CONTENTS

From the Chair ................................................................. 1

Future Meetings .............................................................. 3

Business Law Section 2016 Spring Meeting .............................. 3

Legal Opinions Committee ................................................... 3

Audit Responses Committee ............................................... 6

Law and Accounting Committee ......................................... 9

Securities Law Opinions Subcommittee
   Federal Regulation of Securities Committee ......................... 9

Summary of Recent Listserve Activity
   (Audit Responses Committee) ........................................... 10

Recent Developments .......................................................... 11

Implications of the European Bail-In Legislation for
   Opinions on Credit Facilities in the United States .................. 11

Commentaries on “Implications of the European Bail-In
   Legislation for Opinions on Credit Facilities in the United States” ....... 16

   Don Glazer .................................................................. 16

   Tim Hoxie .................................................................. 18

   Richard R. Howe .......................................................... 20

Legal Advice in Connection with Risk Retention in Securitizations:
   A Preliminary View .......................................................... 22

   Opinion White Paper (§ 316(b), Trust Indenture Act) ................. 28

Legal Opinion Reports .......................................................... 28

   Chart of Published and Pending Reports ............................... 29

Membership ........................................................................ 32

Next Newsletter .................................................................... 32

Addendum, Opinion White Paper
   (TIA § 316(b))
FROM THE CHAIR

We have a great issue of In Our Opinion for you this quarter. As usual, we have our editors, Jim Fotenos and Susan Cooper Philpot, to thank. This issue tackles several matters of current interest, matters that share a common characteristic: all are new, evolving, and therefore not susceptible to definitive treatment. But all will benefit from thoughtful discussion. This issue of the Newsletter furthers that discussion.

Our first focus is a series of articles on “bail-in” regulations adopted in Europe. These regulations have resulted in the appearance of provisions in loan documentation in the U.S. intended to implement the bail-in regime. When these provisions appear in loan documentation upon which U.S. counsel is opining, counsel needs to consider what, if any, effect the provisions have on its opinion.

The bail-in articles begin with an overview prepared by a group of authors from Goodwin Procter LLP led by Ettore Santucci and including Anna Dodson, Simon Fulbrook, and Ed Sibble. The article provides a summary of the issues for those who are unfamiliar with bail-in. It also outlines several possible opinion responses to bail-in provisions in loan documentation. The authors intentionally avoid recommending any particular approach.

The summary article is followed by three commentaries, by Don Glazer, Dick Howe and me. They are more normative, and suggest that opinion givers faced with bail-in provisions respond to them in particular ways. Don suggests that an express exception for bail-in be taken. I take the position that bail-in provisions should be considered generally enforceable and, in all events, to the extent they may not be enforceable, or may adversely impact the enforceability of other provisions in the agreement, that effect is properly understood as addressed by the bankruptcy exception and/or the equitable principles limitation. Dick reports that New York lawyers have given favorable advice on the enforceability of bail-in clauses when included in debt securities issued by European financial institutions, but not where their only obligation subject to bail-in is the commitment to lend money under a credit agreement. Opinions by borrower’s counsel on the enforceability of these clauses are not usually requested by and would not be of interest to lenders. Dick concludes that the presence of a bail-in clause should not prevent borrower’s counsel from giving a customary opinion on the borrower’s obligations; counsel for borrowers may either exclude the clause from coverage in their opinion or regard the bankruptcy exception as excluding it.

These articles are intended to prompt reflection on bail-in and its impact on opinion practice. The article and the commentaries do not address bail-in provisions that appear in financing documents (like bond indentures and related securities) issued by financial institutions subject to the bail-in rules. It remains to be seen which of any of the articles will prove prescient. Perhaps none. But one of the primary purposes of this Newsletter is to discuss current issues in opinion practice, and not all of these are ready for definitive treatment. Bail-in is one such issue. Time will tell what the best approach to the issue might be.

This issue of the Newsletter also contains two timely white papers. The first addresses whether opinion givers can opine on issues arising under the risk retention rules (Regulation RR) adopted to implement the Dodd Frank Act. I will not steal the punch line here; I will only say that it represents the thoughts of the members of a task force drawn from both the Legal Opinions and the Securitization and Structured Finance Committees. As with the bail-in material, the white paper comments on an emerging issue. It is, of necessity, “a preliminary view.” This white paper can also be found on the front page of the Committee’s website under “Discussion Documents.”

The second white paper responds to opinion issues presented by recent court rulings interpreting Section 316(b) of the Trust Indenture Act of 1939. Lest you thought that Act was dormant, it has recently reared its head.
as courts struggle to interpret its requirement that the right to payment on a debt security cannot be impaired without the consent of the holder. What does that mean in the context of restructurings outside of bankruptcy and other transactions which result in amendment to debt securities? The white paper, which represents the work of lawyers at the signatory law firms, provides opinion givers with guidance as to how opinions on debt modifications might be given while the courts continue to consider the meaning of Section 316(b). So, as with the other items in this issue, it is a thoughtful contribution on an important topic of current interest, even if one that may be overtaken by events. The white paper is attached as Annex A to this issue of the Newsletter, and is introduced by David Brittenham, Peter Loughran, and Jeffrey Ross of Debevoise & Plimpton LLP.

I also call your attention to the minutes of the meeting of the Legal Opinions Committee held this past month in Montreal at the Section’s 2016 Spring Meeting. For those who could not make it to Montreal, you missed quite a city. While the weather was a challenge (all forms of precipitation were experienced), the city still has a unique allure that we all appreciated. I want to thank particularly our Canadian colleagues for their hospitality in sponsoring a great event.

At its meeting the Committee continued its discussion of the Statement of Opinion Practices. Many of you will recall that we have discussed prior versions of the Statement over the past years. This Statement is an important work, as it has as its goal updating the Legal Opinion Principles (53 Bus. Law. 831 (1998)) and some of the Guidelines for the Preparation of Closing Opinions (57 Bus. Law. 876 (2002)). These documents are bedrock works that undergird customary practice as now widely understood. Their importance both demands respect, but also attention from each generation of practitioners to renew and expand the commitment to the common understandings that constitute customary practice. Without that renewal and rededication, customary practice can weaken and the common understanding it reflects can be lost.

The Statement therefore aims to fill an important place in legal opinion practice. It is a joint project of our Committee and the Working Group on Legal Opinions Foundation. By the time you read this it is my hope that the Board of Directors of WGLO will have joined our Committee in approving the current version of the Statement for circulation as an exposure draft. The purpose of this important step is to give a wide variety of practitioners and bar associations the opportunity to review and comment on the draft. This step is critical to building the consensus that issuance of the Statement ultimately will demand.

I invite you to read the exposure draft of the Statement, which is posted on the front page of the Committee’s website under “Discussion Documents.” If you have comments, please share them with the Reporter of the Statement (Steve Weise, sweise@proskauer.com). While changes to the text of the statement are not lightly made, comments will be thoughtfully considered, since the aim is to produce a final Statement that can be adopted by as many bar associations and opinion practice groups as possible.

I would be remiss were I not to thank personally the Joint LOC-WGLO group that has worked on the Statement for many years. The effort has been lead by Stan Keller and Ken Jacobson as Co-Chairs. Steve Weise is the Reporter, and Pete Ezell and Steve Tarry are the project’s Co-Reporters. While many have contributed to and commented on the draft (including many at meetings of this Committee), as with all important projects, without a dedicated core team to thoughtfully and imaginatively lead the effort, nothing would have been accomplished.

- Timothy Hoxie, Chair
  Jones Day
tghoxie@jonesday.com
The Business Law Section held its Spring Meeting in Montreal, Canada, on April 7-9, 2016. The Section had a full complement of meetings and programs. The following are reports on meetings held at the Spring Meeting of interest to members of the Legal Opinions Committee.

Legal Opinions Committee

The Committee met on Friday, April 8. The meeting was attended, in person or by phone, by approximately 50 members of the Committee. There follows a summary of the meeting.

Update on Programs. Chair Tim Hoxie began the meeting by noting two programs being presented by the Committee at the Spring Meeting. One of these is focused on the recently published report on Cross-Border Closing Opinions of U.S. Counsel (71 Bus. Law. 139 (Winter 2015-2016)) and will discuss its relevance to lawyers in non-U.S. jurisdictions. Ettore Santucci is chairing that panel, which was scheduled for the next day (Saturday, April 10). The other program, which had taken place earlier in the day, addressed whether lawyers should give opinions under the new risk retention rules applicable to securitization transactions. That panel (jointly sponsored with the Securitization and Structured Finance Committee) was chaired by Ellen Marks, who gave the Committee a brief summary of the conclusions expressed earlier that day. Ellen noted that a white paper would soon be published discussing third-party opinions under the risk retention rules.
Statement of Opinion Practices. Chair Tim Hoxie raised for consideration by the Committee the approval as an exposure draft of the March 31, 2016 draft of the Statement of Opinion Practices (the “Statement”). The exposure draft had been made available to the members of the Committee prior to the meeting. The Statement is a joint project of the Committee and the Working Group on Legal Opinions Foundation (“WGLO”). The purpose of the Statement is to update the Committee’s Legal Opinion Principles (53 Bus. Law. 831 (1998)) in its entirety and selected provisions of the Committee’s Guidelines for the Preparation of Closing Opinions (57 Bus. Law. 875 (2002)). The working group in charge of this project consists of Steve Weise as its reporter, Pete Ezell and Steve Tarry as co-reporters, and Ken Jacobson and Stan Keller as co-chairs, as well as representatives of the Committee and representatives of a number of state bar associations.

