or any other matters relating to the development or use of real property, (xii) telecommunications, (xiii) racketeering or criminal or civil forfeiture, (xiv) Federal contracts, (xv) commodities, (xvi) qualification of entities doing business in foreign jurisdictions, or (xvii) terrorism or money laundering.

Based on and subject to the foregoing, and subject to the exceptions, qualifications and limitations hereinafter set forth, we express the following opinions:

1. The Company is a corporation validly existing and in good standing under the laws of the Commonwealth of Virginia as of the date of the Good Standing Certificate.

2. The Company has the corporate power to execute, deliver and perform its obligations under the Transaction Documents to which it is a party.

3. The Company has authorized the execution, delivery and performance of the Transaction Documents to which it is a party by all necessary corporate action.

4. The execution and delivery by the Company of the Transaction Documents and the consummation by the Company of the transactions provided for in the Transaction Documents, including its issuance and sale of the shares of Series A Preferred Stock (the “Preferred Shares”) and issuance of shares of Common Stock upon conversion of the Preferred Shares in accordance with the Company’s Amended and Restated Articles of Incorporation (the “Conversion Shares”): (a) do not violate any provision of the Articles; (b) do not violate or constitute a default under, or give rise to any right of termination, cancellation or acceleration with respect to, any contract, agreement or other instrument to which the Company is a party, or any order, decree or judgment of any government authority or court by which the Company is bound, in each case as identified on Schedule II to this opinion letter (each, a “Reviewed Document”), or result in the creation of any lien, charge or encumbrance upon any property or asset of the Company pursuant to, any Reviewed Document; and (c) do not violate any statute or regulation of Applicable Law that is applicable to the Company.

5. No consent, approval, authorization or other action by, or filing or registration with, any governmental authority of the United States or the Commonwealth of Virginia is required to be obtained or made by the Company pursuant to any statute or regulation of Applicable Law for the execution and delivery by the Company of the Transaction Documents and for consummation of the transactions provided for therein, except for consents, approvals, authorizations, actions, filings and registrations which have been obtained or made.

6. The Transaction Documents have been duly executed and delivered by the Company and are valid and binding obligations of the Company enforceable against it in accordance with the terms of the Transaction Documents.

7. The Preferred Shares have been duly authorized, and when issued, delivered and paid for in accordance with the Purchase Agreement, will be validly issued, fully paid and nonassessable. The Conversion Shares have been duly authorized and reserved for issuance and,
when issued in accordance with the Company's Amended and Restated Articles of Incorporation upon conversion of the Preferred Shares, will be validly issued, fully paid and nonassessable. Neither the issuance or sale of the Preferred Shares nor the issuance of the Conversion Shares is subject to any preemptive rights under the Virginia Stock Corporation Act or the Company’s Amended and Restated Articles of Incorporation or Bylaws or, except as have been waived, under any shareholders’ agreement or similar agreement known to us.¹

Our opinions are subject to the effect of bankruptcy, receivership, insolvency, fraudulent conveyance, reorganization, moratorium and other laws affecting the rights and remedies of creditors generally and to general principles of equity, regardless of whether considered in a proceeding in equity or at law.

In addition to expressing the opinions set forth above, we advise you that we do not represent the Company in any action, lawsuit or proceeding now pending at law or in equity, or by or before any governmental instrumentality or agency or arbitral body, against the Company by a claimant, that challenges the validity or enforceability of, or seeks to enjoin the performance of, the Transaction Documents.

Our opinion on each legal issue addressed herein represents our opinion concerning how that issue would be resolved were it to be considered by the highest court of the jurisdiction upon whose law our opinion on that issue is based. The manner in which any particular issue would be treated in any actual court case would depend in part on facts and circumstances peculiar to the case, and our opinions are not a guaranty of an outcome of any legal dispute that may arise with regard to the Transaction Documents.

Our opinions expressed in this letter are as of the date of this letter, and we undertake no obligation to advise you of any changes in Applicable Law or any other matters that may come to our attention after the date of this letter that may affect our opinions expressed in this letter.

Our opinions are furnished to you for your exclusive use solely in connection with the matters contemplated by the Transaction Documents. These opinions may not be relied upon by you for any other purpose or furnished to, quoted, referred to or relied upon by any other person, firm or corporation for any purpose, without our prior written consent in each instance.

