CONTENTS

FROM THE CHAIR ................................................................. 1
FUTURE MEETINGS ............................................................. 2
SPRING 2013 MEETING OF THE
ABA BUSINESS LAW SECTION............................................. 3
Legal Opinions Committee.................................................. 3
Securities Law Opinions Subcommittee,
Federal Regulation of Securities Committee......................... 5
Professional Responsibility Committee ................................. 5
Audit Responses Committee................................................ 6
Audit Responses re Environmental Loss Contingencies............. 8
RECENT DEVELOPMENTS ..................................................... 10
Meso Scale Diagnostics........................................................ 10
Proposed Amendments to Delaware GCL
to Validate Corporate Acts................................................. 11
Opinions on Forum Selection Clauses ................................. 12
Proposed Revisions to Circular 230.................................... 14
LEGAL OPINION REPORTS ............................................... 23
Chart of Published and Pending Reports............................... 23
MEMBERSHIP ................................................................. 25
NEXT NEWSLETTER ......................................................... 25
FROM THE CHAIR

I am pleased to share with you this latest issue of In Our Opinion, the Committee’s newsletter. It has a number of articles that demonstrate that the world of opinion giving is ever rich and changing as new judicial decisions interpreting agreement provisions are issued. Once again, we have our Editor, Jim Fotenos, to thank for the newsletter.

This issue is being published following the Business Law Section’s Spring Meeting in Washington, D.C. and before WGLO’s scheduled Fuld @40 Seminar in mid-May, which is the event designed to look at opinion practice in the future that had to be postponed last Fall due to Hurricane Sandy. You will find inside reports on various meetings of interest at the Section Spring Meeting. We hope to provide summaries of the WGLO proceedings in the next issue of the newsletter, planned to be published before the ABA Annual Meeting in August. I will have more to say about opinion practice in that issue, which will be my last as chair.

The Committee’s report on its 2010 survey of law firm opinion practices has gone to the printer and will appear in the May 2013 issue of The Business Lawyer, which you should be receiving in the next several weeks. This report will provide useful insights that will be helpful to law firms in dealing with their own opinion practices. Thanks go to John Power and his committee for their hard work on this project.

The Committee’s other major project is its report on outbound cross-border opinions. Thanks to the dedicated work of Ettore Santucci and his committee, progress continues to be made on this report, as evidenced by the working draft made available to the Committee and discussed at the Spring Meeting. This will be a groundbreaking report covering in depth issues in cross-border opinions given by U.S. counsel in a way that has not been done before. It also will establish the foundation for a meaningful dialogue on opinion practice with our counterparts in other jurisdictions.

Our next meeting will be in San Francisco on Sunday, August 11, at the ABA Annual Meeting. I hope many of you will be able to participate.

- Stanley Keller
Edwards Wildman Palmer LLP
stanley.keller@edwardswildman.com
# Future Meetings

## Working Group on Legal Opinions
**New York, New York**  
**May 13 and 14, 2013**

## ABA Business Law Section Annual Meeting
**Fairmont Hotel**  
**San Francisco, California**  
**August 9-11, 2013**

## Professional Responsibility Committee
**Saturday, August 10, 2013**

Committee Meeting:
2:30 p.m. – 3:30 p.m.

## Legal Opinions Committee
**Sunday, August 11, 2013**

Committee Meeting:
9:30 a.m. – 11:00 a.m.

2:30 p.m. – 4:30 p.m.

Reception:
5:30 p.m. – 7:00 p.m.

## Law & Accounting Committee
**Sunday, August 11, 2013**

Committee Meeting:
8:00 a.m. – 9:30 a.m.

## Audit Responses Committee
**Sunday, August 11, 2013**

Committee Meeting:
1:30 p.m. – 2:30 p.m.

## Securities Law Opinions Subcommittee, Federal Regulation of Securities Committee
**Sunday, August 11, 2013**

Subcommittee Meeting:
4:30 p.m. – 5:30 p.m.

## ABA Business Law Section Fall Meeting
**Washington, D.C.**  
**November 22-23, 2013**
SPRING 2013 MEETING OF THE ABA BUSINESS LAW SECTION

The Business Law Section held its Spring Meeting in Washington, D.C. on April 4-6, 2013. The following are reports on meetings and programs at the Spring Meeting of interest to members of the Legal Opinions Committee.

Meeting of the Legal Opinions Committee

The Committee met on April 5, 2013. Following is a summary of the meeting:

A number of topics were covered at the Legal Opinions Committee meeting on April 5, 2013:

Committee Organization. Stan Keller announced that his three-year term as chair will end at the ABA Annual Meeting in August in San Francisco, and Tim Hoxie, currently a vice chair of the Committee, will succeed him as chair.

Cross-Border Report. Ettore Santucci, reporter for the Committee’s report on outbound cross-border opinions, stated that he expects the report to be final before the end of 2013. He discussed some of the major conclusions in the report as well as some of the analytical complexities encountered.

Cross-Border Program. Ettore referred to a Committee program earlier in the day in which Ettore, Sylvia Chin, Don Glazer and Steve Weise discussed opinions on procedural provisions in transactional agreements and compared those in cross-border agreements governed by non-U.S. law with similar opinions in domestic transactions. The panel presentation, which everyone agreed was excellent, covered opinions on choice of law provisions, arbitration clauses, enforcement of arbitral awards and judgments, and choice of forum provisions. An audio recording of this program can be found on the ABA web site, and the program materials, comprised of a discussion outline (a copy of which was circulated to the Committee) and an exposure draft of the cross-border report, are also available on the Committee’s web site, accessible here.

Survey Report. John Power, reporter for the Committee’s report on responses to its 2010 survey of law firm office opinion practices, stated that the report will appear in the May 2013 issue of The Business Lawyer. John introduced and thanked Robert Rupp, now Associate Executive Director, Business Services of the ABA, who very ably staffed the Survey Subcommittee.

Working Group on Legal Opinions. Arthur Field reported that WGLO will hold its Spring Seminar May 13-14, 2013 in New York. It will commemorate the 40th anniversary of James Fuld’s seminal article on legal opinions (“Legal Opinions in Business Transactions – An Attempt to Bring Some Order Out of Some Chaos,” 28 Bus. Law. 915 (1973)), and cover material originally planned for the Fall 2012 Seminar that was cancelled because of Hurricane Sandy. Arthur said that conversations were in process with the ABA Business Law Section for WGLO to separate from the ABA as a standalone entity in order to facilitate more efficient administration of WGLO’s activities.

Joint Project on a Statement of Certain Commonly Accepted Opinion Practices. Steve Weise and Stan Keller reported that the first stage of work on this project of a joint

---

1 The URL is http://apps.americanbar.org/dch/committee.cfm?com=CL510000.
committee of representatives of WGLO and of this Committee is nearing completion. A draft statement on certain practices will soon be submitted to WGLO and this Committee for approval for distribution for comment to state, local and other opinion groups, with the objective of achieving a broad-based consensus.

**TriBar Opinion Committee.** Dick Howe reported that TriBar is about to publish a report on opinions on choice of law provisions to supplement its discussion of the subject in its 2004 Remedies Opinion Report, and is working on a report on opinions on limited partnerships as a follow-on to its reports on LLC opinions. He added that it also is considering a project that could result in a report on opinions on the enforceability of contractual provisions that shift legal risk from one person to another, for example indemnification clauses.

**California Venture Capital Opinion Report.** Rick Frasch reported on the status of the California project to develop a sample opinion to complement the Venture Capital Opinion Report, 65 Bus. Law. 161 (2009). He indicated that an issue currently being considered is the position of many California law firms that they do not opine on due authorization and enforceability of future obligations in venture capital transactions. Rick noted as an example that, in the case of Securities Act registration rights, the SEC requires separate contemporaneous Board approval of the registration statement at the time of registering the securities.

**Recent Developments:**

- **Enforcement of Choice of Forum Clauses: the Bremen Exception.** Steve Weise reported that the U.S. Supreme Court has accepted certiorari in the Atlantic Marine case. *(In re Atlantic Marine Const. Co., Inc., 701 F.3d 736 (5th Cir. 2012)).* The issue before the Court is the extent to which the “Bremen exception” *(M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972)) approach to the general rule that forum selection clauses are enforceable applies to 28 U.S.C. § 1404, the federal courts venue statute. Depending on how the Court decides, this could prompt a revisiting of the approach to opinions on forum selection clauses.