Stan Keller and Steve Weise led the discussion of the exposure draft. The objective of the working group in preparing the Statement is to achieve as broad a consensus as possible on commonly-accepted opinion practices so that the Statement can be relied upon by lawyers and inform third parties, such as courts, on opinion practice. The Statement is drafted in plain English to make it broadly accessible and understandable. The working group has sought input from a broad range of practitioners, including representatives of the corporate transactions and real estate bars. This broad involvement in developing the Statement follows the approach used for the Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions, 63 Bus. Law. 1277 (2008), which, to date, has 35 separate bar associations and groups having endorsed it. The Statement can be viewed as building on and amplifying the Customary Practice Statement.

The Statement also will be presented for approval as an exposure draft by the board of directors of WGLO at its May 9, 2016 meeting, after which the Statement will be circulated to other bar and opinion groups and other interested parties, with the objective of obtaining as broad a consensus as possible. The exposure draft will be accompanied by an explanatory memo.

The working group plans to continue its efforts, including considering whether there also should be a shorter document with core principles extracted from the Statement that could facilitate incorporation by reference in or attachment to opinion letters and considering an expansion of the Statement to add additional items, such as other provisions of the Guidelines.

There followed a question and answer period concerning the Statement. Don Glazer noted that a footnote to the reference to securities law in the non-exclusive listing of excluded laws in § 6.2 (“Applicable Law”) of the Statement that identified the possible application of the Investment Company Act had been deleted, and a discussion of that deleted footnote then followed. The participants acknowledged that the Statement represents a consensus document and, by design, does not set forth the detail of specific opinion practices that individual lawyers or firms may utilize.

After discussion, and upon motion duly made and seconded, the Statement was unanimously approved for distribution as an exposure draft in substantially the form presented to the meeting. If the Statement is approved by the board of directors of WGLO, it will then be broadly distributed to bar and opinion groups and interested parties for consideration. The final draft of the Statement will be presented to the Committee and to WGLO for approval before publication.

Implications of the European Bail-In Legislation for Opinions on Credit Facilities in the United States. Ettore Santucci gave a brief summary of the opinion implications of the European Union Bank Recovery and Resolution Directive (the “Directive”), which became effective January 1, 2016. Ettore and his colleagues at Goodwin Procter LLP have
prepared an article, to appear in the Spring 2016 issue of In Our Opinion, the Committee’s newsletter, that discusses the impacts of the Directive on opinion practice.

The Directive confers upon European regulators extensive powers designed to prevent EU financial institutions from failing. Under Article 55 of the Directive, EU financial institutions are to include in their contracts that are governed by non-EU law (such as contracts governed by, for example, New York law) provisions recognizing the right and power of EU authorities to write down, reform the terms of, cancel and convert to equity the liabilities of a failing EU financial institution. Because EU financial institutions participate or may participate in many syndicated loans, these so-called “bail-in” provisions are starting to appear in multi-lender credit agreements generally even if the initial lenders are all U.S. financial institutions, in anticipation of possible assignments to EU financial institutions.

The question for opinion givers (when the client is a borrower that is not an EU financial institution) is how to address credit agreement bail-in provisions when delivering a remedies or enforceability opinion on a credit agreement. Ettore summarized five possible approaches (which are discussed in greater detail in the bail-in article):

- **Exclusion.** The opinion giver excludes expressly the bail-in provisions of the credit agreement from its remedies opinion.

- **Rely on the Bankruptcy Exception.** While the bankruptcy exception to the remedies opinion may extend to the implementation of a bail-in provision, the question for opinion givers considering this alternative is whether it would be preferable to address the point expressly.

- **Reliance Upon the Equitable Principles Limitation.** The opinion giver relies upon the equitable principles limitation on the grounds that a court’s relieving a borrower of its obligations in the event of possible exercises of the bail-in provision likely would be based on equitable grounds. As with the bankruptcy exception, the opinion giver may conclude, notwithstanding the extensive reach of the equitable principles limitation, that reliance upon it with respect to the operation of a bail-in provision would better be presented in a reasoned opinion.

- **Targeted Exception.** Under this approach, the opinion giver might expressly exclude from the coverage of the remedies opinion the impact of the bail-in provision on the borrower’s obligations should a lender actually become the subject of an EU directive to implement the bail-in provision.

- **No Remedies Opinion.** Finally, the opinion giver might conclude that it is not able to provide a remedies opinion at all on a credit agreement that includes a bail-in provision because its potentially broad scope renders the credit agreement an illusory contract.

**Upcoming Passing of the Baton.** Chair Tim Hoxie noted that at the close of the Annual Meeting of the Business Law Section in Boston September 8-10, 2016, his three-year tenure as Chair of the Committee will end. Tim announced, to broad acclaim, that his successor as Chair of the Committee will be Ettore Santucci.
Next Meeting. The next meeting of the Committee will be held at the Section’s Annual Meeting in Boston on September ____, 2016.

- Anna S. Mills
  The Van Winkle Law Firm
  amills@vwlawfirm.com

- James F. Fotenos
  Greene Radovsky Maloney Share & Hennigh LLP
 jfotenos@greeneradovsky.com

Audit Responses Committee

The Committee met on April 9, 2016. The principal discussion points are summarized below.

Canadian Revised Joint Policy Statement on Audit Inquiries

Jeff Galway (Partner, Blake, Cassels & Graydon LLP) presented a summary of the recently updated Joint Policy Statement on Audit Inquiries adopted by the Canadian Bar Association and the Auditing and Assurance Standards Board (the “JPS”), which becomes effective for audit inquiries dated on or after December 1, 2016. The Canadian Joint Policy Statement had not been revised since 1978, when the Canadian Bar Association and Canadian Institute of Chartered Accountants first entered into the agreement. The 2016 revisions were prompted by changes in financial reporting standards, and the objective of the updating was to reflect the current legal and accounting environment and practice and provide clarity regarding the process and the participants’ respective roles and responsibilities.

Notably, the JPS is accounting framework neutral, in recognition of the possible differences among the different accounting frameworks employed in Canada regarding when a claim or possible claim may arise. In addition, the JPS clarifies that in-house counsel are subject to the JPS the same as outside counsel. Under the JPS, management is tasked with preparing audit request letters for submission to the company’s lawyers. Management is responsible for listing claims and possible claims, and evaluating outcomes, including the estimated magnitude of the claims, in accordance with the company’s applicable accounting standard. Auditors are tasked with ensuring the letter complies with the applicable accounting framework, and lawyers are responsible for confirming the reasonableness of management’s evaluation. Because lawyers do not list the claims and possible claims pending against a company, lawyers are not required to understand the requirements of each company’s applicable accounting standard. In the event a client fails to list a possible claim, the lawyer’s obligation is to discuss such possible claims with management and ensure that management is aware of its responsibilities to inform the auditors of possible claims omitted from the inquiry letter. Where the lawyer disagrees with the reasonableness of, or is unclear on, management’s evaluation of a claim or possible claim the lawyer is to discuss the matter with the company’s management. Where appropriate, the lawyer may suggest that management involve the auditor in these discussions. If following these discussions management and the law firm do not reach agreement on a revised evaluation, the auditor may prepare a memorandum of the discussion and consider whether to qualify the audit opinion.

The Committee noted that this approach differed significantly from U.S. practice, particularly in that it assigns to management the responsibility to identify claims and assess outcomes, requires lawyers to confirm the reasonableness of management’s assessment, and creates the potential for disagreements between management and the lawyers that would be made known to the auditors.

Mr. Galway remarked that one of the most significant complaints from Canadian lawyers was the timing pressure that they felt accountants imposed. In response, under the JPS, “[t]he auditor will request management to complete its drafting of the inquiry letter and
deliver it to the auditor so the auditor can send it to the law firm at least three weeks in advance of the effective date of response, except when this is not practicable in the circumstances.” The JPS also provides that a law firm will normally require five business days from the effective date of the response to prepare the response letter. The JPS further seeks to bolster claims that management’s inquiry letter and the lawyer’s response are privileged, as to which the law in Canada is not definitive. It provides that management’s inquiry letter and the law firm’s response are intended to be privileged.

