Two years ago the Task Force on Securities Law Opinions was formed by the Section of Business Law Committees (1) on Legal Opinions and (2) on Federal Regulations of Securities. One sub-committee worked on Exhibit 5 Opinions under the Chairmanship of Keith Higgins and the other worked on Negative Assurance Opinions under the Chairmanship of Gerry Backman. The two Reports have been completed and are to be published in the Business Lawyer, perhaps as early as the August 2004 issue. Pre-publication copies of the Report are attached for your use. Many thanks to Keith and to Gerry (and to Don Glazer under whose chairmanship this project began).
SPECIAL REPORT OF TASK FORCE ON SECURITIES LAW OPINIONS*

NEGATIVE ASSURANCE IN SECURITIES OFFERINGS

I. Introduction

In 2002, the Section of Business Law of the American Bar Association adopted Guidelines for preparing legal opinions delivered at the closing of a business transaction by counsel for one party to another party (“closing opinions”). These Guidelines replaced the guidelines included in the Section’s 1991 Third Party Legal Opinion Report and reflected developments in customary practice in the decade since 1991. This Report expands upon Section 4.5 of the Guidelines, which addresses the negative assurance counsel sometimes provides in securities offerings regarding the disclosure in the prospectus or other offering documents furnished to investors.

* The Task Force is a joint effort of the Committee on Legal Opinions and the Subcommittee on Securities Law Opinions of the Committee on Federal Regulation of Securities of the American Bar Association, Section of Business Law. Gerald S. Backman, a co-chair of the Task Force, served as reporter for this report.


4 Section 4.5 of the Guidelines, entitled “Negative Assurance,” reads as follows:

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. Note 17: A request for negative assurance will be appropriate, for example, in many Rule 144A and Regulation S offerings.
II. History and Purpose

Historically, underwriters have required, as a condition to closing a registered offering of securities, that counsel provide them negative assurance regarding the disclosure in the registration statement and prospectus to help them establish a due diligence defense under Sections 11 and 12(a)(2) of the Securities Act of 1933. Negative assurance is not a “legal opinion.” Rather, it is a statement of belief, unique to securities offerings, based on participation in the intensive process of preparing, reviewing and revising the registration statement and prospectus customarily conducted in connection with a registered offering.

Today, in some types of unregistered offerings (e.g., Rule 144A and Regulation S offerings), placement agents and financial intermediaries request negative assurance on the offering documents. They do so, even though Sections 11 and 12(a)(2) of the Securities Act do not apply, to help them establish a defense to possible claims that

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5 Negative assurance by issuer’s counsel is discussed in Part III below and by underwriters’ counsel in Part IV below.


7 In a Rule 144A offering, the initial sale by the issuer is made to a limited number of financial intermediaries pursuant to the exemption from registration provided by Section 4(2) of the Securities Act. These initial purchasers promptly resell the securities to “qualified institutional buyers” pursuant to the resale exemption provided by Rule 144A. Regulation S provides an exemption for certain offshore offerings.

8 Dealer-managers sometimes request negative assurance in exchange offers (which involve both the issuance and purchase of securities) and on occasion in cash tender offers by companies for their own securities (which involve only the purchase of securities) when in each case the process for preparing the disclosure document is comparable to that followed in a registered offering. The practice also has developed for underwriters in offerings of municipal securities sold to the public but exempt from registration under Section 3(a)(2) of the Securities Act to require negative assurance from counsel for the issuer and others.

might be brought pursuant to Rule 10b-5 under the Securities Exchange Act of 1934 (which requires “scienter”).

This Report proposes guidelines for providing negative assurance in both offerings of securities that are registered and, where appropriate, those that are exempt from registration.\textsuperscript{10}

\textbf{III. Guidelines for Issuer’s Counsel}

\begin{itemize}
  \item \textbf{Recipients of Negative Assurance}
  
  As stated in Section 4.5 of the Guidelines, the purpose of negative assurance is to assist the recipient in establishing a due diligence or similar defense. That purpose is served when negative assurance is provided to third parties who can avoid liability in securities offerings by establishing such a defense. It is not served by providing negative assurance to ultimate purchasers of securities as opposed to underwriters (or other financial intermediaries). Requests that negative assurance be provided to those persons or to issuers of the securities are inappropriate.