- **Enforcement of Arbitration Clauses.** Steve Weise also reported that the U.S. Supreme Court recently heard oral argument in Amex *(American Express Company v. Italian Colors Restaurant, 667 F.3d 204 (2d Cir. 2012)),* a case that may give the Court an opportunity to continue its recent practice of enforcing arbitration clauses even with provisions that violate state law by finding preemption under the Federal Arbitration Act.

- **“True Sale” Opinions.** Steve also reported that discussions continue between representatives of the Committee, working with other ABA groups, and of the American Institute of Certified Public Accountants on recent proposals by the AICPA for expanded coverage of true sale opinions.

- **Delaware Developments.** There was a brief discussion of:
  - The timing of the signing of director consents in Delaware as affecting the duly authorized opinion, in view of the Halifax decision in Delaware *(AGR Halifax Fund, Inc. v. Fiscina, 743 A.2d 1188 (Del. Ch. 1999)) and a recent unreported federal court decision citing it. The decisions found ineffective director consents signed by persons who had not yet become directors.
  - Introduction in Delaware of legislation (to add GCL §§ 204, 205) designed to permit ratification of “void” actions, including stock issuances that might be void. It was noted that a lawsuit had recently
been filed against a law firm opining on the valid issuance of shares of a Delaware corporation in connection with its public offering when the shares were later found to have been void.

- Stanley Keller
  Edwards Wildman Palmer LLP
  stanley.keller@edwardswildman.com

**Securities Law Opinions Subcommittee, Federal Regulation of Securities Committee**

The Subcommittee met on April 5, 2013, and once again discussed future projects that it might pursue.

There was another brief discussion of the possible update of the Subcommittee’s 2007 report on “No Registration Opinions,” 63 Bus. Law. 187 (2007). The update would, among other things, address the impact on opinion practice of the rule changes contemplated by Section 201(a) of the JOBS Act to permit general solicitation and general advertising in the context of Rule 506 and Rule 144A offerings. While the project must await adoption of those rule changes, there appeared to be continuing consensus that this is an important project that should be pursued promptly thereafter.

The Subcommittee also discussed a possible project relating to opinions as to compliance with Exchange Act Rule 14e-1, delivered in the context of tender offers for non-convertible debt. Dealer-managers of debt tender offers commonly request such opinions from the issuer’s counsel, and the opinions are commonly given, although the form of the opinions varies widely. One challenge for the opinion giver in this context is the nature of the relevant legal authority. The express requirements of Rule 14e-1 are quite limited. There were a number of no-action letters issued in the 1980’s and 1990’s, but as tender offer practices continued to evolve, market participants have increasingly relied on a growing body of interpretive positions conveyed through telephone advice by the SEC staff. These positions cover a wide (and growing) range of structuring points. The SEC staff has at various times stated its intention to organize and formalize these positions in some manner (and the Proxy Statements and Business Combinations Subcommittee of the ABA Federal Regulation of Securities Committee has offered its assistance), but updated guidance has not yet been issued.

In addition to surveying current practice, a report on this topic might explore, among other things, the reasons why these opinions are requested, and what purpose (if any) they may serve; the form(s) such opinions should take, including assumptions that should be made; whether and how such opinions ought to address the informal nature of the applicable legal authority; and whether the informal nature of that legal authority has other consequences for the opinion giver. There appeared to be consensus that this could be another project worth pursuing.

The next meeting of the Subcommittee will be in San Francisco in August 2013.

- Robert E. Buckholz, Chair
  Sullivan & Cromwell LLP
  buckholzr@sullcrom.com

**Professional Responsibility Committee**

The Professional Responsibility Committee met on April 5, 2013. Chairman Charlie McCallum noted that the Committee is planning an Annual Meeting program in August 2013 (San Francisco) that will discuss the psychological and sociological factors that frame the context for and affect ethical decision-making and compliance. Future programs are under consideration dealing with ethics and law departments, professional responsibility in transnational and multinational practice, and ethical issues as to secondments, of counsel, shared partners, and clinicians.
The Professional Responsibility Committee is pursuing three major initiatives:

- **The Firm Counsel Connection**, headed up by Phil Schaeffer, General Counsel at White & Case LLP, and undertaken collaboratively with the Litigation and Law Practice Management Sections, will provide a vehicle through which law firm in-house counsel connect with one another on a regional basis to discuss common issues and to learn from one another’s experiences. Those interested include law firm General Counsel, Ethics Counsel, Loss Prevention Counsel, and others who, regardless of title, regularly counsel their law firms and the firm’s lawyers on issues of ethics, professional responsibility, and professional liability.

- **The Law of Lawyer Initiative**, headed up by Charlie McCallum and Keith Fisher, of Ballard Spahr LLP, will address over a period of several years a number of issues in the law of lawyering, including the ABA Model Rules of Professional Conduct, that are in need of thoughtful review and consideration of revision or restructuring as a result of changes in the practice of law. Topics will include, but are not limited to, the structure of lawyer regulation; the lack of uniformity among the states in ethics rules; the demands of transnational and multinational practice; the emergence and growth of institutional practice (law firms and law departments); confusion as to choice of law; the prevalence of multijurisdictional practice; and issues relating to the ownership and financing of law firms.

- **A Law and Technology Initiative**, undertaken jointly with the Section’s Cyberspace Law Committee, will build on the work of the Ethics 20/20 Commission to bring practical and useful guidance to lawyers, law firms, and law departments as to the use of technology in their practices. One of the initial projects under this initiative may be the development of a model technology training program for law firms and law departments.

In addition to these initiatives the Committee is working with other Sections, in response to several recent court decisions, on the development of ABA policy in support of the availability of the attorney-client privilege for consultations by lawyers and their law firm with counsel within the firm as to issues involving a current client of the firm. In addition, the Committee is actively commenting on a proposal by the Standing Committee on Professional Discipline and ABA’s Task Force on the International Trade in Legal Services (“ITILS”) for the development of international protocols for the exchange of information among lawyer disciplinary authorities in the United States and their counterparts in other countries.

The Professional Responsibility Committee’s newsletter, *The Ethical Business Lawyer*, may be subscribed to by any Business Law Section member without joining the Committee. However, the Committee welcomes new members.

- Charles E. McCallum, Chair
  Warner Norcross & Judd LLP
  emccallum@wnj.com

**Audit Responses Committee**

The Audit Responses Committee met on April 6, 2013 in connection with the Business Law Section’s Spring meeting. There follows a summary of the topics addressed at the meeting.

1. **Discussion of Issues that Arose in Most Recent Audit Letter Requests.**

   - International Financial Reporting Standards—Many firms continue to receive inquiries based on international standards. Generally, there is no pushback when firms
provide a US-standard response under the ABA Statement of Policy, even though the company being audited may report in IFRS. It was noted that under UK standards, lawyers are obligated to provide even less information than US standards require. One participant noted that in some very high stakes matters for companies reporting under IFRS, the auditors had sought additional information from the lawyers. Other lawyers have received requests to confirm management’s assessment of the magnitude of a claim. These non-standard requests have been resisted.

- Updates—It was noted that there has been some slippage this year in the timeliness of requests for updates. Auditors need to be reminded that law firms have processes to follow to issue updates. Most firms represented at the meeting agreed that they can respond quickly to requests but they only provide responses in writing and after surveying persons who have worked on the matter since the last letter or update.

- Privilege—Many requests now state that management does not intend to waive any privilege. The audit letter itself may not be privileged. It may, however, be considered to contain attorney work product, but some courts have ruled that communications to auditors may breach the work product protection.

2. Benefit Plan Audits. Auditing standards for audits of benefit plans require auditors to inquire of lawyers about various matters, some of which may not fall within the Statement of Policy. Some firm responses expressly disclaim responding to such items, while others just use the general Statement of Policy response. It was also noted that often the lawyers who receive the notices are counsel to the company, not the plan itself. In that case, a firm may state that it does not represent the plan but deem the request to be a request from the company concerning the plan, and respond accordingly.