The Committee discussed current practice by U.S. law firms in responding to audit request letters from foreign companies. Most Committee members noted that their firms’ response letters indicated that the response was provided under applicable U.S. standards, rather than the standards of the foreign country submitting the request. Similarly, Mr. Galway noted he references the JPS in response to audit request letters submitted to his firm by U.S. accounting firms. The Committee considered whether Canadian auditors might reject such responses and insist that the response be provided under the JPS, which would create difficulties for U.S. lawyers. In this regard, it is of note that the JPS provides that it does not address the responsibilities of auditors and law firms in other jurisdictions. This will be an area to monitor as practice develops and attorneys and accountants begin to operate under the JPS.

Notable Audit Request Letters

The Committee next discussed notable audit request letters that Committee members observed during the most recent audit letter season. Noël J. Para reminded the Committee that the form of audit request letter is set forth in AU 9337 and the Addendum thereto. Under the ABA Statement of Policy, law firms are instructed to respond to audit request letters regarding overtly threatened and pending litigation. In some cases, auditors have requested that lawyers respond to matters extending beyond the parameters of the ABA Statement of Policy. Committee members noted that they had received requests to comment on liens, security interests, claims not identified by the client, illegal acts and the treatment of law firm fees and expenses. Committee members indicated that in these instances, their firms generally respond by identifying the paragraphs containing such requests and indicate that the lawyer is not responding to them.

In other instances, Committee members noted at least one case in which a U.S. accounting firm prepared an audit request letter on a form typically used by a non-U.S. affiliate of a network accounting firm, while another Committee member noted a request to respond under the definitions of “probable” and “remote” in Accounting Standards Codification 450-20 (formerly FAS 5), as opposed to relying on the interpretations of those terms in the ABA Statement of Policy. The Committee cautions attorneys to be aware of requests that purport to vary the standards set forth in the ABA Statement of Policy or that request a response under a framework other than the ABA Statement of Policy and recommends that attorneys decline to respond under different standards or as to matters not contemplated by the ABA Statement of Policy. Depending on the extent of the departure by an audit request letter from the ABA Statement of Policy, lawyers may wish to consult with the client to request that the auditor provide a revised audit request letter.

Recent Court Decisions

The Committee noted three recent court decisions relevant to a determination of when to disclose a government investigation, which are summarized below:

- **In re Lions Gate Entertainment Corp. Securities Litigation**, 2016 WL 297722 (S.D.N.Y. Jan. 22, 2016). In this case, the court dismissed civil claims based on Lions Gate’s failure to disclose the existence of an SEC investigation prior to announcing a settlement with the SEC. Among other things, the court found that there was no affirmative duty under the securities laws to disclose a government investigation. The court
also concluded that a company’s receipt of a Wells Notice regarding an SEC investigation did not amount to a pending proceeding or a proceeding “known to be contemplated by governmental authorities under Item 103” of Regulation S-K; nor did the Wells notice constitute “pending or threatened litigation” for purposes of ASC 450. *Id.* at *13, 15* (internal citations omitted).

- *Indiana Public Retirement System v. SAIC, Inc.*, 2016 WL 1211858 (2nd Cir. Mar. 29, 2016). The Second Circuit reversed the district court’s dismissal of claims based on SAIC’s failure to disclose a federal criminal investigation into a kickback scheme involving a large contract with the City of New York. The court found that the plaintiffs had made sufficient allegations of a violation of ASC 450-20. It rejected the district court’s holding that ASC 450-20 does not require disclosure of an unasserted claim “unless it is considered probable that a claim will be asserted.” *Id.* at 6. The Second Circuit stated that “[t]he ‘probability’ standard applies in lieu of the ‘reasonable possibility’ standard only if the loss contingency arises from ‘an unasserted claim or assessment when there has been no manifestation by a potential claimant of an awareness of a possible claim or assessment.’” *Id.* (quoting ASC 450-20-50-6 (formerly FAS 5 ¶ 10)). The court found that the “reasonable possibility” standard applied in view of the plaintiff’s allegation that by the time of the reports in question, the City of New York had, through public statements by Mayor Bloomberg, manifested an awareness of a possible, sizeable claim against SAIC. *Id.*

- *Rexam Incorporated v. Berry Plastics Corporation*, 2015 WL 7958533 (Del. Ch. Dec. 3, 2015). In the context of a dispute about whether a communication from a government agency was a “threat” for purposes of a contractual termination clause, the court concluded that a threat needed to entail more than simply notifying another party of a problem. Rather, a threat needs to carry with it an expression that the party making it “was going to do something about that problem, in such a way that a reasonable person would understand that [the party] was intending to press the issue through a proceeding before a third party.” *Id.* at *4* (internal citations omitted). The court said the Pension Benefit Guaranty Corporation “gave no indication that it would do anything about the Pension Plan Transfer” that was the subject of the contractual termination clause. *Id.* at *5*. Rather, it had simply expressed its frustration at (and disapproval of) the proposed course of action and, while expressly reserving the right to take action, it did not in fact say it would take action.

**Confirmation.com**

The Committee is in the process of establishing a working group to work with Confirmation.com regarding the user agreement governing use of the company’s electronic audit letter platform and other aspects of the platform. The Committee noted that it is in the best interest of the legal profession and Confirmation.com to work toward a mutual understanding regarding the application of the ABA Statement of Policy and the needs of companies, auditors and lawyers.

**Next Meeting**

The Committee’s next meeting is scheduled for the Business Law Section’s Annual Meeting in Boston, on Saturday, September 10, at 11:00 a.m. to 12:00 p.m. EDT.

- Thomas W. White, Chair
Wilmer Cutler Pickering Hale and Dorr LLP
thomas.white@wilmerhale.com
Law and Accounting Committee

The Law and Accounting Committee met on April 2, 2016. The principal items of discussion are summarized below.

**FASB Comment Letters.** Committee member and former chair Mike Scanlon began a spirited discussion regarding the following FASB proposals on the determination of materiality: (i) Proposed Amendments to Statement of Financial Accounting Concepts – Conceptual Framework for Financial Reporting Chapter 3: Qualitative Characteristics of Useful Financial Information – Exposure Draft; and (ii) Proposed Accounting Standards Update – Notes to Financial Statements (Topic 235): Assessing Whether Disclosures are Material – Exposure Draft. Mike presented a copy of a draft of a proposed comment letter from the Committee regarding these proposals. Committee members then engaged in a lengthy discussion regarding the issues involved in the comment letter.

**PCAOB Update.** Committee member Mary Sjoquist provided a summary of current PCAOB matters. She discussed the audit report project and the proposal to include an auditor’s name in the audit opinion. Mary also discussed the status of the going concern and the “other information” projects.

**FASB Update.** The Chair then gave a brief update of current FASB developments, including a discussion of the Committee’s leadership's telephone conference with James L. Kroeker, Vice-Chairman of the FASB.

**FASB Update from Danielle Zeyer.** The Committee was honored to have Danielle Zeyer, Senior Project Manager at FASB, participate in the meeting via telephone conference. Ms. Zeyer discussed the FASB’s recently proposed standard on lease accounting, including the standard’s basic accounting concepts and disclosure and transition rules.

Next Meeting. The next meeting of the Committee will be held of the Section’s fall meeting in Boston on Saturday, September 10, 2016.

- Randall D. McClanahan, Chair
  Butler Snow LLP
  Randy.McClanahan@butlersnow.com

**Securities Law Opinions Subcommittee**

**Federal Regulation of Securities Committee**

The Subcommittee met on April 8, 2016. The participants discussed comments on a revised draft of a report addressing Exchange Act Rule 14e-1 opinions given in connection with debt tender offers. The revised draft, which was circulated to Subcommittee members on April 4, 2016, incorporated comments made at the Subcommittee’s November 21, 2015 meeting and comments received after such meeting. The sense of the participants was that the Subcommittee should continue working on this report, specifically focusing on the language of the opinion in view of the SEC staff’s interpretation and administration of such requirements. Subcommittee members were urged to submit written comments on the revised report.

The next meeting of the Subcommittee will be held at the Section’s Annual Meeting in Boston on September 8-10, 2016. The agenda for the meeting will include a further revised draft of the report on opinions given in connection with debt tender offers.

- Thomas J. Kim, Chair
  Sidley Austin LLP
  thomas.kim@sidley.com
SUMMARY OF RECENT LISTSERVE ACTIVITY
DECEMBER 2015 – MARCH 2016
(AUDIT RESPONSES COMMITTEE)

[Editors’ Note: This summary of Listserv activity during the period December 2015 – March 2016 among members of the Audit Responses Committee does not necessarily represent the views of the Committee or authoritative pronouncements regarding audit response letters practice, but rather reflects views of individual members of the Committee on current practice topics. The comments referred to below may be viewed by clicking on the “Listserve” item on the Audit Responses Committee’s web page.]