  \item \textbf{Nature of Transaction and Disclosure Document}
  
  Negative assurance should be limited to registered offerings or to transactions in which an offering document comparable to a statutory prospectus under the Securities Act is being delivered and the process for preparing the offering document is comparable to that followed in a registered offering. These transactions include many Rule 144A offerings and some Regulation S offerings.\textsuperscript{11}
\end{itemize}

\textsuperscript{10} Although many of the basic principles apply, this Report does not address negative assurance in specialized areas such as asset-backed and structured finance transactions.

\textsuperscript{11} In offerings under Rule 144A, for example, the offering document and the process for preparing it are often comparable to the prospectus and the process followed to prepare the prospectus under
Offerings using short-form registration statements on forms such as Form S-3, and take-downs from shelf registration statements under Rule 415 (as well as comparable non-registered offerings, such as some Rule 144A offerings), often are accomplished within a short time frame and involve not only a document describing the offering but also disclosure documents relating to the Company that are incorporated by reference. Lawyers customarily provide negative assurance in connection with these offerings based on their review, within the limited time available, of the offering document and the documents incorporated by reference, as supplemented by their knowledge of the Company’s affairs gained in prior representation.12

- **Role of Counsel**

Negative assurance normally should be provided only by counsel who has overall responsibility for advising the client concerning the preparation of the offering document. When other counsel has been retained to advise the client on a particular aspect of a transaction, e.g., specific contracts or intellectual property or regulatory matters, such counsel usually addresses the portion of the offering document dealing with that matter by rendering an opinion on the accuracy of the description rather than by providing negative assurance.13

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12 In some situations, lawyers who give negative assurance may not have been involved in the preparation of the documents incorporated by reference but base their negative assurance on their review of those documents and on discussions with officials of the Company and participation in the preparation of the offering document as described in the negative assurance.

13 Such counsel ordinarily should not be asked to provide negative assurance. Such a request might be made, however, if such counsel has been retained to advise the client regarding the disclosure in a specific legal area material to the Company, such as patent or regulatory matters, is sufficiently versed in applicable securities law standards and has had sufficient involvement in the

• **Basis for Providing Negative Assurance**

Counsel is not an insurer of the adequacy of the disclosure in the offering document or a “reputational intermediary,” and a statement of negative assurance expresses only the subjective belief (*i.e.*, conscious state of mind)\(^{14}\) of those lawyers in the firm who have actively participated in the preparation of the offering document.\(^{15}\) That belief is subject to a good faith standard and is based on their familiarity with the Company and what they have learned as a result of the inquiries and reviews described in the negative assurance statement and their work on the transaction, including any consultations with other lawyers in the firm.

• **Location of Negative Assurance**

Because negative assurance is not a legal opinion, it is generally provided in a separate letter\(^{16}\) or in a separate unnumbered paragraph of a closing opinion. Either way, counsel’s responsibility and the meaning of the negative assurance are the same.

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\(^{14}\) The Task Force disagrees with the contrary conclusion reached in *In Re: CFS-Related Securities Litigation*, 2002 U.S. Dist. Lexis 7562, that a reasonableness standard (*i.e.*, what the lawyers reasonably should have known) applies.

\(^{15}\) Some underwriters object to the inclusion in the negative assurance statement of “ring fencing” language to this effect and, because that language is not thought to be necessary, many lawyers do not insist on it. On occasion, underwriters have requested a statement that the belief expressed in the negative assurance encompasses all lawyers in the firm who have performed services for the client. Such an approach may be impractical and uneconomic in that it could require the lawyers involved in the offering to canvass every other lawyer in the firm who may be knowledgeable about the client’s affairs. In addition, it could be construed to require lawyers in the firm who are not securities lawyers, and have not devoted the necessary attention to the offering document, to review that document and make judgments regarding the application of the federal securities laws.