3. In-House Counsel. There was a discussion of how the Committee might interact with in-house counsel on audit letter issues. The Committee considered a few years ago doing a project on audit letters for in-house lawyers. It was decided at the time that such a project only made sense if it was done in conjunction with another organization such as the Association of Corporate Counsel. However, another avenue might be assisting the Committee’s constituency (mostly external counsel) in advising in-house counsel on audit letter and related issues. For example, in many companies, the General Counsel’s office may give litigation charts to the accounting department, which then provides them to the auditors. GCs may not fully grasp the potential privilege waiver implications. (The group engaged in further discussion about the scope of privilege or work product protection attaching to materials provided to accountants. It was noted that lawyers’ responses will usually be included in accountant workpapers and may get produced in responses to subpoenas to the accounting firm, without regard to privilege.) External lawyers may also be asked to advise in-house counsel on the extent to which they can adhere to the Statement of Policy in responding to auditor’s requests and/or whether they should sign management representation letters.

4. Environmental Claims. Stan Keller noted that unique issues may arise in the context of environmental liabilities, which are subject to separate accounting literature. Stan’s memo on this subject follows this report.

5. Inquiries About Possible Illegal Acts. Many firms continue to get letters from one of the major accounting firm that seek a representation that the law firm has disclosed to the auditor all possible illegal acts of which it is aware. Firms uniformly either do not respond to the request or expressly disclaim a response. Investigations continue to be a major topic with auditors. One participant noted a scenario in which the company did an internal investigation of a potential Foreign Corrupt Practices Act violation and took appropriate remedial action, but chose not to self-report to the government. Although the matter probably was an unasserted claim, the auditor nonetheless initially pressed for financial statement disclosure until it was
referred to the accounting literature requiring disclosure only if assertion of a claim is probable.

6. Auditor’s Letter Handbook. Jim Rosenhauer reported that the second edition of the Handbook was now in page proofs and should be published as early as May. He undertook to determine whether law firms could purchase copies in bulk with their logo printed on them (they can).

- James J. Rosenhauer, Chair
  Hogan Lovells US LLP
  james.rosenhauer@hoganlovells.com

Thomas W. White, Vice Chair
WilmerHale LLP
thomas.white@wilmerhale.com

Memorandum on Audit Responses Regarding Environmental Loss Contingencies

This memo reviews the ground rules applicable to responses to audit letter requests regarding loss contingencies related to environmental matters. Specifically, it addresses the following:

(i) The extent to which the allocation of liability among potentially responsible parties (“PRPs”) can be taken into account in determining the materiality of a client’s exposure and any difference between such liability and other sources of liability mitigation, such as insurance and indemnity.

(ii) The relationship between materiality determinations and conclusions as to remoteness and whether claims that are material but for which liability is considered remote need to be disclosed.

(iii) Factors that should be considered in making materiality judgments and a framework for such determinations.

Before addressing these specific questions, it is helpful to provide the context for dealing with these issues. Lawyer responses to auditors are governed by the ABA Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information (December 8, 1975) which, together with the AICPA’s Statement of Auditing Standards No. 12 (SAS 12), form the so-called Treaty. The Treaty is part of auditing standards related to the accounting and financial statement disclosure for loss contingencies, including environmental liabilities. The accounting standard generally applicable to accounting for loss contingencies is Financial Accounting Standard No. 5 (FAS 5), now codified as Accounting Standards Codification (ASC) 450-20. The Treaty is cast in terms of dealing with FAS 5 and that is the standard that lawyers generally focus on. There is, however, accounting guidance with respect to environmental loss contingencies that illuminates how FAS 5 should be applied in the case of these loss contingencies. The guidance is somewhat complicated because it varies based upon the type of environmental loss contingency and how it was acquired. The basic guidance is in the AICPA’s Statement of Position 96-1 (SOP 96-1), now codified as ASC 410-30. A related interpretation is in SOP 94-6, codified as ASC 275-50, dealing with disclosure of significant risks and uncertainties, which requires disclosure of estimates made and their sensitivity to change in areas subject to significant uncertainty, such as environmental remediation obligations. To round out the picture, there are separate standards for asset retirement obligations, including those resulting from environmental hazards, and for environmental obligations acquired in merger transactions. These require a fair value approach to recording a liability.

Lawyer audit response letters confirm that the law firm fulfills its professional responsibility in advising clients regarding the client’s disclosure obligations. Those disclosure obligations are derived from several sources under SEC requirements, each of which has its own variations. These include Item 103 of Regulation S-K regarding disclosure of legal
proceedings, Item 303 MD&A, Item 503(c) Risk Factors and financial statement disclosure requirements. The last item, financial statement disclosure, is the one most relevant, as described above, for lawyer responses to auditors.

Regarding the specific questions:

Both SOP 96-1 (ASC 410-30-30 at 30-1) and SEC Staff Accounting Bulletin 92 (SAB 92) recognize that in estimating its liability, which would include for purposes of determining materiality, a company may make a reasonable determination of its allocable share of the joint and several remediation liability. However, the determination is not necessarily easy and will vary based on the stage of the matter, but it includes assessing whether other PRPs will pay their allocable share of liability. SAB 92 puts it in terms of the need to include in the company’s share another PRP’s liability if it is probable that the other PRP will not fully pay its share. The key is to make reasonable determinations based on the information then available and to disclose the basis upon which determinations are made. Consistent with the accounting treatment, lawyers can similarly use professional judgment to consider PRPs’ allocable shares in assessing materiality. However, this is a difficult determination for lawyers to make and therefore lawyers typically are reluctant to conclude that liability is remote unless the absence of liability is clear.

It is difficult to define a framework for making materiality determinations because of the variability of situations. SOP 96-1, as reflected in ASC 410-30, provides examples of considerations based upon the source of the contamination, the nature of the proceeding, the stage of the proceeding, the type of costs involved and the type of remediation and other remedial measures.

The key to any assessment is to consider what is “reasonably possible,” which in this context means more than remote but less than likely. The assessment of materiality is not limited to what is probable (that is a standard under FAS 5 for accrual of a liability) or clearly known nor does it require speculation regarding what is conceivable or purely hypothetical. The basis of the assessment is information known or reasonably available at the time the assessment is made. SOP 94-6, as reflected in ASC 275-50, is clear that speculation or prediction of future events is not required and the subsequent occurrence of an event not considered before does not suggest noncompliance if an appropriate judgment had been made regarding what was reasonably possible based on the information known or reasonably available at the time. This standard has similarities to the standard for MD&A disclosure of “known trends and uncertainties.”

The determinations based on the relevant factors ultimately involve the professional judgment of a lawyer regarding materiality and
the likelihood that the liability is remote. Because the underlying purpose of the lawyer’s response to the auditor relates to disclosure, lawyers typically take a conservative approach to determining that liability is not material or is remote. However, that approach does not foreclose making that determination based on the information available to the lawyer and the lawyer’s exercise of professional judgment.

- Stanley Keller, Past Chair
  Audit Responses Committee
  Edwards Wildman Palmer LLP
  stanley.keller@edwardswildman.com

**RECENT DEVELOPMENTS**

**No Breach or Default Opinions in Reverse Triangular Mergers: What Meso Scale Means**

In 2011, M&A practitioners were taken by surprise by the decision of the Delaware Chancery Court in *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 2011 WL 1348438 (Del. Ch. Apr. 8, 2011), denying a motion to dismiss in an action alleging that a reverse triangular merger violated an anti-assignment provision in an agreement. In 2013, the M&A world was returned to its axis as a result of a subsequent decision of the Delaware Chancery Court in the same case (*Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 2013 WL 655021 (Del. Ch. Feb. 22, 2013)). In that decision, the court, in granting a motion for summary judgment, held that a reverse triangular merger did not constitute an assignment by operation of law and therefore did not violate the contractual provision at issue. Although the holding in *Meso Scale* is straightforward, issues remain for lawyers giving opinions on these transactions.