1. Wells Notices. A Committee member stated that his firm was representing a client in connection with a Wells notice, and there had been no prior disclosure to the auditors regarding the SEC staff’s investigation. The member referred to the case of Richman v. Goldman Sachs, 868 F. Supp. 2d 261 (S.D.N.Y. 2012) and the discussion of the case in the minutes of the Committee’s meeting on August 5, 2012, and asked whether, since that case, there had been any further thinking as to whether a Wells notice should be treated as an unasserted claim or overtly threatened litigation. Responders to this inquiry indicated that they continue to treat Wells notices as overtly threatened litigation. A Wells notice, or equivalent notice from other regulators, provides a reasonably bright line between asserted and unasserted claims. It was noted that, increasingly, some lawyers have had to grapple with less clear-cut indications of regulators’ intentions, including “pre-Wells” notices or situations where the regulator manifests an intent to bring action without the formality of a notice. Reporting judgments tend to turn on the facts and circumstances of the communications from the regulator.

It was also noted that the Second Report of the Committee on Audit Inquiry Responses (1976), reprinted in Auditor’s Letter Handbook at 40 (2d ed. 2013), addresses pending government investigations. The Committee opined that such situations do not involve overtly threatened litigation when no charges have been made against the client or with respect to its conduct. However, the client may authorize the lawyer to report on such matters, so long as the lawyer follows a consistent approach as to such reporting.

2. Related Party Transactions. PCAOB Auditing Standard No. 18 imposes auditing requirements regarding related party transactions. As a result, many companies have enhanced their internal controls with respect to related party transactions. The inquiry was whether anyone had been asked, as part of a client’s internal control structure, to periodically inform their own client, whom they represent on a general basis and may even effectively act as its general counsel, of any related party transactions (as defined) of which they are aware. The responses did not indicate that firms had received such requests. In general, it was thought to be undesirable for both the client and the lawyer for the outside lawyer to become part of the client’s internal control structure. First, this involves the client’s information, which the lawyer may or may not have or have in scattered ways. It would mix the lawyer’s roles and potentially be inconsistent with the lawyer’s obligations to advise and counsel the company. There could be confidentiality issues, and having the lawyer’s response be the subject of auditor review could breach confidentiality obligations, result in premature disclosures and jeopardize privilege protection. Instead, the lawyer should be available to counsel the client upon request on such questions as whether a particular matter is a related party transaction and how such transactions should be handled. As noted, the lawyer may be in a position where, consistent

---

1 The URL is http://apps.americanbar.org/dch/committee.cfm?com=CL965000.
with his or her professional obligations under Rule 1.13 and the SEC’s Part 205 Rules, he or she needs to report related party transactions to a higher authority in the organization. Having to report these periodically to financial people as part of a control structure could interfere with judgments lawyers must be free to exercise to properly discharge their professional responsibilities.

3. Confirmation.com. In light of discussion at the last Committee meeting, a Committee member asked what policies firms had adopted with respect to delivery of audit response letters through the Confirmation.com platform. Several firms responded. Some firms indicated that they continue to send their responses “the old fashioned way,” i.e., by email, fax or mail. Some firms indicated that they are not currently participating in the platform, due to confidentiality and other concerns. Other firms indicated that they are using the platform and working with Confirmation.com to address their questions and concerns about the platform.

- Thomas W. White, Chair
Wilmer Cutler Pickering Hale and Dorr LLP
thomas.white@wilmerhale.com

**RECENT DEVELOPMENTS**

Implications of the European Bail-In Legislation for Opinions on Credit Facilities in the United States

On January 1, 2016, the European Union Bank Recovery and Resolution Directive (the “BRRD”) became effective. The BRRD establishes a framework for the recovery and resolution of European credit institutions and investment firms (“EEA Financial Institutions”) and has been adopted into the national law of most member states of the European Economic Area (“EEA”). Among the broad resolution powers conferred on bank regulators under the BRRD and the implementing legislation of EEA member countries (the “Bail-In Legislation”) are the powers to write down, reform the terms of, cancel and convert into equity the liabilities of failing EEA Financial Institutions (the “Writedown and Conversion Powers”).

The BRRD confers on European regulators powers to deal with EEA Financial Institutions which could affect the giving of legal opinions on credit facilities governed by New York law or the law of another state in the United States. This is because Article 55 of the BRRD requires that EEA Financial Institutions include in their contracts that are governed by any law other than the law of an EEA member country provisions recognizing the right of European resolution authorities to exercise under the contract the Writedown and Conversion Powers that they can exercise under the Bail-In Legislation. There are many contracts that fall within the scope of this requirement, including agreements through which EEA Financial Institutions finance their operations, such as borrowings in the global capital markets. This article focuses on credit agreements under which an EEA Financial Institution is or may become a lender or an agent and the opinion giver represents the borrower. It discusses five possible approaches an opinion giver might take in addressing the impact of the Writedown and Conversion Powers on the enforceability of a credit agreement (and, by extension, the

---


3 EEA members are: Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom. Switzerland has adopted a similar bail-in regime. Iceland, Lichtenstein, and Norway have not yet adopted the BRRD and have until the end of 2016 to do so.
collateral and other documentation of the credit facility) against a borrower.

European Bail-In at 20,000 Feet

The genesis of the BRRD was the global financial crisis and its fallout – in which European countries suffered not only when troubled financial institutions failed, but also when they did not fail and instead had to be bailed out. As a result of Europe’s interconnected economies, what started as a banking crisis became a pan-European problem when countries that had provided rescue packages to their financial institutions themselves fell into financial difficulty (although the rescue of financial institutions was but one factor in those difficulties). In the years following, and in recognition of the systemic issues resulting from bank failures, Europe implemented more stringent regulations both to strengthen the balance sheets of its financial institutions and to protect banking services vital to their economies. The logical extension to that increased regulation – certainly from the European Parliament’s perspective – was the implementation of a harmonized set of powers for regulators to deal with EEA Financial Institutions facing financial difficulty. Among the goals of this legislation was to provide the means to allow regulators (i) to intervene rapidly when EEA Financial Institutions exhibit financial difficulties; and (ii) to impose losses on creditors (known as a bail-in) before the taxpayers of a country have to undertake a bail-out.

The legislation was intended to maximize the effectiveness of the BRRD and the Writedown and Conversion Powers because many of the contractual obligations of EEA Financial Institutions are governed by laws of countries to which the BRRD does not apply. Article 55 of the BRRD requires (other than in limited circumstances) EEA Financial Institutions to ensure that all contracts governed by non-EEA law to which they are a party, under which they have a “liability” and which were entered into after January 1, 2016 (or entered into before that date and then materially amended after January 1, 2016) include a contractual recognition of, and agreement to be subject to, the Bail-In Legislation (“Contractual Recognition Provisions”). The penalties for non-compliance by an EEA Financial Institution generally include unlimited fines and public censure by the relevant national regulator. Article 55 also permits an EU regulator to require that an EEA Financial Institution furnish the regulator with a legal opinion from legal counsel confirming that the Contractual Recognition Provisions are binding in the jurisdiction whose law governs the agreement.

The term “liabilities” in the BRRD is to be read broadly. In a syndicated loan agreement in which an EEA Financial Institution participates, “liabilities” could include any commitment to fund, obligations to indemnify fronting banks in respect of letters of credit, confidentiality obligations, consent requirements on debt transfers, indemnities given to a facility agent and security agent, and obligations under the Uniform Commercial Code with respect to collateral. Contractual Recognition Provisions also extend to other finance documents – including any intercreditor agreements, security documents, mandate letters and term sheets. Under Article 55, Contractual Recognition Provisions must provide that: (A) the liabilities may be subject to the Writedown and Conversion Powers; (B) the parties to the contract agree to accept those provisions being applied; and (C) the terms of the contract may be amended as necessary to give effect to the exercise of the Writedown and Conversion Powers (a “Bail-In Action”). The Loan Market Association (“LMA”) has produced the “Recommended Form of Bail-in Clause and User’s Guide” and the Loan Syndications and Trading Association (“LSTA”) also has produced model Contractual Recognition Provisions for inclusion in credit agreements governed by New York law. Market practice is quickly moving to including the LSTA model

4 The LSTA’s “EU Bail-In Rule: Form of Contractual Recognition Provision – LSTA Variant” and the LMA’s “Recommended Form of Bail-in Clause and User’s Guide” can be found on the LSTA website: www.lsta.org.
provisions (or a variation) in syndicated and other credit facilities governed by New York law. It should be noted that an important aspect of the LMA and LSTA model language, with its incorporation of the Bail-In Legislation in the credit agreement, is that Writedown and Conversion Powers include not only the BRRD itself, but also current and future implementing legislation and regulations within each of the EEA member countries.