\(^{16}\) The separate letter approach may help counsel limit the recipients of negative assurance to those for whom it is appropriate. Negative assurance normally should not be directed to all the
IV. Negative Assurance by Underwriters’ Counsel

In transactions in which issuer’s counsel provides negative assurance to the underwriters, counsel for the underwriters also normally furnishes negative assurance to the underwriters (but not the issuer). The negative assurance furnished to the underwriters by their own counsel is generally comparable to the negative assurance provided by counsel for the issuer.\textsuperscript{17}

As in the case of counsel for the issuer, the negative assurance furnished by underwriters’ counsel expresses the subjective belief of only those lawyers in the firm who have actively participated in the preparation of the offering document. Because of the firm’s lack of other involvement with the issuer, those lawyers are likely to be the only lawyers in the firm who are knowledgeable about the issuer. Thus, the issue discussed in Note 15 above is not normally presented when underwriters’ counsel furnishes negative assurance.

\textsuperscript{17} Unlike counsel for the issuer who is providing negative assurance to a third party, counsel for the underwriters has professional responsibilities to the underwriters as its client.
V. Form of Negative Assurance – Customary Exceptions, Qualifications, Interpretations and Scope Limitations

Annexed to this Report is a form of negative assurance that reflects the views expressed in this Report.\(^{18}\) Whatever its exact language, the negative assurance normally states that:

- Counsel is not assuming responsibility for the accuracy, completeness or fairness of the offering document, except to the extent that specific sections are addressed in a separate opinion or confirmation.\(^ {19}\) The negative assurance may go on to point out the limitations on counsel’s professional engagement and the fact that many of the disclosures in an offering document are of a non-legal character.
- Counsel has not undertaken any obligation to verify the facts contained in the disclosure document.
- Counsel’s belief is based on a review of the offering document and counsel’s participation in its preparation and in discussions that took place in the preparation process among the various participants.\(^ {20}\)
- Financial statements are not being covered.\(^ {21}\) In addition, because other parts of an offering document, such as Management’s Discussion and Analysis of Financial Condition and Results of Operations (MD&A), usually include financial

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\(^{18}\) The form is included solely for illustrative purposes and, as indicated in the notes to the form, has been drafted to apply only to limited types of offerings. The Task Force is not recommending any particular form of negative assurance. The form makes explicit a number of matters that are understood as a matter of customary practice whether or not stated. However expressed, negative assurance should be read in light of customary practice except as it expressly varies that practice.


\(^{20}\) Some lawyers may indicate that they also have reviewed other materials.

\(^{21}\) The reference to financial statements includes the notes and schedules to the financial statements (which sometimes are, but need not be, referred to expressly). These are covered in the accountant’s report and comfort letter. See Statement on Auditing Standards No. 72.
and accounting information, financial and accounting data are often expressly excluded.\textsuperscript{22}

- “Nothing came to our [counsel’s] attention that caused us to believe …” or something along those lines.\textsuperscript{23}

APRIL, 2004

\textsuperscript{22} Some lawyers refer to “information” instead of “data” and, when requested, sometimes limit the clause to data or information “that are derived from the financial statements or the books and records of the Company.” Some lawyers also exclude “statistical data” on the ground that a lawyer’s professional competence does not extend to that type of information. Even if statistical data or some financial information are not excluded, it is understood that there are limitations on what lawyers can provide in areas outside their expertise.

\textsuperscript{23} Several formulations of negative assurance are in common use. For example, “led us to conclude” may be used in place of “caused us to believe,” and “no facts” in place of “nothing”. Further, “nothing that came to our attention caused us to believe” may be used in place of “nothing came to our attention that caused us to believe”. These differences in formulation do not change the subjective nature of the negative assurance statement as described in this Report.
I. Introduction

Section 7(a) of the Securities Act of 1933 requires a registration statement to contain the information specified in Schedule A to the Act. Paragraph 29 of Schedule A requires the filing of “a copy of the opinion or opinions of counsel in respect to the legality of the issue.” The Securities and Exchange Commission has addressed that requirement in Item 601 of Regulation S-K. Under paragraph (b)(5) of Item 601, a registration statement must include as an exhibit “an opinion of counsel as to the legality of the securities being registered, indicating whether they will, when sold, be legally issued, fully paid and non-assessable, and, if debt securities, whether they will be binding obligations of the registrant.” The opinion on legality appears as Exhibit 5 to a registration statement and is thus often referred to as an “Exhibit 5 opinion.” This report examines Exhibit 5 opinions.