The *Meso Scale* case involved a challenge to whether the transfer to Roche of license rights through a reverse triangular merger of a Roche subsidiary into the holder of those rights violated an anti-assignment provision in the relevant agreement. That provision prohibited assignment “by operation of law or otherwise” without the consent of third parties with rights in the technology.

The court held that, although a merger can involve an “assignment by operation of law,” a reverse triangular merger does not involve an “assignment,” but rather is merely a change in ownership of the acquired entity. In concluding that the reverse triangular merger did not trigger the consent requirement in question, the court considered the intent of the parties as shown by the language of the agreement, as well as their reasonable expectations, and also considered section 259 of the Delaware General Corporation Law which provides, in specifying the effects of a merger, that the rights and properties of merging corporations “shall be vested in the corporation surviving or resulting from such merger . . . .”

Although the recent *Meso Scale* decision removes a cloud over the giving of no breach or default opinions in connection with reverse triangular mergers, it does not resolve every issue.

First, the precise language of the anti-assignment provision can be critical. For example, if the provision in the agreement in *Meso Scale* had expressly covered reverse triangular mergers or changes-of-control, the result would have been different.

Next, the law that is applied to resolve the issue, and the court making that determination, can affect the outcome. The Delaware court in *Meso Scale* does not make clear what law it applied to determine whether the anti-assignment provision was triggered by the reverse triangular merger. The court refers both to interpretation of the agreement with the anti-assignment provision (which, on another issue, it identifies as governed by New York law) and to the relevant provision of the Delaware General
Corporation Law (the “DGCL”). A reasonable way to analyze the court’s approach in *Meso Scale* is that it looked to the law governing the anti-assignment provision (New York law) to determine whether the provision was triggered by the transaction and, in doing so, considered the effect of a reverse triangular merger under the corporation law governing the merger (presumably the corporation law applicable to the surviving corporation, which in *Meso Scale* was the DGCL). Depending upon the law applicable in other situations, the outcome could be different than the outcome in *Meso Scale*. For example, the Delaware court, while expressly declining to follow it, noted the decision of a federal district court in California purporting to apply California law (*SQL Solutions, Inc. v. Oracle Corp.*, 1991 WL 626458 (N.D. Cal. Dec. 18, 1991)), and holding that a reverse triangular merger results in an assignment by operation of law.

For opinion purposes, however, the law a court would consider in deciding whether a reverse triangular merger violates an anti-assignment provision in an agreement may not be determinative. As a matter of customary practice, when the law chosen to govern the agreement containing an anti-assignment provision is not the law covered by the opinion, the opinion preparers are entitled to interpret the terms of the agreement in accordance with their plain meaning and to assume without so stating that technical terms have the meaning they have in the state whose law is covered by the opinion. See TriBar Opinion Committee, “Third-Party ‘Closing Opinions,’” 53 Bus. Law 591 (1998) at 660-661. The term “assignment” is a technical term and, therefore, the opinion preparers may analyze the anti-assignment provision as it would be interpreted under the law covered by the opinion (even though it might be interpreted differently under the law selected as the governing law). Because the effect of a reverse triangular merger under the applicable corporation law is relevant to the question whether an assignment has taken place, the opinion preparers should be able to take into account the corporation law of the state whose law is covered by the opinion or, if they have the requisite familiarity, the corporation law that actually governs the effect of the merger. Since many lawyers are familiar with the DGCL, the *Meso Scale* decision will be helpful in the analysis when the surviving corporation is a Delaware corporation. When it is not, the analysis for opinion preparers could be more difficult.

Opinion preparers also should keep in mind when they analyze an anti-assignment provision that the nature of the agreement (such as an intellectual property license or a personal services contract) and the effect of the transaction on the other party to the agreement could affect their analysis of whether that provision will be triggered by the transaction. The form the transaction takes also can affect the analysis. For example, although a reverse merger might not involve an assignment, a forward merger could.

The recent *Meso Scale* decision is welcome and will be helpful in permitting opinion givers to give a no breach or default opinion in reverse merger transactions in many circumstances, but it still leaves issues open for opinion preparers to consider.

- Stanley Keller
Edwards Wildman Palmer LLP
stanley.keller@edwardswildman.com

**Proposed Amendments to Delaware General Corporation Law Permitting Ratification of Defectively-Authorized Corporate Acts**

Two proposed amendments to the DGCL will enable corporations to validate corporate acts that might otherwise be invalid under Delaware law due to defects in the authorization of such acts. The classic example is a defective stock issuance, such as an issuance of stock not preceded by the requisite board or stockholder approval. (See “Notes From the Listserve — Postscript: Curing Prior Deficiencies in Authorizations of Share Issuances” in the Spring 2011 (volume 10, no. 3) issue (pages 10-12) of...
the newsletter.) Another example is the filing of a merger or charter amendment that was not approved in strict compliance with statutory requirements. Delaware case law has held that defects in the requisite approval actions may render the act in question void or voidable. This obviously could make it difficult, if not impossible, to render a due authorization opinion or an opinion on the valid issuance of shares.

The proposed amendments, generally referred to as the “ratification amendments,” would add new sections 204 and 205 to the DGCL. Importantly, although expected to be approved this summer, they would not actually take effect until August 1, 2014 due to the need to give the Delaware Secretary of State time to adopt certain implementing procedures.

Section 204 is a “self-help” procedure and Section 205 is a “go to court” procedure. Section 204 generally involves obtaining the board approval or, as applicable, stockholder approval that should have been obtained when the act in question was originally taken. In other words, it is a statutory ratification process to bless corporate acts that were not properly authorized when taken. Notice must be provided to stockholders even if stockholder approval is not required for the act in question.

Section 205 provides a separate track, allowing the Delaware Court of Chancery to validate prior acts that may be invalid due to defective authorization. Section 205 also permits the court to rule upon any challenges to the validity of a section 204 ratification, but only if the challenge is generally brought within 120 days of the “validation effective time” as defined in proposed Section 204(h)(7). After the 120 day deadline, the act would not be subject to invalidation on grounds of defective authorization. However, the new statutes would have no effect on any other grounds for challenging a prior corporate act, such as, for example, breach of fiduciary duty by the board of directors.

Of course, sections 204 and 205 have yet to be tested in practice, but the hope is that they will provide corporations, and opinion givers, certainty that corporate acts may obtain “due authorization” status even if there are defects in their initial authorization.

- Jeffrey R. Wolters
  Morris, Nichols, Arst & Tunnell LLP
  jwolters@mnat.com

Revisiting Opinions on Forum Selection Clauses

By granting certiorari to review the Fifth Circuit’s decision in In re Atlantic Marine Construction Co., 701 F.3d 736 (5th Cir. 2012), the United States Supreme Court has the opportunity to clarify the relationship of its Bremen decision to the federal court venue transfer provision found in 28 U.S.C. § 1404(a) and to define the standard to be applied by a federal court in deciding what weight to give to the forum selected by the parties in their agreement in deciding federal venue under Section 1404(a). The Court’s decision in Atlantic Marine could have an impact on opinion practice in dealing with forum selection clauses.

In Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), the Supreme Court established what has become known as the “modern view” that courts ordinarily will give effect to the parties’ choice of the forum in which their disputes are to be resolved. The Court recognized only a limited exception (commonly referred to as the “Bremen exception”) to this principle, when giving effect to the parties’ choice of forum would be “unfair or unreasonable.”

The majority of federal courts, following the position of the concurring opinion in Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 33 (1988), have applied the Bremen approach to their exercise of authority under Section 1404(a) and have given a valid forum selection clause “controlling weight in all but exceptional circumstances.” The federal courts have not, however, been uniform on this, and the Fifth Circuit in Atlantic Marine joined the Third and
Sixth Circuits in treating the parties’ choice as just one of several factors to consider in a *forum non conveniens* analysis in determining venue under Section 1404(a).