¹ A third-party legal opinion letter delivered in connection with a private offering of shares will often include an opinion to the effect that the offering and sale of such shares are not required to be registered under the Securities Act of 1933 and applicable state securities laws. Sometimes other opinions addressing compliance with other federal securities laws are also requested and included. The “no registration” opinion requires examination of the applicability of both the federal and the Virginia Securities Act’s registration requirements and compliance with available exemptions. These securities laws opinions and the customary assumptions, exceptions, qualifications and due diligence related to them are outside the scope of this Report. Lawyers who either give or receive securities laws opinions should be familiar with federal and applicable state securities laws and with published reports on such opinions, such as ABA Section of Business Law, Committee on Federal Regulation of Securities, Subcommittee on Securities Law Opinions, No Registration Opinions, 63 Bus. Law. 187 (2007); updated 71 Bus. Law. 129 (Winter 2015-16).
Very truly yours,

LAW FIRM NAME
XI. SELECTED BIBLIOGRAPHY

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ABA Section of Business Law, Committee on Audit Inquiry Responses, *Introductory Analysis and Guides to Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information*, 31 Bus. Law. 1737 (1976)


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ABA Section of Corporation, Banking and Business Law, Committee on Audit Inquiry Responses, Auditor’s Letter Handbook (1976), updated Business Law Section (2013)

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STATEMENT OF OPINION PRACTICES

1 INTRODUCTION

Third-party legal opinion letters ("closing opinions") are delivered at the closing of a business transaction by counsel for one party (the "opinion giver") to another party (the "opinion recipient") to satisfy a condition to the opinion recipient’s obligation to close. A closing opinion includes opinions on specific legal matters ("opinions") and, in so doing, serves as a part of the diligence of the opinion recipient. This Statement of Opinion Practices (this "Statement") provides guidance regarding selected aspects of customary practice and other practices generally followed throughout the United States in the giving and receiving of closing opinions.

2 CUSTOMARY PRACTICE

Closing opinions and the opinions included in them are prepared and understood in accordance with the customary practice of lawyers who regularly give those opinions and lawyers who regularly review them for opinion

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1 This Statement has been published in The Business Lawyer [cite]. At the time of its publication, this Statement was approved by the bar associations and other lawyer groups identified in Schedule I (the “Schedule of Approving Organizations”). A current Schedule of Approving Organizations can be found at [URL]. Approval by a bar association or other lawyer group does not necessarily mean approval by individual members of that association or group.

2 The terms “opinion letters” and “closing opinions” are commonly used to refer to third-party legal opinion letters, defined in this Statement as “closing opinions.”

3 References in this Statement to an opinion recipient mean the addressee of a closing opinion and any other person the opinion giver expressly authorizes to rely on the closing opinion.

4 This Statement is drawn principally from: Comm. on Legal Op. of the Section of Bus. Law of the Am. Bar Ass’n, Legal Opinion Principles, 53 BUS. LAW. 831 (May 1998), and Comm. on Legal Op., Guidelines for the Preparation of Closing Opinions, 57 BUS. LAW. 875 (Feb. 2002). It updates the Principles in its entirety and selected provisions of the Guidelines. The other provisions of the Guidelines are unaffected, and no inference should be drawn from their omission from this Statement. Each provision of this Statement should be read and understood together with the other provisions of this Statement.
recipients. The phrase “customary practice” refers principally to the work lawyers are expected to perform to give opinions (“customary diligence”) and the way certain words and phrases commonly used in closing opinions are understood (“customary usage”). Customary practice applies to a closing opinion whether or not the closing opinion refers to it or to this Statement.

3 LEGAL OBLIGATIONS AND RULES OF PROFESSIONAL CONDUCT

When giving closing opinions, lawyers are subject to generally applicable legal obligations and to the rules governing the professional conduct of lawyers.

4 GENERAL

4.1 Expression of Professional Judgment

An opinion expresses the professional judgment of the opinion giver regarding the legal issues the opinion addresses. It is not a guarantee that a court will reach any particular result.

4.2 Bankruptcy Exception and Equitable Principles Limitation

The bankruptcy exception and equitable principles limitation apply to opinions even if they are not expressly stated.