II. Preliminary Matters

Neither the statute nor the SEC rules indicate to whom an Exhibit 5 opinion should be addressed. Customary practice is for the opinion to be

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* The Task Force is a joint effort of the Committee on Legal Opinions and the Subcommittee on Securities Law Opinions of the Federal Regulation of Securities Committee of the Business Law Section of the American Bar Association. Keith F. Higgins, who served as co-chair of the Task Force, was the reporter for this report.

24 A similar requirement for small business issuers appears in Regulation S-B, and references in this report to Item 601 of Regulation S-K also refer to the comparable provision of Regulation S-B.
addressed to the issuer. Counsel to the issuer – either inside counsel or outside counsel – renders the opinion.

An Exhibit 5 opinion need not be included as an exhibit to a registration statement as initially filed. The only requirement is that it be filed as an exhibit before the registration statement is declared effective. Thus, the opinion often is filed with an amendment to the registration statement.

The fact that the opinion must be filed before – and in the case of shelf registrations often long before – the securities are actually sold gives rise to issues about the appropriateness of assumptions that are included in the opinion. These assumptions are discussed below.

Rule 436 under the Securities Act requires that a written consent of counsel be filed as an exhibit to a registration statement if “any portion of the . . . opinion of . . . counsel is quoted or summarized as such in the registration statement or in a prospectus. . . .” This requirement has led to speculation whether counsel rendering an Exhibit 5 opinion, whose name is included in the prospectus as having passed on the legality of the securities, is considered an expert for purposes of Section 7 of the Securities Act. The statute itself refers to an expert as “any accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him [who] is named as having prepared or certified any part of the registration statement, or is named as having prepared or certified a report or valuation for use in connection with the registration statement. . . .” The statute does not specifically refer to lawyers, an omission that may explain why Rule 436 refers to the consent of “an expert or counsel.” In any event, Rule 436 requires that a consent of counsel be filed as an exhibit to the registration statement. That consent is both to the filing of the opinion as an exhibit to the registration statement and to the reference to counsel in the related prospectus. As a drafting matter, most lawyers include the consent in the opinion. Some also add a statement to the effect that the filing of the consent shall not be deemed an admission that counsel is an expert within the
meaning of Section 7 of the Securities Act. The SEC staff has not objected to “no admission” language. The SEC staff has objected, however, to language affirmatively denying that counsel is an expert within the meaning of the Securities Act. Whether counsel includes the “no admission” language or not should have no bearing on whether counsel is or is not an expert under Section 7.

Rule 436(f) under the Securities Act specifies that, if an opinion filed as an exhibit relies on an opinion of another counsel, the consent of that other counsel need not be provided. The SEC staff has taken the position, however, that a signed copy of the opinion relied on must be included as an exhibit to the registration statement.

Third party closing opinions often expressly limit their use. If an Exhibit 5 opinion were to state that it may be relied on only by the issuer, the SEC staff would almost certainly object, viewing such a limitation as being inconsistent with the purpose of paragraph 29 of Schedule A to the Securities Act.

III. Particular Classes of Securities

A. Equity Securities

Substantive Requirements

Item 601 of Regulation S-K requires that the opinion state that the securities, when sold, will be:

- Legally issued
- Fully paid, and
- Non-assessable.

The phrase “legally issued,” although taken directly from the language of the Securities Act, is not the language lawyers customarily use when rendering a third party closing opinion on equity securities. Thus, in Exhibit 5 opinions, many lawyers use the more customary formulation that the securities have been “duly authorized and, when sold in accordance with the provisions of
[the applicable purchase agreement], will be validly issued, fully paid and non-assessable.”