**Opinion Practice at 40,000 Feet**

Contrary to practice in some other jurisdictions, U.S. counsel for a borrower customarily delivers to the lender an opinion that the borrower’s obligations under the credit agreement are enforceable against the borrower under the law governing the agreement – the so-called remedies opinion – subject to customary exceptions. The lenders and their agents require the remedies opinion before they will commit to fund a term loan or other advance, to issue a letter of credit or to make any other financial accommodation. When a credit agreement is governed by New York law and contains Contractual Recognition Provisions, borrower’s counsel must consider the impact under New York law of the Writedown and Conversion Powers on the borrower’s obligations under the agreement. Specifically, counsel must consider whether a New York court might view the contractual grant of these powers to an European regulator to “step in the shoes” of a lender and alter the contract as it elects to be so one-sided as to call into question the enforceability of the contract in general (including any modifications imposed by the regulator), or the Contractual Recognition Provisions in particular. The answer may depend on issues such as how different classes of liabilities are treated under a Bail-In Action, whether and how it matters if the borrower is in breach of “core” obligations like payment of principal or other obligations like negative covenants, and what is the impact of a Bail-In Action on the borrower. Moreover, U.S. counsel cannot be expected to be familiar with, or to have expertise in, the Bail-In Legislation (which includes implementing legislation and regulations regarding the BRRD at the national level) and thus to analyze how a U.S. court would apply Contractual Recognition Provisions that incorporate Bail-In Legislation.

**Five Possible Approaches to Consider**

An opinion giver could take, at least, five different approaches in addressing the impact of the Contractual Recognition Provisions and the incorporation of the Writedown and Conversion Powers on the enforceability of a credit agreement.

1. **Exclusion.** An opinion giver could exclude expressly the Contractual Recognition Provisions, the BRRD and the Bail-In Legislation from the coverage of the remedies opinion. Such an exclusion might be formulated as follows: “We express no opinion on the enforceability of any provision of any Credit and Security Document incorporating the [Bail-In Legislation] or authorizing any [Bail-In Action].” Under this approach the opinion giver declines to give an opinion on whether a U.S. court would enforce the Contractual Recognition Provisions or the exercise of Writedown and Conversion Powers. Because this exception only applies to the Contractual Recognition Provisions incorporating the Bail-In Legislation, it does not excuse the opinion giver from having to conclude that all the other provisions of the agreement are enforceable under the law governing the agreement, including in the circumstances covered by the third approach below (e.g., the effect of the application of Bail-In Legislation to the agreement through the Contractual Recognition Provisions should a lender become subject to a Bail-In Action).

This approach will leave it to an EEA Financial Institution to ask its counsel, rather than borrower’s counsel, to advise the lenders or agents on the enforceability under U.S. law of the Contractual Recognition Provisions, the BRRD and the Bail-In Legislation. Such advice may take the form of a legal opinion if, as permitted by Article 55 of the BRRD, an EU regulator asks for it. This first approach can be coupled with any of the next three approaches.
2. Bankruptcy Exception. Lawyers commonly include in their opinion letters an exception, referred to as the bankruptcy exception, that excludes from the remedies opinion the impact of bankruptcy, insolvency and other laws affecting the rights and remedies of creditors generally. This exception is understood to apply whether or not stated. A common formulation of the exception is as follows: “Our opinions set forth in this letter are subject to and limited by the effect of any bankruptcy, insolvency, fraudulent transfer, reorganization, moratorium and other similar laws affecting the rights and remedies of creditors.” The U.S. Bankruptcy Code confers on a court broad powers, including the power to write down a debtor’s liabilities, to disaffirm or repudiate contracts and to convert liabilities to equity. In the context of third-party closing opinions of borrower’s counsel on credit agreements, practitioners have typically thought of the bankruptcy exception as dealing with the borrower’s financial distress, so as to exclude from the remedies opinion its impact on the enforceability of the borrower’s obligations.  

The BBRD and the Bail-In Legislation, in giving European regulatory authorities broad powers to write down, reform, cancel or convert into equity the obligations of EEA Financial Institutions, may be viewed as the sort of laws affecting the rights and remedies of creditors that are appropriate for inclusion within the scope of the bankruptcy exception. A question to consider, however, is whether the standard bankruptcy exception will be interpreted to exclude from the coverage of the remedies opinion the impact on the borrower’s contractual obligations of a lender’s (or an agent’s) financial distress, in addition to the borrower’s financial distress, or whether it would be preferable, in light of the novelty of the Bail-In Legislation, to address this point expressly. An express exclusion also would put to rest the question whether a Bail-In Action under the Writedown and Conversion Powers fits within the accepted meaning of “insolvency and similar proceedings,” given that an EU regulator may exercise these powers in advance of traditional insolvency of an EEA Financial Institution.

Therefore, to avoid misunderstanding an opinion giver who takes this approach might consider adding express (and as of now not commonly used) language to the opinion letter to make it clear that (i) the bankruptcy exception is intended to apply also to bankruptcy, insolvency or similar proceedings involving a lender or agent, to the extent they impact the borrower’s obligations that are the subject of the opinion, and (ii) the BBRD and the Bail-In Legislation fall within the scope of “other similar laws affecting the rights and remedies of creditors” with respect to lenders or agents who are EEA Financial Institutions.

3. Equitable Principles Limitation. A third approach would be for the opinion giver to conclude that the standard equitable principles limitation to a remedies opinion already covers the Contractual Recognition Provisions and, thus, the Writedown and Conversion Powers. The opinion giver could, for example, conclude that this limitation, which is understood to apply whether or not stated, excludes from the coverage of the remedies opinion the possibility that a court could refuse to enforce the Contractual Recognition Provisions or give the borrower relief from some of its obligations under the agreement if it views a Bail-In Action as inequitable under the circumstances. A common formulation of the equitable principles limitation is: “Our opinions set forth in this letter are subject to and limited by ... general principles of equity (including, without limitation, concepts of materiality, reasonableness, good faith, fair dealing and unconscionability), regardless of whether considered in a proceeding in equity or law.”

---

5 D. Glazer, S. FitzGibbon and S. Weise, Glazer and FitzGibbon on Legal Opinions: Drafting, Interpreting, and Supporting Closing Opinions in Business Transactions § 9.10 (3d ed. 2008) (hereinafter “Glazer Treatise”) (“the bankruptcy exception excludes the effect of laws affecting the rights and remedies of creditors generally that might prevent the opinion recipient from enforcing its rights under the agreement if the company were to encounter financial difficulties”).
In the absence of any cases directly dealing with the exercise of Writedown and Conversion Powers or similar circumstances, reliance on the equitable principles limitation would be based on analogy to other contractual provisions or principles. For example, “Illegality” and “Increased Costs” provisions in a typical credit agreement, which permit a lender to terminate its loan and increase the cost to the borrower based on factors exogenous the credit agreement, are customary in loan agreements governed by New York law and the law of many other states, and are not ordinarily carved out of remedies opinions. Further, the exercise of the Writedown and Conversion Powers is comparable to an event that causes commercial impracticability, which is covered by the equitable principles exception. Nevertheless, because the Writedown and Conversion Powers are open-ended in their reach and could, for example, be exercised in ways that discriminate as among similarly situated borrowers, the opinion giver may conclude that, at least in the near term, an opinion that the Contractual Recognition Provisions are enforceable, subject only to customary exceptions, is better presented as a reasoned opinion.6

4. **Targeted Exception.** A fourth approach might be to craft a targeted “bail-in action exception.” Under this approach, the opinion giver might expressly exclude from the coverage of the remedies opinion the impact of the Bail-In Legislation on the borrower’s obligations should a lender actually become the subject of a Bail-In Action. The exception might further be limited to apply only to the affected lender (i.e., it might be drafted to exclude only obligations of the borrower to the lender whose liabilities are affected by Bail-In Action). Such an exception might read as follows: “We express no opinion as to the enforceability of the Loan Parties’ obligations under the Credit and Security Documents owed to, or for the benefit of, a Lender that becomes the subject of a [Bail-In Action].” An advantage of this approach is that it provides most of the benefits of an expanded bankruptcy exception, but without the risk of broader, unintended implications for the recipient if the exception is broadened to cover a lender’s or agent’s financial distress, in addition to the borrower’s financial distress.