4.3 Cost and Benefit

The benefit to the recipient of a closing opinion and of any particular opinion should warrant the time and expense required to give them.

4.4 Golden Rule

Opinion givers and counsel for opinion recipients should be guided by a sense of professionalism and not treat closing opinions as if they were part of a business negotiation. An opinion giver should not be expected to give an opinion that counsel for the opinion recipient would not give in similar circumstances if that counsel were the opinion giver and had the requisite

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5 See Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions, 63 BUS. LAW. 1277 (Aug. 2008) (the “Customary Practice Statement”), which has been approved by the bar associations and other lawyer groups listed at the end of that Statement and by additional groups following publication that can be found at [URL].

6 See infra Section 10 (Varying Customary Practice).

7 These include the duties opinion givers have to their own clients. Counsel to opinion recipients also have duties to their clients, including duties relating to closing opinions.
competence to give the opinion. Correspondingly, before declining to give an opinion it is competent to give, an opinion giver should consider whether a lawyer in similar circumstances would ordinarily give the opinion.

4.5 Reliance by Recipients

Opinion recipients are entitled to expect an opinion giver, in giving an opinion, to exercise the diligence customarily exercised by lawyers who regularly give that opinion. An opinion recipient should not be expected to take any action to verify an opinion it receives. However, an opinion recipient is not entitled to rely on an opinion if it knows the opinion to be incorrect or if its reliance on the opinion is otherwise unreasonable under the circumstances.

4.6 Good Faith

An opinion giver and an opinion recipient and its counsel are each entitled to presume that the other is acting in good faith with respect to a closing opinion.

5 Facts and Assumptions

5.1 Reliance on Factual Information and Use of Assumptions

Because the lawyers preparing a closing opinion (the “opinion preparers”) typically will not have personal knowledge of all the facts they need to support the opinions being given, an opinion giver ordinarily is entitled to base those opinions on factual information provided by others, including its client, and on factual assumptions.

5.2 Reliance on Facts Provided by Others

An opinion giver is entitled to rely on factual information from an appropriate source unless the information appears irregular on its face or the opinion preparers know that the information is incorrect or know of facts that they recognize make reliance under the circumstances otherwise unwarranted.

5.3 Scope of Inquiry Regarding Factual Matters

Opinion preparers are not expected to conduct an inquiry of other lawyers in their law firm or a review of the firm’s records to ascertain factual matters, except to the extent they recognize that a particular lawyer is reasona-

8 See the Customary Practice Statement. See also infra Section 10 (Varying Customary Practice).
bly likely to have or a particular record is reasonably likely to contain information not otherwise known to them that they need to give an opinion.\(^9\)

5.4 Reliance on Representations That Are Legal Conclusions

An opinion giver should not base an opinion on a representation that is tantamount to the legal conclusion the opinion expresses. An opinion giver may, however, rely on a legal conclusion in a certificate of an appropriate government official.

5.5 Factual Assumptions

Some factual assumptions on which opinions are based need to be stated expressly; others do not. Factual assumptions that ordinarily do not need to be stated expressly include assumptions of general application that apply regardless of the type of transaction or the nature of the parties. Examples are assumptions that (i) the documents reviewed are accurate, complete and authentic, (ii) copies are identical to the originals, (iii) signatures are genuine, (iv) the parties to the transaction other than the opinion giver’s client (or a non-client whose obligations are covered by the opinion) have the power and have taken the necessary action to enter into the transaction, and (v) the agreements those parties have entered into with the opinion giver’s client (or the non-client) are enforceable against them. An opinion should not be based on an unstated assumption if the opinion preparers know that the assumption is incorrect or know of facts that they recognize make their reliance under the circumstances otherwise unwarranted. A stated assumption is not subject to this limitation because stating the assumption puts the opinion recipient on notice of the particular matters being assumed.\(^{10}\) Stating expressly a particular assumption that could have been unstated does not imply the absence of other unstated assumptions.

5.6 Limited Factual Confirmations and Negative Assurance\(^{11}\)

An opinion giver ordinarily should not be asked to confirm factual matters, even if the confirmation is limited to the knowledge of the opinion prepar-

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\(^9\) References in this *Statement* to a law firm also apply to a law department of an organization.