The SEC staff does not insist on the “legally issued” language, and many opinion givers use “duly authorized” and “validly issued” instead.\(^{25}\) That is the language normally used in third party closing opinions, and its meaning (as well as the meaning of “fully paid and non-assessable”) is the subject of numerous bar association reports.\(^{26}\)

Because the Exhibit 5 opinion is delivered before the securities are sold, opinion givers often cast the opinion in the future tense, stating that the securities will be validly issued, fully paid and non-assessable upon their sale in accordance with the applicable purchase agreement or governing document. Opinion givers also sometimes condition the opinion on further action by the board or a board committee. Opinion givers should be careful about the breadth of any such assumptions. Although an opinion giver may appropriately assume that the pricing committee of the board has taken the action necessary to set the sale price,\(^{27}\) the SEC staff may object to an assumption that the board or a pricing committee has taken all action required to be taken prior to the issuance and sale of the securities. In general, assumptions should be limited to matters that structurally cannot be completed before effectiveness of the registration statement.

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\(^{25}\) Due authorization is subsumed in validly issued even if not stated separately. D. Glazer, S. FitzGibbon and S. Weise, Glazer and FitzGibbon on Legal Opinions, § 10.5 (2d ed. 2001). Thus, “validly issued” should be sufficient.

\(^{26}\) See, e.g., Third-Party Closing Opinions: A Report of the TriBar Opinion Committee (1998) §§6.2.1 and 6.2.2 (referred to throughout as the “TriBar 1998 Report”). Many of the bar association reports describe opinion practice in particular states. By following the approach taken for third party closing opinions, opinion givers should be able to rely on the substantial body of literature describing customary practice regarding those opinions.

\(^{27}\) For example, this practice is usually followed when in reliance on Rule 430A the registration statement is declared effective before pricing occurs.
Opinions on Delaware Corporations by Counsel Not Admitted to Practice in Delaware

Counsel not admitted to practice in Delaware often render Exhibit 5 opinions on stock issued by Delaware corporations. Usually, they include in their opinions a so-called coverage limitation, limiting the scope of the opinions to the Delaware General Corporation Law. In the late 1990s, a question arose over the scope of the law covered by legality opinions on stock issued by Delaware corporations. In the registration review process, the SEC staff frequently commented that this limitation unacceptably limited the scope of the opinion because on its face it seemed to focus only on the Delaware corporation statute and not on the Delaware Constitution and judicial interpretations. That controversy has been largely resolved.

Representatives of the ABA Business Law Section met with the staff and explained that the reference to the “Delaware General Corporation Law” was an opinion drafting convention and that the practicing bar understood this phrase to cover the Delaware General Corporation Law, the applicable provisions of the Delaware Constitution, and reported judicial decisions interpreting these laws. Based on these discussions, the staff revised its procedures. These new procedures, which are described in the SEC Division of Corporation Finance’s November 2000 Current Issues and Rulemaking Projects outline, are as follows:

- The staff will issue a comment asking counsel to confirm in writing that it concurs with the staff’s understanding that the reference and limitation to “Delaware General Corporate [sic] Law” includes the statutory provisions and also all applicable provisions of the Delaware Constitution and reported judicial decisions interpreting these laws. As part of this standard comment, the staff will ask that counsel file this written confirmation as correspondence on the EDGAR system. As such, it will be part of the Commission’s official file regarding the related registration statement.

- Once the staff has received this written confirmation from counsel, it will not comment further on the inclusion of this language in the opinion for that registration statement.

The revised procedure satisfies SEC staff concerns, although it creates what many view as the unnecessary step of having to confirm in writing to the SEC the customary meaning of opinion language. Many lawyers now include the required confirmation directly in their Exhibit 5 opinions.

B. Debt Securities

*Binding Obligations*

For debt securities, Item 601 of Regulation S-K requires the filing of an opinion that the securities will be “binding obligations of the registrant.” In practice, this opinion, often referred to as the “remedies” or “enforceability” opinion, is stated in various ways. Perhaps the most common formulation is that the debt securities constitute “valid and binding obligations of the issuer, enforceable against the issuer in accordance with their terms except as may be limited by bankruptcy, insolvency or other similar laws affecting the rights and remedies of creditors generally and general principles of equity.”\(^\text{29}\) Minor differences in wording do not change the meaning of the opinion.\(^\text{30}\)

Exhibit 5 opinions on debt securities typically refer to the debt instruments themselves rather than the indenture under which they are issued. An enforceability opinion on the debt securities covers those portions of the indenture that relate to the terms of the securities, including any terms in the indenture that further define terms in the securities, such as the terms for conversion.