The TriBar Opinion Committee, in its special report on the remedies opinion (“Special Report of the TriBar Opinion Committee: The Remedies Opinion - Deciding When to Include Exceptions and Assumptions,” 59 Bus. Law. 1483 (2004)), indicates that in a state that follows the modern view established by *Bremen* opinion givers generally do not regard a qualification for the possible application of the Bremen exception to be necessary, noting the narrowness of the exception, the judicial discretion inherent in its application and the inability of knowing in advance whether grounds for applying the exception will exist when an action is brought. TriBar similarly indicates that, as with the Bremen exception (and for similar reasons), many opinion preparers do not take an exception for the possibility of a transfer of venue under Section 1404(a). On both points, TriBar notes that some lawyers choose to point out in the opinion the Bremen exception and the possible application of Section 1404(a). In view of *Atlantic Marine* and similar decisions, until the Supreme Court has issued its decision, lawyers in the Third, Fifth and Sixth Circuits might want to consider whether to refer to Section 1404 in their opinions and, depending on the Supreme Court’s decision, it may be appropriate to rethink the treatment of the Bremen exception and Section 1404(a) in opinions on forum selection clauses.

Another recent decision, *Petersen v. Boeing Company*, ---F.3d---, 2013 WL 1776975 (9th Cir. April 26, 2013) (*per curiam*), highlights the importance of the possible application of the Bremen exception, particularly in the cross-border context. The Ninth Circuit reversed a decision of the federal district court to enforce a forum selection clause on a motion to dismiss for improper venue. The clause at issue required all disputes under an employment contract to be resolved in Saudi Arabia. The *Petersen* court, ruling on the basis of factual allegations by the plaintiff in the complaint, found grounds for two of the three prongs of the Bremen exception to be applied — first, that the forum selection clause was the product of fraud and overreaching and second, that the plaintiff would effectively be deprived of his day in court were the clause enforced. The facts alleged in *Petersen* were extreme (e.g., although hired under a preliminary employment agreement signed in the U.S., the employee was required to sign a different agreement after arriving in Saudi Arabia and was told he would have to return home at own expense if he did not). The Ninth Circuit held that the district court abused its discretion by dismissing the suit without leave to amend the complaint without at least holding an evidentiary hearing. The court found that the plaintiff “provided specific evidence sufficient to demonstrate that he would be wholly foreclosed from litigating his claims […] in a Saudi forum.” 2013 WL 1776975 at *3. The court took judicial notice of U.S. State Department reports to the effect that in Saudi Arabia “in practice, the judiciary was not independent, […] was subject to influence and […] judges may discount the testimony of persons of other [non-Muslim] religions,” *id.*, as well as Saudi law that might disadvantage a foreign plaintiff.

The *Petersen* case illustrates the need, when an opinion giver recognizes that a Bremen exception will likely be applicable, to consider whether giving the opinion without pointing that out would mislead the opinion recipient.

- Stanley Keller  
  Edwards Wildman Palmer LLP  
  stanley.keller@edwardswildman.com

- Ettore Santucci  
  Goodwin Procter LLP  
  esantucci@goodwinprocter.com

- Steven O. Weise  
  Proskauer Rose LLP  
  sweise@proskauer.com
Proposed Revisions to Circular 230: Is the Treasury Acknowledging the Role of Customary Practice in the Preparation of Tax Opinions?

A. Circular 230

Circular 230 (“Regulations Governing Practice Before The Internal Revenue Service,” 31 C.F.R. pt. 10) sets forth rules that govern the conduct of individuals who practice before the IRS. These rules determine who can engage in such practice, the duties and restrictions relating to such practice, the sanctions for violating the rules, and the procedures to be followed in disciplinary proceedings. First enacted in 1921, the Circular has undergone numerous revisions with a significant focus, commencing in 1980, on regulating legal opinions used in tax shelters and, since 2005 following passage of the American Jobs Creation Act of 2004 (“AJCA”), “covered opinions.”

“Practice before” the Internal Revenue Service has a broader meaning than its common reading: it includes “rendering written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion…” 31 C.F.R. § 10.2(a)(4). As knowledgeable observers have noted, tax avoidance or evasion “is essentially everything that most tax planners do.” R. Lipton, R. Walton, and S. Dixon, “The World Changes: Broad Sweep of New Tax Shelter Rules in AJCA and Circular 230 Affect Everyone,” J. Taxation 134, 147 (March 2005).² If there were any doubt about the Treasury’s power to reach legal opinions addressing Federal taxes, it was dispelled by the AJCA’s amendment to 31 U.S.C. § 330, which grants the Treasury the power to regulate the practice of persons before it. See AJCA § 822 and the Senate Committee Report thereon in CCH, American Jobs Creation Act of 2004 ¶¶7105, 11,130 (2004). A lawyer rendering a legal opinion on one or more Federal tax questions to a third party or to his or her own client is engaged in “practice before” the IRS under Circular 230.

The 2005 amendments to Circular 230 (effective June 20, 2005) replaced the rules on tax shelter opinions with similar but expanded rules applicable to “covered opinions,” defined in Section 10.35, which include those opinions the Treasury Department believed could be used in potentially abusive transactions. For such opinions Section 10.35 sets forth extensive requirements, including an identification in the opinion of “all facts” that the opinion giver determines to be relevant to the opinion, a discussion of all significant Federal tax issues (unless the opinion is a “limited scope opinion”), and a requirement that the opinion relate the applicable law (including potentially applicable judicial doctrines) to the relevant facts. A disclaimer can be used to generally avoid the broad ambit of a covered opinion, § 10.35(b)(4)(ii), and these disclaimers have now become ubiquitous, not only in written (including email) advice from tax lawyers, but in all emails from lawyers generally. To avoid another sub-category of covered opinion, those addressing plans or arrangements with a “significant” purpose being the avoidance or evasion of any Federal tax that are subject to conditions of confidentiality, counsel now also routinely include disclaimers in offering circulars involving transactions with any discussion of their tax aspects to the effect that, regardless of the confidentiality generally (e.g., a private placement) of the disclosures, “there is no limitation on disclosure of the tax treatment or tax structure of the transaction that is the subject of the written advice.” § 10.35(b)(6).

A covered opinion that follows the requirements of Circular 230, and that reaches a conclusion at a confidence level of more likely than not that one or more significant Federal tax issues will be resolved in the taxpayer’s favor, can be relied upon by a taxpayer under Internal Revenue Code Section 6664 to avoid the imposition of penalties under Section 6662. But the onerous requirements applicable to the rendering of such opinions, and their

---

² As noted by the authors, “[t]ax planning always has as its goal the reduction of current federal tax liability — not an increase in that liability.” Id., note 38.
complexity, have generated widespread criticism by practitioners.

B. The Proposed Revisions

The Treasury proposed its revisions to Circular 230 on September 17, 2012. The revisions would radically change and simplify the Circular, and have met with universal applause from practitioners. See R. Lipton, “Proposed Regulations Radically Overhaul ‘Tax Opinion’ and Other Rules in Circular 230,” J. Tax’n 6 (Jan. 2013); and the comment letters on the proposed revisions from the Tax Section of the New York State Bar Association (December 26, 2012), and the ABA Section of Taxation (November 27, 2012). Acknowledging practitioner dissatisfaction with the difficulty and cost of compliance with the covered opinion rules, the Treasury has concluded that “the covered opinion rules are often burdensome and provide only minimal taxpayer protection. Overall, the benefit is insufficient to justify the additional costs associated with practitioner compliance with the covered opinion rules.” 77 Fed. Reg. 57055, 57057 (September 17, 2012).

The proposed revisions would streamline Circular 230’s rules for written tax advice by eliminating in their entirety the covered opinion rules and applying one standard for all written tax advice in proposed revised Section 10.37.

Existing Section 10.37 further provides that if the practitioner knows that the opinion will be used in “promoting, marketing or recommending” to one or more taxpayers a partnership or other entity, investment plan or arrangement a “significant” purpose of which is the avoidance or evasion of tax (“Marketed Tax Advice”), then the determination of whether a practitioner has failed to comply with Section 10.37 will be made on the basis of a “heightened” standard of care “because of the greater risk caused by the practitioner’s lack of knowledge of the taxpayer’s particular circumstances.” § 10.37(a).