\(^{10}\) Basing an opinion on a stated assumption is subject to the generally applicable limitation described in Section 12 (*No Opinion That Will Mislead Recipient*). Even if a stated assumption (for example, one that is contrary to fact) will not mislead the opinion recipient, an opinion giver may decide not to give an opinion based on that assumption.

\(^{11}\) This *Statement* also applies, when appropriate in the context, to confirmations.
ers.\textsuperscript{12} A confirmation of factual matters, for example, the accuracy of the representations and warranties in an agreement, does not involve the exercise of professional judgment by lawyers and therefore is not a proper subject for an opinion even when limited by a broadly-worded disclaimer. This limitation does not apply to negative assurance regarding disclosures in a prospectus or other disclosure document given to assist a recipient in establishing a due diligence defense or similar defense in connection with a securities offering.

6 LAW

6.1 Covered Law

When a closing opinion states that an opinion covers the law of a specific jurisdiction or particular laws, the opinion covers no other law or laws.

6.2 Applicable Law

An opinion on the law of a jurisdiction covers only the law of that jurisdiction that lawyers practicing in the jurisdiction, exercising customary diligence, would reasonably recognize as being applicable to the client or the transaction that is the subject of the opinion. Even when recognized as being applicable, some laws (for example, securities, tax and insolvency laws) are not covered by a closing opinion. A closing opinion also does not cover municipal and other local law. An opinion may, however, cover law that would not otherwise be covered if the closing opinion does so expressly.\textsuperscript{13}

7 SCOPE

7.1 Matters Addressed

The opinions included in a closing opinion should be limited to reasonably specific and determinable matters of law that involve the exercise of professional judgment. A closing opinion covers only those matters it specifically addresses.

7.2 Matters Beyond the Expertise of Lawyers

Opinion givers should not be expected to give opinions on matters that are not within the expertise of lawyers (for example, financial statement analysis, economic forecasting and valuation). When an opinion depends on a

\textsuperscript{12} A confirmation that is sometimes requested and, depending upon the circumstances and its scope, sometimes given relates to legal proceedings to which the client is a party.

\textsuperscript{13} See infra Section 10 (Varying Customary Practice).
matter not within the expertise of lawyers, an opinion giver may rely on information from an appropriate source or an express assumption with regard to the matter.

7.3 Relevance

Opinion requests should be limited to matters that are reasonably related to the opinion giver’s client or the transaction that is the subject of the closing opinion. Depending on the circumstances, limiting assumptions, exceptions and qualifications to those reasonably related to the client, the transaction and the opinions given can facilitate the opinion process.

8 PROCESS

8.1 Opinion Recipient and Customary Practice

An opinion giver is entitled to presume that the opinion recipient is familiar with, or has obtained advice about, customary practice as it applies to the opinions it is receiving from the opinion giver.

8.2 Other Counsel’s Opinion

Stating in a closing opinion reliance on an opinion of other counsel does not imply concurrence in the substance of that opinion. An opinion giver should not be expected to express concurrence in the substance of an opinion of other counsel.

8.3 Financial Interest in or Other Relationship with Client

Opinion preparers ordinarily do not attempt to determine whether others in their law firm have a financial interest in, or other relationship with, the client. Nor do they ordinarily disclose any such financial interest or other relationship that they or others in their firm have. If the opinion preparers recognize that such a financial interest or relationship exists, they should consider whether, even if disclosed, it will compromise their professional judgment with respect to the opinions being given.

8.4 Client Consent and Disclosure of Information

If applicable rules of professional conduct require a client’s consent to the delivery of a closing opinion, an opinion giver may infer that consent from a provision in the agreement making delivery a condition to closing or from other circumstances of the transaction. Unless a client gives its informed consent, an opinion giver should not give an opinion that discloses information the opinion preparers know the client would not want to be dis-
closed or as to which the opinion giver is otherwise subject to a duty of non-disclosure under applicable rules of professional conduct.

9 DATE

A closing opinion speaks as of its date. An opinion giver has no obligation to update a closing opinion for events or legal developments occurring after its date.

10 VARYING APPLICATION OF CUSTOMARY PRACTICE

The application of customary practice, including those aspects of customary practice described in this Statement, to a closing opinion or any particular opinion may be varied by a statement in the closing opinion or by an understanding with the opinion recipient or its counsel.