*Governing Law*

Unlike the law governing the validity of equity securities (which is the entity law of the jurisdiction in which the issuer is organized), the law governing the enforceability of debt securities is generally the law chosen in the instrument under which the securities are issued. Often New York law is chosen to govern the obligations of the issuer in a registered debt offering. When counsel for the issuer is not in a position to render an opinion on New York contract law,

\(^{29}\) The bankruptcy exception and equitable principles limitation are standard exceptions that are understood to apply even when not stated expressly. These exceptions do not require disclosure, and the SEC staff does not normally comment on them.

\(^{30}\) *TriBar 1998 Report*, §3.1 (text at note 61).
underwriters may be willing to accept an opinion on the enforceability of the debt as if the law of counsel’s home jurisdiction applied.\textsuperscript{31} That practice is not acceptable to the SEC staff. The Securities Act requires an opinion on the legality of the issue, and the SEC staff takes the position that anything short of an opinion on the law that governs the enforceability of the debt securities will not suffice.

\textit{Non-Standard Exceptions}

Sometimes counsel includes exceptions, in addition to the standard bankruptcy exception and equitable principles limitation, to identify issues that affect the enforceability of particular provisions of the securities being registered. When including additional exceptions, counsel should consider whether they relate to issues requiring disclosure in the prospectus. In addition, counsel should be prepared for possible SEC staff comments.\textsuperscript{32} If the exceptions simply make explicit what is understood as a matter of customary practice to be implicit or otherwise are not material, additional exceptions should not require prospectus disclosure.

\textbf{C. Options, Warrants and Rights}

Rights to acquire securities, whether equity or debt, are contractual rights. In that respect they are more like debt securities than equity securities.\textsuperscript{33} In the case of warrants, for example, an opinion that a warrant is validly issued, fully paid and non-assessable would be inapt because these concepts relate to stock not contractual obligations.

\begin{footnotesize}\begin{enumerate}
\item TriBar 1998 Report, §4.6 at note 98.
\item Counsel should keep in mind that "boilerplate" exceptions that do not relate to the securities being offered are likely to be questioned by the SEC staff.
\item This is the case even though an option, warrant or right fits the definition of “equity security” in Rule 405 under the Securities Act.
\end{enumerate}\end{footnotesize}
An Exhibit 5 opinion on warrants should address their enforceability under the law chosen to govern the warrants. Typically, the offer and sale of the warrants and the securities underlying the warrants are registered at the same time. In that case, the Exhibit 5 opinion should state not only that the warrants are enforceable, but also that the underlying securities have been duly authorized and, upon delivery in accordance with the terms of the warrants, will be validly issued, fully paid and non-assessable.

IV. Particular Types of Offerings

Opinion practice varies, depending not only on the type of securities being offered but also on the type of offering. The Exhibit 5 opinion – not simply the form of opinion – must be on file when the registration statement is declared effective. When a significant period elapses between effectiveness and the sale of the securities, special issues may arise.

A. Shelf Offerings

Shelf offerings under Rule 415 permit issuers to offer and sell securities long after a registration statement becomes effective. Moreover, in the case of universal shelf registrations, the class or classes of securities to be offered and sold may not be known on the effective date. Exhibit 5 opinion practice has adjusted to accommodate shelf offerings.

Shelf Registrations for Specific Securities

When an issuer registers common stock to be issued from time to time in the future, the opinion should state that the shares have been duly authorized. The remainder of the opinion, however, often requires assumptions that various actions will be taken before the securities are issued. In addition to the assumptions that apply whenever shares are being issued in the future, such as the
issuer’s receipt of the required consideration, the opinion giver may need to assume expressly, among other matters, that:

- The board of directors adopts resolutions approving the issuance and sale of the common stock at a specified price or pursuant to a specified pricing mechanism.
- If the issuer is in a regulated industry and requires regulatory approval pursuant to the law under which it was incorporated or a similar statute, it has obtained any necessary regulatory approvals.