5. **Not Enforceable.** Finally, the opinion preparers might determine that they are not able to provide a remedies opinion on a credit agreement that includes Contractual Recognition Provisions (regardless of standard or new exceptions) because the broad, apparently unfettered powers of an EU regulator, including to write down and cancel all of a lender’s obligations under a credit agreement if that lender becomes subject to a Bail-In Action and to discriminate between similarly situated borrowers in doing so, renders the credit agreement an illusory contract. In reaching this conclusion, however, the opinion preparers would have to consider that case law in many analogous situations, at least in New York, suggests that the power to reform a contract such as that provided an EU regulator by the Contractual Recognition Provisions would not render the credit agreement an illusory or otherwise unenforceable contract. For example, both demand loan provisions and a lender’s rights to withhold credit on a discretionary basis ordinarily are enforceable under New York law and would not cause a loan agreement to be viewed as illusory, and thus unenforceable,

6 Glazer Treatise § 3.3. While closing opinions on credit agreements governed by New York or other U.S. law usually are not reasoned opinions, this topic might, at least in the short term, lend itself to the reasoned approach as a way of bridging the gap between the opinion giver and the recipients.
against the borrower, notwithstanding the lender’s discretion.7

The incorporation of the Writedown and Conversion Powers under the BRRD into a credit agreements governed by U.S. law through the inclusion of Contractual Recognition Provisions presents a challenge for U.S. opinion givers, who often will be unfamiliar with law and practice under the BRRD and the Bail-In Legislation. Given that the BRRD is a novel and untested legal construct, an opinion giver may be justified in “playing it safe” by crafting qualifications along the lines discussed in this article, even though in the future the law or practice may be clarified in such a way as to make them unnecessary. The extraterritorial application of Bail-In Legislation through Contractual Recognition Provisions has no obvious analogue in other situations in which U.S. courts have had to consider whether to give effect under U.S. law to what could be politically-motivated (or at least policy-driven) actions by non-U.S. government actors outside the setting of insolvency proceedings. Several approaches are available to the opinion giver – from declining to take a position, to treating a lender’s financial distress in the same manner as a borrower’s by expanding the standard bankruptcy exception, to fashioning a targeted exception, to drawing on the case law and doctrine on the enforceability of loan obligations governed by New York law (and other jurisdictions) to reason through the substantive impact of the Writedown and Conversion Powers on the enforceability of a borrower’s obligations. The BRRD, the Bail-In Legislation and the Contractual Recognition Provisions provide U.S. opinion givers much to consider.

- Anna E. Dodson8
  Goodwin Procter LLP
  adodson@goodwinprocter.com

Simon Fulbrook
Goodwin Procter LLP
sfulbrook@goodwinprocter.com

Ettore A. Santucci
Goodwin Procter LLP
esantucci@goodwinprocter.com

Edward Matson Sibble
Goodwin Procter LLP
esibble@goodwinprocter.com

Commentaries on “Implications of the European Bail-In Legislation for Opinions on Credit Facilities in the United States”

Don Glazer

Ettore and his colleagues have done an admirable job summarizing the bail-in rules and describing the alternatives available to borrower's counsel when asked to give an opinion on the enforceability of a loan agreement containing a “Contractual Recognition Provision” (as defined by Ettore and his colleagues). By design, they have studiously avoided expressing a preference as among their five alternatives. Not being similarly constrained, however, I have volunteered to stick my neck out and put in writing what I would do as counsel for a borrower (not itself a regulated EU financial institution) based on what I have heard and read so far. So here goes:

8 The authors thank Don Glazer and Andrew Kim for their valuable contributions and assistance in the preparation of this article.

---

7 See, e.g., In re Lehman Brothers Holdings Inc., 541 B.R. 551, 568-70 (S.D.N.Y. 2015); Thomas J. Hall and Stacey Trimmer, Good Faith and Lenders’ Exercise of Contractual “Sole Discretion”, 126 BANKING L.J. 483 (June 2012); cf. SSP Capital Partners, LLC v. Mandala, LLC, 715 F. Supp. 2d 443, 448-49 (S.D.N.Y. 2009) (observing that a provision allowing a lender to exercise discretion in fulfilling a loan commitment does not make a loan agreement illusory and unenforceable per se, as “such discretionary language is not uncommon in loan commitment agreements”).
1. As borrower’s counsel I would give the same enforceability opinion I would ordinarily give on a loan agreement. As things now stand, however, I would qualify the opinion by adding two new exceptions (although either would likely do the job):

2. The first exception would be for the Contractual Recognition Provision itself. I would carve that provision out of the coverage of my opinion because the discretion the bail-in rules give the EU regulators is so far reaching that I cannot be confident that a New York court (assuming the agreement chooses New York law as its governing law) would give the provision effect no matter what modification the EU regulator makes to the lender’s obligations. I do not want to be on the hook, for example, for assuring a bank that a New York court would give effect to the provision and hold that a U.S. borrower was bound by a discriminatory determination by the regulator, exercising its authority under the provision, to terminate the bank’s contractual commitment to advance funds to the U.S. borrower while not doing likewise for similarly situated EU borrowers. Moreover, giving an opinion on a contractual provision requires a lawyer to understand what the provision provides, and that is impossible because the country-specific regulations that will govern action by the regulator for a particular lender (which are required by EU rules to be incorporated in a Contractual Recognition Provision) have yet to be written and, even if they were, would be for Americans in a foreign language (including the English used in the English legal system). The fact is that in the EU the practice is for lenders to look to their own counsel for an opinion on an agreement’s enforceability, and I see no reason why they should not be looking to their counsel for advice on a provision incorporating rules their regulators have adopted.

3. My second exception would be for the effect on the borrower’s obligations of changes made by an EU regulator in the bank’s obligations (assuming a court were to give effect to those changes). In other words I would decline to pass on whether the borrower’s obligations would continue to be enforceable once the Contractual Recognition Provision is triggered. I would take this exception because of the difficulty of anticipating the effect on a borrower of changes in a bank’s obligations. I do not see how, for example, I could be confident enough to give an opinion that a New York court would hold a borrower to its obligations under the loan agreement if a bank were to seek to enforce the borrower’s contractual obligation to pay a default fee when the default was caused by the release of the lender's commitment to provide the funding the borrower needed to generate the revenues it was relying on to pay the loan.

I readily concede that I am not an expert on the bail-in rules and that others may take a different view. They might, for example, decide to give an unqualified opinion on an agreement containing a Contractual Recognition Provision, concluding that the problems that concern me are not real and that a court would enforce a Contractual Recognition Provision regardless of the action an EU regulator might take. Or they may conclude, as Tim Hoxie suggests below, that the bankruptcy exception and the equitable principles limitation provide them all the protection they need should a court decline to enforce a Contractual Recognition Provision or a borrower’s obligation after it is triggered. They may be right, and I certainly do not want to prejudice anyone who gives an unqualified opinion on either or both of those bases. But for me the bottom line is why take a chance when banks and their counsel are in a much better position than I am as borrower’s counsel to analyze the effect of the bail-in rules on loan agreements. The banks and their counsel do not need me to help them decide whether a Contractual Recognition Provision is enforceable, and I am confident that on this one they can fend for themselves without my help.

- Donald W. Glazer
dwglazer@goodwinprocter.com
Tim Hoxie

It is with some trepidation that I take any issue with Don Glazer’s comment on the excellent summary by Ettore Santucci and his colleagues of the possible opinion responses to the appearance of “Contractual Recognition Provisions” (as defined by Ettore and his colleagues) in loan documentation when one is asked to opine on such agreements as counsel to a borrower. Don’s suggested approach would exclude Contractual Recognition Provisions (and their effect on the enforceability of other provisions if it is given effect) from the scope of the opinion. It is difficult to argue that the proposed course is not safest. But is it necessary?

As Ettore and his colleagues make clear, Contractual Recognition Provisions operate much like bankruptcy or insolvency laws do: they allow a governmental authority to strengthen financial institutions by modifying or eliminating their liabilities. These modifications can include changes to loan terms and/or conversions of the financial institutions’ debt to equity. Ettore and his colleagues consider the options an opinion giver has when faced with an agreement that imposes obligations on the lender (such as an obligation to lend) and yet also provides that the borrower agrees that those obligations can be modified (and perhaps eliminated) by regulatory action.

I start with the premise that a contractual provision that says “I agree that your obligations are conditional, the condition being that a third party may limit or modify them” is generally enforceable. There is no want of consideration: the provision is part of the bargain between the parties. The provision does not fail for lack of mutuality: there is no ability by either party to the agreement to unilaterally modify the agreement. It is not vague: the legal regime and parties that can modify the agreement are ascertainable, and their acts should be clear when taken. And in the commercial context where most opinions are rendered, it should not be deemed unconscionable.

There appears to be a concern that a regulator would modify a lender’s obligation in a loan agreement in a manner that is materially adverse to the borrower, and that such a modification could excuse the borrower from performance of other obligations under the agreement. While I am not certain that such harm would excuse performance — I would not advise my borrower client to accept a Contractual Recognition Provision on that assumption — posit for a moment that it might. What then for a lawyer who has opined that the borrower’s obligations under an agreement containing a Contractual Recognition Provision are enforceable?

The remedies or enforceability opinion of borrower’s counsel is subject to the bankruptcy exception and the equitable principles limitation, whether expressly stated in the opinion letter or not. The first of these excludes from the opinion the “effect” of any insolvency law or other “similar” law. TriBar makes clear the bankruptcy exception is not limited to proceedings against any particular party (i.e., it is not limited to proceedings against or relating to the borrower) but rather excludes the effect on the opinion of the entire body of law encompassed by the exception. The exception is not limited to any particular species of “insolvency” law or any particular definition of “insolvency”; it encompasses all “similar” laws limiting creditors rights generally. If an insolvency law applicable to the lender limits its obligations, and that limitation gives rise to a limit on the borrower’s obligations, the origin of the limitation on the borrower’s obligations should be understood to be the insolvency law applicable to the lender. See TriBar Opinion Committee, Third-Party “Closing” Opinions § 3.3, 53 Bus. Law. 591, 622-625 (1998).