The proposed revisions to Section 10.37 to encompass all written tax advice would convert the proscriptions of existing Section 10.37 to affirmative mandates, and borrow from the obligations imposed upon practitioners by existing (and to be eliminated) Section 10.35 on covered opinions. Specifically, in revised Section 10.37, a practitioner rendering written advice (including an email communication) concerning one or more Federal tax matters would have to:

- base the written advice on reasonable factual and legal assumptions (including assumptions as to future events);
- reasonably consider all relevant facts that the practitioner knows or should know;
- does not consider all relevant facts that the practitioner knows or should know; or
- takes into account the possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be resolved through settlement if raised.

Existing Section 10.37 sets forth the requirements for written (including email) tax advice not involving a covered opinion. For such advice, existing Section 10.37 prescribes what must not be done: a practitioner must not give such advice if the practitioner —

- bases the written advice on unreasonable factual or legal assumptions (including assumptions as to future events);
- unreasonably relies upon representations, statements, findings or agreements of the taxpayer or any other person;
- use reasonable efforts to identify and ascertain the facts relevant to the written advice on each Federal tax matter;
not rely upon representations, statements, findings, or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person if reliance on them would be unreasonable; and

not, in evaluating a Federal tax matter, take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit.

In addition, revised Section 10.37 would make explicit that reliance on representations, statements, findings or agreements is unreasonable if the practitioner knows or should know that one or more representations or assumptions on which any representation is based are incorrect or incomplete.

Revised Section 10.37 would also state that the Commissioner will apply a “reasonableness” standard in evaluating whether a practitioner has complied with the Section, “considering all facts and circumstances, including, but not limited to, the scope of the engagement and the type and specificity of the advice sought by the client.” Proposed § 10.37(c)(1).

Similar to existing Section 10.37(a), proposed Section 10.37(c)(2) would provide for a heightened “standard of review” (not “care”) for Marketed Tax Advice.

Other relevant provisions include:

1. **Supervisory Obligations.** Existing Section 10.36 of Circular 230 imposes supervisory responsibility upon practitioners who have or share “principal” authority and responsibility for overseeing a firm’s tax practice and oblige them to take “reasonable steps” to ensure that the firm has adequate procedures in effect for all of its members, associates, and employees for purposes of complying with the covered opinion rules of existing Section 10.35. The proposed revisions of Circular 230 would eliminate the reference to covered opinions, consistent with the elimination of the covered opinion rules from Circular 230, and apply its supervisory responsibilities to those overseeing the firm’s tax practice to all of the advice rendered by the firm concerning Federal tax matters. Such individual(s) must take reasonable steps to ensure that the firm has adequate procedures in place for complying with Circular 230, and will be subject to discipline if, through “willfulness, recklessness, or gross incompetence” he or she does not take reasonable steps to comply with the supervisory mandates. Proposed § 10.36(a)(1).

2. **The Due Diligence Rule.** Existing Section 10.22 of Circular 230 imposes a general “due diligence” requirement upon those engaged in practice before the IRS. The rule, in place since 1970 (before the adoption of the tax shelter and covered opinion rules), requires a practitioner to exercise due diligence —

   (a) In preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to IRS matters;

   (b) In determining the correctness of oral or written representations made by the practitioner to the Treasury Department; and

   (c) In determining the correctness of oral or written representations made by the practitioner to clients with reference to any matter administered by the IRS.

   (This Section served as the basis for the Service’s challenge to the opinions at issue in the Sykes decision (discussed below) rendered in 1996 (before adoption of the covered opinion rules).)

The foregoing provisions of Section 10.22 would not be revised by the Treasury’s proposed revisions of Circular 230.

The relation between Circular 230’s due diligence rule and the more detailed rules currently applicable to covered opinions (Section 10.35) and proposed for all tax opinions
is not apparent. The issue is not addressed in the Treasury’s September 17, 2012 release proposing the revisions to Circular 230. In its 2001 notice proposing adoption of the detailed tax shelter opinion rules (2001-1 C.B. 834), the Service discussed at length the proposed tax shelter rules, and included a proposed amendment to Section 10.22 to make clear that a practitioner is presumed to have exercised due diligence if the practitioner relies on the work product of another person (e.g., a partner or associate) and the practitioner used reasonable care in engaging, supervising, training and evaluating such person. But the Service did not address the interplay between the general standards of the due diligence rule and the detailed requirements of the proposed tax shelter rules.

Practitioners may be sanctioned under Circular 230 for willfully violating any of its individual regulations (other than the “best practices” guidelines set forth in Section 10.33) or for recklessly or through gross incompetence violating specified sections of the Circular (including the covered opinion rules of Section 10.35 and the general standards of Section 10.37). §10.52(a)(2). The due diligence rule, Section 10.22, is not one of the rules specified in Section 10.52(a)(2). The proposed revisions to Circular 230 will delete the reference in Section 10.52 to the covered opinions section and reaffirm its reference to the general rules of Section 10.37 (as revised), but will not otherwise revise Section 10.52. In light of the “willfully” violate standard of Section 10.52 (the only basis for sanctions for not observing the due diligence rule), and the lack of any discussion of the interplay between the due diligence rule and the more specific rules applicable to the preparation of tax opinions, it is reasonable to infer that the due diligence rule does not impose any substantive obligations upon tax practitioners in addition to the more detailed specifications of a practitioner’s obligations when rendering tax advice set forth in proposed Section 10.37.

C. Factual Diligence Conducted Under Customary Opinion Practice

What does customary practice say about the factual diligence to be conducted in preparing a third-party closing opinion? How does it compare to the factual diligence expected of tax lawyers under the proposed revisions to Circular 230?

As noted by this Committee and others in the Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Options, 63 Bus. Law. 1277 (2008), customary practice “identifies the work (factual and legal) opinion givers are expected to perform to give opinions. Customary practice reflects a realistic assessment of the nature and scope of the opinions being given and the difficulty and extent of the work required to support them.”

This Committee’s Legal Opinion Principles, 53 Bus. Law. 831 (1998) addresses factual diligence in its Section III. As is relevant here, these Principles state:

“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.”

Both the Principles and this Committee’s Guidelines for the Preparation of Closing Opinions, 57 Bus. Law. 875 (2002), recognize that an opinion recipient is entitled to rely on the fact that the opinion giver is acting in good faith and that an opinion giver “should not render an opinion that the opinion giver recognizes will mislead the recipient with regard to the matters

In Our Opinion
addressed by the opinions given.” Principles I(F); Guidelines ¶ 1.5.

The TriBar report on third-party closing opinions addresses these principles. TriBar Opinion Committee, “Third-Party ‘Closing’ Opinions,” 53 Bus. Law. 591 (1998) (“TriBar Report”). The TriBar Report acknowledges that opinion preparers must rely upon information provided by others in rendering opinions; that the opinion preparers must “thoughtfully” guide the process by which information is obtained in an effort to assure that the opinions given are meaningful; that opinion preparers typically draft certificates that set forth with precision various key facts and that they then customarily review the certificates with those who will be asked to sign them in order to satisfy themselves that the persons providing the factual information understand that the information provided is being relied on in an opinion letter and therefore must be based on knowledge; that, in some situations, opinion preparers will elect to go beyond customary diligence “for a specific opinion”; and that opinion preparers may rely on information provided by an appropriate source “unless reliance is unreasonable under the circumstances in which the opinion is rendered or the information is known to the opinion preparers to be false . . . .” TriBar Report §§ 2.12, 2.13, 2.14.

Lawyers delivering closing opinions are not auditors. They are not expected to investigate whether facts represented by company officials are true or not true. Glazer and FitzGibbon on Legal Opinions § 4.2.3.1 at 129-130 (3d ed. 2008). To be sure, the Restatement of Law Governing Lawyers and commentators on customary practice note that the tenets of customary practice on factual diligence may not apply to certain areas, such as to tax and securities law no-registration opinions. The reasons commonly given for this limitation include that unlike the recipient of a standard closing opinion who is represented by counsel who can advise the recipient as to the scope and acceptability of the closing opinion, the recipient of a tax or no-registration opinion often is not so represented, and that the opinion giver of a tax or no-registration opinion assumes a role in the administration of the applicable law that does not apply to the opinion giver of a standard closing opinion. See Restatement of Law Governing Lawyers § 51, Comment e, volume I, at 360-361 (ALI 2000) (recognizing that the effectiveness of limitations or disclaimers stated in an opinion may depend on whether customary practices are known to the recipient concerning the construction of opinions and whether the recipient is represented by counsel or a similarly experienced agent); § 95, volume II, Comment g (“The specific standards applicable to such opinion letters [opinions on tax law] are beyond

that this principle does not continue to apply to the factual diligence required of tax practitioners under Circular 230.