These assumptions are perfectly appropriate, and the SEC staff has not objected to them before the shelf registration statement is declared effective.\(^{34}\)

Most issuers filing a shelf registration statement for common stock register a specific number of shares rather than an aggregate dollar amount.\(^{35}\) If the issuer decides to register an aggregate dollar amount of common stock, the opinion giver should assume that no more than a specified number of shares, based on the then current market price, will be issued and sold under the registration statement. That number should be available under the issuer’s currently authorized common stock in its charter. If the issuer ultimately wishes to sell more shares than were covered by the original opinion, a new opinion should be filed at the time of the takedown covering the shares being issued.

**Universal Shelf Registrations**

Universal shelf registrations permit issuers to register an aggregate dollar amount of securities, designating by class the various types of securities (e.g., common stock, debt securities, convertible debt securities, preferred stock, warrants) that may subsequently be issued but not allocating the dollar amount among those classes of securities. A universal shelf registration statement thus requires more assumptions than even a shelf registration for a particular class of security. The board of directors will not have approved the terms of

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\(^{34}\) But see the discussion *infra* under “Filing Updated Opinions.”

\(^{35}\) Although an aggregate dollar amount of securities can be registered under Rule 457(o), choosing that option would result in the issuer’s being able to sell fewer shares if the price of the common stock increases from the price used to determine the registration fee.
the debt securities or preferred stock at the time of effectiveness of the shelf registration statement. In the case of common stock, the issuer may not have sufficient authorized shares to permit an opinion that, were the issuer to elect to sell the entire aggregate dollar amount of securities registered as common stock at current market prices, the stock to be sold has been duly authorized. Assumptions, therefore, are necessary, and the SEC staff has not objected to opinions that include reasonable assumptions.

**Filing Updated Opinions**

Shelf registration was not contemplated at the time Congress enacted the legality opinion requirement. Permitting assumptions in these opinions is necessary for the shelf registration process to work. Although the SEC has not adopted a rule that requires the filing of an updated opinion at the time of a shelf takedown, it has expressed the view that such an updated opinion is required. In note 47 of Release 33-6714, the SEC stated:

> “Although certain qualified legality opinions may be filed as an exhibit to such a registration statement that is declared effective, after pricing and prior to sales an unqualified opinion (and consent) must be filed on Form 8-K [17 CFR 249.308] and thus incorporated by reference into the registration statement or must be contained in a post-effective amendment.”

The Division of Corporation Finance has affirmed this position in its *Manual of Publicly Available Telephone Interpretations*, at D.11, in which it states that it will accept a “qualified opinion” at the time of effectiveness, subject to the understanding that an “unqualified opinion” will be filed before any sales are made under the registration statement.

In filing an updated opinion, an issuer can make an exhibit-only filing pursuant to Rule 462(d), which provides for the immediate effectiveness of post-effective amendments filed solely to include exhibits. Alternatively, for shelf offerings conducted by an issuer under Rule 415(a)(1)(x), which must be registered under Forms S-3 or F-3, the opinion may be incorporated by reference into the registration statement through a Form 8-K or 6-K filing.

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36 This problem can be solved by assuming that after the sale of shares of common stock under the registration statement the total issued shares will not exceed the number authorized in the issuer’s charter.

B. Acquisitions and Exchange Offers

Acquisitions and exchange offers that involve the offer and sale of securities are registered on Form S-4. These registration statements require an Exhibit 5 opinion on the securities being issued in the acquisition. Often the issuance of the securities being registered requires the approval of shareholders. Such is the case in many stock-for-stock mergers, whether as a requirement of state corporation law or a securities exchange. Because an opinion must be on file before the registration statement is declared effective, as with shelf registrations these opinions may be based on the express assumption that the required shareholder approval has been received.\textsuperscript{38} The SEC staff does not require a new opinion following shareholder approval.

\textsuperscript{38} An assumption may not be necessary, however, where the shareholder approval is obtained solely to satisfy listing requirements. Shares would still be validly issued even if a listing rule is violated.