This is not so extraordinary. Bankruptcy law has long provided parties a way to avoid contractual obligations. If a contract is “rejected” no one thinks that counsel who opined that the obligations of the counterparty were enforceable cannot point to the bankruptcy exception if the counterparty refuses to perform its obligations following the rejection. No
different result should follow if the rejection is by one of several lenders of its executory obligations and the rejection is materially adverse to the borrower. The only difference would appear to be that in a bankruptcy context contracts must be rejected in their entirety; one cannot pick and choose those provisions of the contract that are rejected in the manner that a bail-in regulatory authority might have the power to do under Bail-In Legislation. But that does not make the exercise of the power any less a consequence of a body of law that should be understood to be encompassed within the bankruptcy exception.

One might answer “no, the court declined to enforce the borrower’s obligations not because of insolvency laws, but because of some other principle.” Put another way, the bail-in regulatory authority did not say that the borrower’s obligations are limited; rather it limited a different party’s obligation (the lender’s), and that in turn had the effect (in the eyes of another court considering the borrower’s obligations) of limiting the borrower’s obligations. But is that not a consequence of the bail-in regime? Consider a common “ipso facto” clause. These are generally viewed as not enforceable to the extent provided by bankruptcy law, but we take no separate exception for them. And we would take no exception whether the clause was triggered by a borrower’s bankruptcy or that of another party.

The bankruptcy exception exists because it is not reasonable to expect counsel to attempt to parse the impact of laws that are by their very nature intended to limit, modify or eliminate obligations. Opinion recipients understand these laws exist. And they understand they may deprive them of the ability to enforce their agreements. Limiting the bankruptcy exception to cases where the bankruptcy law directly limits an obligation, rather than to any case where the unenforceability of an obligation results from an act taken in connection with an insolvency or similar proceeding, unduly restricts the meaning of the exception. And opinion recipients are always free to ask for an opinion that addresses the impact of bankruptcy or similar laws.

The second relevant exception is the equitable principles limitation. The limitation addresses cases where a clause otherwise enforceable is not enforced if doing so would be inequitable. If a court faced with the exercise of a bail-in power finds that it so adversely affects a borrower that the court declines to enforce the borrower’s obligations to its lenders, is it doing anything other than exercising an equitable power? The fact that the agreement provides for such an outcome should not change the result. And the exception has not been understood to apply only when the inequitable conduct was taken by a particular party (though that is the typical case). Rather, like the bankruptcy exception, the equitable principles limitation recognizes that courts can and will “do equity” when faced with what they believe to be unfair results. So long as the unfair result stems from acts or omissions after the delivery of the opinion and the clause in question is not unenforceable without regard to the nature of the subsequent act, the opinion should not be read as providing assurance that obligations will not be limited or even eliminated in the face of such acts or omissions. The fact that the acts are those of a foreign regulator should be of no consequence.

Why do I write this if I agree with Don that an express exception may be safer for opinion givers? I do so because relying on an exception that presumably (if everyone read our articles) would be taken routinely by borrower’s counsel in a loan transaction where a Contractual Recognition Provision is found strikes me as unnecessary when bail-in is easily understood as akin to bankruptcy and where the impact of “unfair” or “inequitable” actions by bail-in regulators can be understood as exercises of the type of equitable power that should fall within the equitable principles limitation. If opinions addressing Contractual Recognition Provisions are desired, they can be specifically requested (as opinions are requested, for example, on the enforceability of arrangements in the context of bankruptcy from time to time).
I am not suggesting that opinion givers take (or not take) any particular exception with respect to Contractual Recognition Provisions in loan agreements. I am suggesting that when an opinion on a loan agreement is rendered by borrower’s counsel, all should understand that Bail-In Legislation is akin to “insolvency” and that the impact of the exercise of bail-in powers on borrower’s obligations is excluded, whether or not stated expressly.

- Timothy Hoxie
  Jones Day
  thoxie@jonesday.com

Richard R. Howe

The implications of the European Bail-In Legislation for legal opinions on credit facilities in the United States have already been considered by many New York lawyers who represent European systemically important financial institutions (“SIFIs”) that are subject to national bail-in regimes. Many of these SIFIs routinely enter into agreements governed by New York law. Even before the BRRD (as defined by Ettore and his colleagues) became effective on January 1, 2016, these agreements frequently included bail-in clauses. As a result, many New York lawyers have already analyzed the enforceability of these agreements under New York law, and at least some of them have advised their clients that the agreements are enforceable.

Potential issues concerning the enforceability of bail-in regimes were first addressed in connection with the issuance of debt securities by European SIFIs, well before bail-in clauses were required to be included in credit agreements with SIFI lenders. In the absence of a clause in the terms of the securities expressly providing for contractual agreement to bail-in, enforcement by a federal or state court in New York of the exercise of bail-in powers by a foreign regulatory authority would usually depend on whether the court would give comity to the actions of the foreign state and whether such actions had been applied in a manner that did not raise public policy concerns (e.g., by discriminating against U.S. creditors in favor of home country creditors). With specific contractual agreement to bail-in now included in the terms of the securities, many New York lawyers believe that the case for enforcement of the bail-in agreement is strengthened in light of the traditional respect that New York courts have given to freedom of contract. Moreover, issues of debt securities are typically offered by prospectuses, offering circulars or other disclosure documents that describe the bail-in powers of the resolution authorities and the potential consequences thereof, which are matters of public record and have been well publicized, making it difficult for security holders to assert that they did not know of such powers or assent to their exercise. These circumstances further support the enforceability of the issuer’s obligations.

The article by Ettore and his colleagues examines the opinion issues from a different perspective—the opinion of borrower’s counsel to a lender under a credit agreement where the lender’s obligations, rather than the borrower’s, are subject to bail-in. The article raises questions concerning the enforceability of the borrower’s obligations due to concerns that the bail-in powers may so upset the mutuality of obligations of the parties that contract formation cannot occur or that they so lack elements of fairness that they are incompatible with due process or are contrary to U.S. or New York public policy. The article then discusses ways in which the opinion giver can give the enforceability opinion customarily requested by the lenders without expressing a positive view on the Contractual Recognition Provisions (as defined by Ettore and his colleagues).

From my perspective as a New York lawyer, the concerns appear to be overstated and exaggerated. The Financial Stability Board, which has been the major proponent of bail-in powers around the world, has said that bail-in is an essential element of an effective resolution regime, one of the most important means of
Title II of the Dodd-Frank Act created a resolution regime for U.S. SIFIs that, like the BRRD bail-in regime, gives the FDIC “extraordinary powers,” including the power to create a “bridge company” to assume the assets of a failed U.S. SIFI and leave some or all of its liabilities as receivership claims, which may be satisfied with equity of the bridge company or, if the value of the bridge is insufficient, result in no payment at all. U.S. bank regulators have acknowledged that European bail-in regimes are similar to the Dodd-Frank resolution regime. When the FDIC steps in as receiver to liquidate an insolvent bank, its ability to transfer liabilities other than domestic deposits to the bridge company is limited, and as a result, non-deposit claims will nearly always be “left behind” in the receivership and receive little or no payment (and as a result be “written off”). U.S. lawyers have never expressed concerns over whether contract formation can occur between a domestic borrower and a U.S. bank lending funds under a credit agreement or whether the effect of the FDIC’s resolution powers over lenders could render a loan agreement unenforceable against the borrower. As U.S. lawyers become more familiar with Title II and European bail-in regimes, perhaps they will recognize their similarities.

Secondly, the opinion which the article selects to focus on is usually not requested. A lender generally has no interest in receiving borrower’s counsel’s views about whether Contractual Recognition Provisions are enforceable against the borrower. So far, the European regulators with supervisory powers over lenders have generally not requested legal opinions addressing the effect of their bail-in powers on lenders’ commitments to advance funds under a credit agreement. To the extent that a lender’s regulators do wish to receive such an opinion, they are entitled to receive an opinion from the lender’s own counsel. It would not help the lender to receive any opinion from the borrower’s counsel addressing this issue, particularly if that opinion were to cast doubt on enforceability. Borrower’s counsel should therefore be free to exclude Contractual Recognition Provisions from its opinion, so that it can address the enforceability of the agreement on the basis that that provision is not being addressed or is excluded from the agreement for purposes of the opinion.