Existing Section 10.34 of Circular 230 sets forth standards with respect to tax returns and documents, affidavits or other papers submitted to the Service. It states that when a practitioner is advising a client to take a position on a tax return, document, affidavit or other papers submitted to the Service, the practitioner “. . . generally may rely in good faith without verification upon information furnished by the client. The practitioner may not, however, ignore the implications of information furnished to, or actually known by, the practitioner, and must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete.” § 10.34(d).

The proposed revisions to Circular 230 do not include any modification to Section 10.34.
the scope of this Restatement.”); § 95, Reporter’s Note on Comment c (recognizing that if opinions are to be rendered to or relied upon by unrepresented parties, custom and practice may not permit abbreviated presentation if the recipient cannot reasonably be expected to understand the meaning of the opinion letter, including all of its assumptions, limitations, and diligence standards); Glazer and FitzGibbon § 4.2.3.1 note 33; A. Field and J. Smith, Legal Opinions in Business Transactions at xvi (“It is possible to meet customary practice opinion standards but not meet anti-fraud standards”) and page 5-4 note 5 (2d ed. 2009).

D. A Look at the Standards of Proposed Circular 230 § 10.37 Through the Lens of Customary Practice on Factual Diligence in the Preparation of Third-Party Closing Opinions

Advocates for extending the scope of customary practice in the preparation of third-party opinions should be gratified by the Treasury’s proposed revisions to Section 10.37 of Circular 230 setting forth the requirements for tax lawyers in rendering written tax advice. The revisions clearly reflect a principles-based rather than a rules-based approach to the subject. While the proposed requirements are more specific than the tenets of customary practice with respect to factual diligence, that is to be expected from standards that apply not only to the preparation of tax opinions but also as a basis for sanctions. See proposed Section 10.52(a)(2) (practitioners may be sanctioned for “recklessly or through gross incompetence” violating Section 10.37). But even the limited specificity of the proposed Section 10.37 requirements is subordinated to the general principles of its rules, e.g., practitioners are instructed not to rely upon “representations, statements, findings, or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person if reliance on them would be unreasonable . . . .” Proposed § 10.37(a)(iv). While the proposed standards include an obligation of diligence (e.g., practitioners are to consider all relevant facts that he or she knows or “should know” and must use reasonable efforts to “identify and ascertain” the facts relevant to the written advice), these strictures are no different in kind from those applicable to the factual diligence expected to be conducted generally in the preparation of third-party closing opinions, e.g.,

“The opinion preparers must thoughtfully guide the process by which information is obtained in an effort to assure that the opinions given are meaningful. No opinion can be better than the factual information on which it is based.

The process for obtaining information in connection with the opinion will likely be inseparable from other diligence related to the transaction itself. This process usually requires a determination by the opinion preparers of: (i) the factual information required; (ii) the source of that information . . . ; and (iii) the vehicle by which the factual information is to be provided . . . .

. . . .

‘Establishing’ fact means that in accordance with customary practice (i) the opinion preparers have assembled factual information (whether in certificate, representation or other form), (ii) such information is not ‘unreliable’ . . . and (iii) the information so assembled includes the facts customarily required for giving the specific opinion.”

TriBar Report §§ 2.1.3, 2.2.

Contrast the approach reflected in the Treasury’s proposed opinion requirements in Section 10.37 with its previous requirements governing tax shelter opinions, in effect from 1984 through June 2005 (and found in former Section 10.33 of Circular 230). By these requirements, among others,

“(iii) If the fair market value of property or the expected financial
performance of an investment is relevant to the tax shelter, a practitioner may not accept an appraisal or financial projection as support for the matters claimed therein unless:

(A) The appraisal or financial projection makes sense on its face;

(B) The practitioner reasonably believes that the person making the appraisal or financial projection is competent to do so and is not of dubious reputation; and

(C) The appraisal is based on the definition of fair market value prescribed under the relevant Federal tax provisions.”

§ 10.33(a)(1)(ii), (iii).  

Of course the freedom of a non-tax opinion giver to limit its factual diligence in third-party closing opinions rendered to a represented party is not available to the tax practitioner rendering an opinion subject to Circular 230. For the tax practitioner rendering a tax opinion to one or more unrepresented parties, it simply will not do to limit the factual diligence conducted by the practitioner (say by an express statement to that effect in the opinion) if that diligence will be required by Section 10.37.  

E. The Factual Diligence That May Occasionally Be Conducted by Tax Practitioners: An Example

The Treasury’s proposal to revise Circular 230 to simplify the rules governing the factual diligence required to give Federal tax advice in a way that is not materially different from the factual diligence customarily followed by lawyers generally in rendering third-party closing opinions does not mean that the diligence exercised by tax lawyers in giving certain tax opinions does not, and will not, occasionally differ in kind from that generally performed by opinion preparers in preparing third-party closing opinions. The detailed rules of the former tax shelter requirements may have been eliminated from Circular 230 but that does not mean that competent tax lawyers, in preparing opinions where, for example, the fair market value of property or the expected financial performance of an investment is material to the opinion, do not, and will not, occasionally engage in the type of diligence specified in the formerly applicable tax shelter rules.

As an example, consider the diligence conducted by respondent John Sykes and his law firm (Shearman & Sterling LLP) in rendering the opinions challenged by the IRS in Director, Office of Professional Responsibility v. Sykes, Complaint No. 2006-1 (January 29, 2009) sought by the client.” The Tax Section of the New York State Bar Association, in its December 26, 2012 comment letter on the proposed revisions to Circular 230, requests clarification of a practitioner’s flexibility in rendering written tax advice, based on context: “...we believe that it is intended that the scope of the written advice [under Section 10.37], the manner in which the practitioner determines the relevant facts and what factual assumptions are appropriate, as well as the amount of detail provided regarding the facts, the law, the issues considered and the legal analysis, will be dictated by the practitioner’s professional judgment as to what is reasonable under all the facts and circumstances,” id. at page 10, and requests the Service to “clarify this point.”

---

4 These detailed requirements, down to the use of the colorful reference to financial projections of “dubious reputation,” were borrowed from the ABA’s Formal Opinion 346 (“Tax Law Opinions in Tax Shelter Investment Offerings”) (January 29, 1982).

5 For represented parties, the opinion giver should be permitted, with the knowledge and consent of the represented party, to limit expressly the opinion giver’s factual diligence. Arguably, such a limitation is what may be contemplated by proposed Section 10.37(c)’s standard of review in referring to the Commissioner’s use, in evaluating a practitioner’s compliance with Section 10.37, of a “reasonableness” standard, “considering all facts and circumstances, including, but not limited to, the scope of the engagement and the type and specificity of the advice sought by the client.”

The proceeding against Sykes was an offshoot of the Government’s spectacular victory against Long-Term Capital Holdings (“LTCH”) in Long-Term Capital Holdings, LP v. United States, 330 F. Supp. 2d 122 (D. Conn. 2004), aff’d by summary order, 150 Fed. App. 40, 2005 WL 2365336 (2d Cir. 2005), in which the district court disallowed claimed losses of over $106 million from a $1 million investment, and imposed a 40% gross valuation misstatement penalty. In claiming its losses LTCH had relied upon legal opinions from both Shearman & Sterling and King & Spalding LLP. The case was thoroughly reviewed by Richard Lipton in “Reliance on Tax Opinions: The World Changes Due to Long-Term Capital Holdings and the AJCA,” J. Tax’n 344 (Dec. 2004).