11 RELIANCE

A closing opinion may be relied on only by its addressee and any other person the opinion giver expressly authorizes to rely.\textsuperscript{14}

12 NO OPINIONS THAT WILL MISLEAD RECIPIENT

An opinion giver should not give an opinion that the opinion preparers recognize will mislead the opinion recipient with regard to a matter the opinion addresses.\textsuperscript{15}

\textsuperscript{14} This section does not address the circumstances in which reliance by others may be permitted as a matter of law. See also supra note 3.

\textsuperscript{15} An opinion, even if technically correct, can mislead if it will cause the opinion recipient, under the circumstances, to misevaluate the opinion. The risk of misleading an opinion recipient can be avoided by appropriate disclosure. An opinion giver may limit the matters addressed by an opinion through the use of specific language in the closing opinion (including a specific assumption, exception or qualification) so long as the opinion preparers do not recognize that the limitation itself will mislead the recipient. See supra Section 10 (Varying Customary Practice). Omissions from a closing opinion of information unrelated to the opinions given do not mislead.
Guidelines for the Preparation of Closing Opinions

By The Committee on Legal Opinions*

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

1. Purpose, Scope, and Reliance

1.1 Purpose

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

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

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


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

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

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

1.3 **Relevance**

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

1.4 **Professional Competence**

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

1.5 **Misleading Opinions**

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

1.6 **“Market” Opinions**

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

1.7 **Reliance**

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

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

8. For a general discussion of this subject (including the role of disclosure), see 1998 TriBar Report, supra note 3 at 602-03, 607. This Guideline does not preclude limiting the matters addressed by an opinion through the use of specific language if the limitation itself will not mislead the recipient. See Legal Opinion Principles §§ 1.B, 1.C. For an opinion giver’s ethical obligations to its client, see infra § 2.4.
permitted to rely on the closing opinion to the same extent as—but to no greater extent than—the addressee.

2. **Process**

2.1 **Opinion Request and Response**

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

2.2 **Other Counsel’s Opinion**

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

2.3 **Financial Interest in or Other Relationship with Client**

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

2.4 **Client Consent and Confidential Information**

When the client’s consent to the delivery of a closing opinion is required by applicable rules of professional conduct, that consent normally may be inferred from a provision in the agreement that makes delivery of a closing opinion a condition to closing. The opinions contained in a closing opinion ordinarily do
not disclose information the client would wish to keep confidential. If, however, an opinion would require disclosure of information that the lawyers preparing the opinion are aware the client would wish to keep confidential, the implications should be discussed with the client and the opinion should not be rendered unless the client consents to the disclosure.

3. CONTENT

3.1 GOLDEN RULE

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

3.2 MATERIALITY

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

3.3 PRESUMPTION OF REGULARITY

An opinion giver may rely upon the presumption of regularity\(^9\) for matters relating to its client, such as actions taken at meetings during the period covered by a missing minute book, that are not verifiable from the client’s records (assuming the matters are not inconsistent with those records). Opinion givers ordinarily need not disclose their reliance on the presumption.\(^{10}\)

3.4 USE OF THE PHRASE “TO OUR KNOWLEDGE”

Certain factually-oriented opinions, such as the opinions on the existence of legal proceedings,\(^{11}\) ordinarily are expressed as being to the opinion giver’s knowl-

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10. An exception is when, based on the available facts, the lawyers preparing the opinion conclude that the deficiency in company records is likely to be significant.
11. Because these opinions lack legal analysis, some lawyers prefer to refer to them as “confirmations.”
edge. To avoid a possible misunderstanding over the meaning of “knowledge,” the opinion preparers should consider describing in the opinion letter the factual inquiry they have conducted (for example, by stating what they intend “to our knowledge” to mean or by indicating that they are rendering the opinion based solely on their personal knowledge without making any inquiry).

3.5 EXPLAINED OPINIONS; “WOULD/SHOULD”

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

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

4. SPECIFIC OPINIONS

4.1 FOREIGN QUALIFICATION AND GOOD STANDING

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

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

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

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

4.2 Outstanding Equity Securities

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

4.3 Comprehensive Legal or Contractual Compliance

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

4.4 Lack of Knowledge of Particular Factual Matters

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

4.5 Negative Assurance

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

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

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

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

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

4.7 Litigation Evaluation

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

4.8 Matters of Public Policy

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

4.9 When Law Covered by Opinion and Law Selected to Govern Agreement Are Different

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

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18. The “bankruptcy exception” (which is implied even when not stated) excludes the effect of fraudulent transfer laws from the enforceability opinion. See 1998 TriBar Report, supra note 3, at 624.
20. See supra note 6.
APPENDIX

Legal Opinion Principles

By The Committee on Legal Opinions*

In the Committee’s 1991 Third Party Legal Opinion Report¹ the Committee undertook to monitor developments respecting the Report and the Legal Opinion Accord contained in the Report. It also undertook in due course to take such further action as might seem appropriate. These Legal Opinion Principles are a product of those undertakings.

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

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

I. GENERAL

A. At the closing of many business transactions legal counsel for one party delivers legal opinion letter(s) to one or more other parties. Those opinion letters, often referred to as third party opinion letters, are the subject of these Legal Opinion Principles.

B. The matters usually addressed in opinion letters, the meaning of the language normally used, and the scope and nature of the work counsel is expected to perform are based (whether or not so stated) on the customary practice of lawyers who regularly give, and lawyers who regularly advise opinion recipients regarding, opinions of the kind involved. These Legal Opinion Principles are intended to provide a ready reference to selected aspects of customary practice.

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¹ Thomas L. Ambro, Chair. Donald W. Glazer and Steven O. Weise, Co-Reporters.
C. An opinion giver may vary the customary meaning of an opinion or the scope and nature of the work customarily required to support it by including an express statement in the opinion letter or by reaching an express understanding with the opinion recipient or its counsel.

D. The opinions contained in an opinion letter are expressions of professional judgment regarding the legal matters addressed and not guarantees that a court will reach any particular result.

E. In accepting an opinion letter, an opinion recipient ordinarily need not take any action to verify the opinions it contains.

F. The lawyer or lawyers preparing an opinion letter and the opinion recipient and its legal counsel are each entitled to assume that the others are acting in good faith with respect to the opinion letter.

II. LAW

A. Opinion letters customarily specify the jurisdiction(s) whose law they are intended to cover and sometimes limit their coverage to specified statutes or regulations of the named jurisdiction(s). When that is done, an opinion letter should not be read to cover the substance or effect of the law of other jurisdiction(s) or other statutes or regulations.

B. An opinion letter covers only law that a lawyer in the jurisdiction(s) whose law is being covered by the opinion letter exercising customary professional diligence would reasonably be expected to recognize as being applicable to the entity, transaction, or agreement to which the opinion letter relates.

C. An opinion letter should not be read to cover municipal or other local laws unless it does so expressly.

D. Even when they are generally recognized as being directly applicable, some laws (such as securities, tax, and insolvency laws) are understood as a matter of customary practice to be covered only when an opinion refers to them expressly.

III. FACTS

A. The lawyers who are responsible for preparing an opinion letter do not ordinarily have personal knowledge of all of the factual information needed to support the opinions it contains. Thus, those lawyers necessarily rely in large measure on factual information obtained from others, particularly company officials. Customary practice permits such reliance unless the factual information on which the lawyers preparing the opinion letter are relying appears irregular on its face or has been provided by an inappropriate source.

B. As a matter of customary practice the lawyers preparing an opinion letter are not expected to conduct a factual inquiry of the other lawyers in their firm or a review of the firm’s files, except to the extent the lawyers preparing the opinion letter have identified a particular lawyer or file as being reasonably

2. See § II.A.
likely to have or contain information not otherwise known to them that they need to support an opinion.

C. An opinion should not be based on a factual representation that is tantamount to the legal conclusion being expressed. An opinion ordinarily may be based, however, on legal conclusions contained in a certificate of a government official.

D. Opinions customarily are based in part on factual assumptions. Some factual assumptions need to be stated expressly. Others ordinarily do not. Examples of factual assumptions that ordinarily do not need to be stated expressly are assumptions of general application that apply regardless of the type of transaction or the nature of the parties. These include assumptions that copies of documents are identical to the originals, signatures are genuine and the parties other than the opinion giver’s client have the power to enter into the transaction.

IV. DATE

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