Following its victory against LTCH, the IRS brought a disciplinary proceeding against Sykes in 2006 under 31 U.S.C. § 330 and Circular 230, seeking his suspension from practice for a period of one year. The Service challenged the opinions Shearman & Sterling had rendered under Sykes’ supervision concerning the basis for tax purposes of preferred stock issued to an affiliate of LTCH in connection with lease stripping transactions. The IRS alleged that Sykes “willfully” violated the due diligence rule (clauses (a) and (c), cited above) by issuing “short form” opinions that failed to address relevant law and tax doctrines, including IRS Notice 95-93 (in which the Service indicated it would challenge lease stripping transactions) and further that Sykes “did not make sufficient inquiries to determine whether the lease stripping transactions had a valid and reasonable expectation of a pre-tax profit and whether the parties to the transactions had complied with the contractual terms of the transactions.” Id. at page 6.

A key to the opinions was whether the underlying leases constituted true leases for tax purposes. This, in turn, was dependent upon the value of the underlying leased computer equipment. To establish the value of the computer equipment, Shearman & Sterling (not the client) interviewed four appraisal firms and selected one of them to do an appraisal of the computer equipment. Sykes reviewed a draft of the appraisal to assure that it was internally consistent and that it provided the answers needed to evaluate the tax consequences of the lease transactions. He also discussed the appraisal with the appraisal firm and had it explain to him parts that were unclear. To assist in the evaluation of the appraisal, Shearman & Sterling retained an accounting firm to review the appraisal. The accounting firm concluded that the appraisal followed generally accepted appraisal procedures, that the conclusions of the appraisal were reasonable, and that the methodology used to determine the residual values of the computer equipment were reasonable.

The administrative law judge, after a hearing, rejected the Service’s complaint against Sykes in its entirety.

Most opinion givers would regard the factual diligence conducted by Sykes and Shearman & Sterling as an illustration of TriBar’s observation that, in “some situations, “did not make sufficient inquiries to determine whether the lease stripping transactions had a valid and reasonable expectation of a pre-tax profit and whether the parties to the transactions had complied with the contractual terms of the transactions.”

8 The dates when the opinions were rendered by Shearman & Sterling are masked in the decision, but from the 2004 district court decision we know that five opinions were rendered by the firm, on August 1, 1996 and November 1, 1996. In addition, the administrative law judge refers, in note 8 to his decision, to the 1996 version of Circular 230 as governing the opinions delivered by the firm, before the inclusion therein of the detailed tax shelter and covered opinion rules.


7 Of course things got even worse for LTCH. See R. Lowenstein, When Genius Failed: The Rise and Fall of Long Term Capital Management (2001).
the opinion preparers will elect to go beyond customary diligence.” TriBar Report § 2.1.3. The extensive (and independent) diligence performed by Sykes and Shearman & Sterling is undoubtedly explained by the fact that Sykes was aware of the Service’s hostility to lease stripping transactions as announced in Notice 95-93 (which announcement would, under the current Treasury Regulations, qualify the transactions as “listed transactions” under Treas.Regs. § 1.6011-4(b)(2)) and that he was aware that the opinion recipients would rely upon Shearman & Sterling’s opinions to establish “reasonable cause” protection against the assessment of penalties under Code § 6664. The Shearman & Sterling opinions were truly delivered in a fishbowl.

What the factual diligence conducted by Sykes and Shearman & Sterling in this instance illustrate is that the factual diligence conducted by opinion preparers in discharging their obligations in rendering an opinion is determined by context, and that the context, in certain areas, including tax, can be demanding.

______________

Tax practitioners have uniformly applauded the Treasury’s proposal to simplify and streamline Circular 230’s requirements governing the giving of tax advice and opinions. The Service’s proposal to adopt principles-based standards for the conduct of factual diligence in giving written tax advice more closely aligns practice in the preparation of tax opinions, as articulated by the Service, to customary practice in the conduct of factual diligence in the preparation of third-party opinions generally. This alignment of customary opinion practice should be greeted with favor by tax and non-tax practitioners alike.

- James F. Fotenos
  Greene Radovsky Maloney Share & Hennigh LLP
  jfotenos@greeneradovsky.com
Chart of Published and Pending Reports

[Editor’s Note: The chart of published and pending legal opinion reports below has been prepared by John Power, O’ Melveny & Myers LLP, Los Angeles, and is current through May 1, 2013.]

A. Recently Published Reports

<table>
<thead>
<tr>
<th>Organization</th>
<th>Year</th>
<th>Report Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABA Business Law Section</td>
<td>2007</td>
<td>No Registration Opinions – Subcommittee on Securities Law Opinions</td>
</tr>
<tr>
<td></td>
<td>2009</td>
<td>Effect of FIN 48 – Committee on Audit Responses</td>
</tr>
<tr>
<td></td>
<td>2009</td>
<td>Negative Assurance – Subcommittee on Securities Law Opinions</td>
</tr>
<tr>
<td></td>
<td>2010</td>
<td>Sample Opinion – Committee on Mergers and Acquisitions</td>
</tr>
<tr>
<td></td>
<td>2011</td>
<td>Diligence Memoranda – Task Force on Diligence Memoranda</td>
</tr>
<tr>
<td></td>
<td>2013</td>
<td>Survey of Office Practices – Committee on Legal Opinions</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Legal Opinions in SEC Filings (Update) – Subcommittee on Securities Law Opinions</td>
</tr>
<tr>
<td>ABA Real Property Section (among others)</td>
<td>2012</td>
<td>Real Estate Finance Opinion Report of 2012</td>
</tr>
<tr>
<td>Arizona</td>
<td>2004</td>
<td>Comprehensive Report</td>
</tr>
<tr>
<td>California</td>
<td>2007</td>
<td>Remedies Opinion Report Update</td>
</tr>
<tr>
<td></td>
<td>2007</td>
<td>Comprehensive Report Update</td>
</tr>
<tr>
<td></td>
<td>2009</td>
<td>Venture Capital Opinions</td>
</tr>
<tr>
<td></td>
<td>2010</td>
<td>Sample Opinion</td>
</tr>
<tr>
<td>Florida</td>
<td>2011</td>
<td>Comprehensive Report Update</td>
</tr>
<tr>
<td>City of London</td>
<td>2011</td>
<td>Guide</td>
</tr>
<tr>
<td>Maryland</td>
<td>2007</td>
<td>Comprehensive Report</td>
</tr>
<tr>
<td></td>
<td>2009</td>
<td>Supplement to Comprehensive Report</td>
</tr>
</tbody>
</table>

9 These reports are available (or soon will be available) in the Legal Opinion Resource Center on the web site of the ABA Legal Opinions Committee, http://apps.americanbar.org/buslaw/tribar/.
Recently Published Reports (continued)

Michigan  2009  Statement
          2010  Report

New York  2009  Substantive Consolidation – Bar of the City of New York
          2012  Tax Opinions in Registered Offerings – New York State Bar
                Association Tax Section

North Carolina  2009  Supplement to Comprehensive Report

Pennsylvania  2007  Update

Tennessee  2011  Report

Texas  2009  Supplement to Comprehensive Report

TriBar  2008  Preferred Stock
          2011  Secondary Sales of Securities
          2011  LLC Membership Interests

Multiple Bar Associations  2008  Customary Practice Statement

B. Pending Reports

ABA Business Law Section  Outbound Cross-Border Opinions – Committee on Legal Opinions
                        Revised Handbook – Committee on Audit Responses

California  Sample Venture Capital Opinion
          Opinions on Partnerships & LLCs
          Sample Personal Property Security Interest Sample Opinion

South Carolina  Comprehensive Report

TriBar  Limited Partnership Opinions

Texas  Comprehensive Report Update

Washington  Comprehensive Report

Multiple Bar Associations  Commonly Accepted Opinion Practices
MEMBERSHIP

If you are not a member of our Committee and would like to join, or you know someone who would like to join the Committee and receive our newsletter, please direct him or her here. If you have not visited the website lately, we recommend you do so. Our mission statement, prior newsletters, and opinion resource materials are posted there. For answers to any questions about membership, you should contact our membership chair Anna Mills at amills@vwlawfirm.com.

NEXT NEWSLETTER

We expect the next newsletter to be circulated in July of this year. Please forward cases, news and items of interest to Stan Keller (stanley.keller@edwardswildman.com) or Jim Fotenos (jfotenos@greeneradovsky.com)

---

10 The URL is http://apps.americanbar.org/dch/committee.cfm?com=CL510000.