Finally, as others have said, the bankruptcy exception usually refers expressly to other similar laws of general applicability relating to or affecting creditors’ rights. It has long been understood that the resolution powers of the FDIC and other bank regulators in the United States represent an example of such “other similar laws.” The European bail-in regimes should be considered further examples of “other similar laws.” Therefore, a remedies opinion with a bankruptcy exception ought to be understood to be inherently qualified by whatever the effects of the Contractual

---

9 See Financial Stability Board, Key Attributes of Effective Resolution Regimes for Financial Institutions, available at http://www.fsb.org/wp-content/uploads/r_141015.pdf. The Financial Stability Board is an international body established by the G20 in 2009 that monitors and assesses vulnerabilities affecting the global financial system and proposes actions needed to address them. The U.S. is a member of the FSB.


Recognition Provisions might be.\textsuperscript{12} If the opinion giver has any doubt about this, it could expand the language used in the bankruptcy exception to address bail-in expressly, as others have suggested.

The upshot is that there should really be no objection if an opinion of borrower’s counsel to a lender under a credit agreement were to exclude any consideration of Contractual Recognition Provisions or to ignore the issue on the ground that it is already excluded by the bankruptcy exception, and borrower’s counsel should equally have no concerns about giving the customary opinion.

- Richard R. Howe  
  Sullivan & Cromwell LLP  
  hower@sullcrom.com

\textsuperscript{12} Some have suggested that the bankruptcy exception in borrower’s counsel’s opinion should be understood to relate to only the effect of bankruptcy on the borrower. The TriBar Opinion Committee, however, has said that it “relates to a body of law rather than to a proceeding relating to a particular person or entity.” See Third Party “Closing” Opinions, 53 Bus. Law. 591, 624 (1998). TriBar has also said that the bankruptcy exception is understood even if not stated in the opinion letter (53 Bus.Law. at 623), but most opinion letters include it expressly.

Legal Advice in Connection with Risk Retention in Securitizations: A Preliminary View  
(February 26, 2016 Working Draft)  
(Subject to Completion)

On December 24, 2015, U.S. rules for risk retention took effect with respect to the issuance of residential mortgage-backed securities, and on December 24, 2016, these rules will take effect for securitizations of all other asset classes.\textsuperscript{13} The rules, which were adopted by multiple regulatory agencies pursuant to the requirements of the Dodd-Frank Act, represent a significant change in the offering of asset-backed securities, and impose substantial new regulatory obligations on “sponsors” or “securitizers”—essentially, the parties who organize and initiate the offering of asset-backed securities, and in many instances who also are “originators” of the securitized assets.\textsuperscript{14}

Specifically, the new rules generally require certain parties to have and retain an “Eligible Vertical Interest” or an “Eligible Horizontal Residual Interest” or a combination thereof, generally representing at least 5% of the credit risk of the securitized assets, either directly or through certain affiliates, on an unhedged credit basis, for the duration of the transaction or a large portion thereof.

The Securitization and Structured Finance Committee and the Legal Opinions Committee of the American Bar Association’s Business Law Section have formed a joint task force (the “Task Force”) to discuss the issues regarding legal advice that the implementation of the risk retention rules will pose for all transaction

\textsuperscript{13} Credit Risk Retention; Rule, Federal Register, Vol. 79 No. 247 (December 24, 2014), pp.77602 \textit{et seq}.

\textsuperscript{14} Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub.L. 111-203
participants. This report presents the Task Force’s preliminary conclusions with respect to the delivery of third-party legal opinions related to risk retention in securitizations. It does not address the nature or form of legal advice that lawyers may give to their own clients. This report reflects only the views of its authors and has not been submitted for approval to the American Bar Association, the Business Law Section, the Securitization and Structured Finance and Legal Opinions Committees or to any other bar association or other organization. Further, this report does not necessarily reflect the views of the law firms with which the authors are associated.

Market participants and their counsel are actively considering in what form, and to what extent, legal advice with respect to compliance with the rules will be necessary or appropriate. Legal advice to clients, and the memorialization, if applicable, of such advice, can be tailored to meet the needs of the specific clients, reflecting among other considerations the clients’ sophistication, cost sensitivity and risk tolerance.

15 The members of the Task Force include:
Sylvia Fung Chin, White & Case LLP;
Lewis R. Cohen, Hogan Lovells US LLP;
Steven Felsenstein, Greenberg Traurig, LLP;
J. Paul Forrester, Mayer Brown LLP;
Robert Hahn, Hunton & Williams LLP;
Lorraine Massaro, K&L Gates LLP;
Mark J. Kowal, The Hinduja Group;
Ellen L. Marks, Latham & Watkins LLP
(Task Force Chair);
Ellen Marshall, Mannatt, Phelps & Phillips, LLP;
Kenneth P. Morrison, Kirkland & Ellis LLP;
Carolyn P. Richter;
James J. Rosenhauer, Hogan Lovells US LLP;
Douglas M. Rutherford, Rutherford & Bechtold LLC;
Paul R. St. Lawrence;
James S. Stringfellow, Skadden, Arps, Slate, Meagher & Flom LLP;
William F. Stutts, Baker Botts LLP;
Charles A. Sweet, Morgan, Lewis & Bockius LLP;
Neil J. Weidner, Cadwalader, Wickersham & Taft LLP;
Stephen T. Whelan, Blank Rome LLP;
Amy Williams, Hunton & Williams LLP;
Cynthia J. Williams, Dechert LLP; and
George M. Williams Jr., Kaye Scholer LLP.

However, the issuance of third-party legal opinions in the context of a nascent area of the law is often problematic for all concerned. A third-party legal opinion is intended to reflect the opinion giver’s professional judgment about how the highest court in the applicable jurisdiction would appropriately resolve the issues addressed in the opinion.16 Third-party legal opinions also typically reflect the “customary practice” of opinion givers, which customary practice includes a common understanding of the language used in the opinion and expectations as to customary due diligence.17 However, no judicial decisions have been issued with respect to any aspect of the risk retention rules, and there is as yet no customary practice or understanding—or is there much by way of guidance, other than that contained in the preamble to the rules’ adopting release. Moreover, to the extent market participants noted ambiguities in the proposed rule text before its final adoption, in many cases those ambiguities were not addressed in the final rule and remain unresolved.

In addition, many of the key aspects of the analysis rely on facts—such as whether the sponsor has a controlling financial interest in the retention holder, whether the fair value determinations are appropriate, or whether assets that are purported to be qualifying assets satisfy the relevant criteria—that will be outside the expertise of the lawyer. Such facts would have to be assumed, and in many instances there would likely be little law remaining to be addressed after taking into account such

17 Id.
assumptions. The problems presented by heavy reliance on factual assumptions would likely be compounded by questions of materiality, with neither lawyers nor those providing factual confirmations having much guidance as to what would be considered “material” in the context of the rules. As discussed below, the issues that affect risk retention compliance, and the factual circumstances on which compliance would be founded, differ so significantly from one structure to the next that Task Force members would find it extremely difficult, if not impossible, to develop a relatively standardized form of reasoned third-party opinion that could be tailored to specific situations, meaning that the cost of opinions would be high relative to their value.

The current state of the law and practice therefore makes it difficult to predict how the “highest court” in a jurisdiction would interpret the rules, and also means that there would be no baseline expectations that would inform either the opinion giver or the opinion recipient as to the scope or language of an opinion.

**The Risk Retention Rules**

The risk retention rules place the responsibility on the sponsor or securitizer of a transaction to hold (or, in some circumstances, to cause to be held) risk in a permitted form, in a minimum amount, and in compliance with certain restrictions on hedging and transfer. The rules include relatively complicated provisions about the form in which the retained interests have to be held, which persons are permitted holders of those interests, and the conditions under and duration for which the interests must be held. In many cases these provisions depend on the asset class and the structure of the related transaction, and include a number of tailored provisions for certain asset classes, as well as special rules for “qualifying” assets within certain asset classes. The rules also include requirements as to the value of the retained interest and certain disclosure and reporting obligations. While there are no specific penalties articulated in the rules for the failure to comply, since the statutory risk retention requirements have been codified in Section 15G of the Securities Exchange Act, the Task Force’s understanding is that regulators would be able to enforce such rules using their enforcement authority under Section 15G(f) of that Act as well as their general enforcement authority with respect to regulations they have appropriately adopted.

Ultimately, the application of these rules to a specific securitization is likely to be extremely fact-dependent. Some of the questions that may arise under the risk retention rules are the following:

- Is the transaction a securitization such that the rules apply?
- Who is the sponsor/securitizer?
- What categories of persons (e.g., majority-owned affiliates of the sponsor, wholly owned affiliates of the sponsor, an originator of the assets, a third-party investor who conducts independent diligence or a lead arranger) may hold the retained interest for a securitization for an asset class with a given structure?

---

18 In other circumstances where an analysis would rely heavily on facts outside the attorney’s expertise, common practice is generally not to give legal opinions. The Task Force notes, as one example, the question of whether a transfer of assets constitutes a fraudulent transfer is not typically addressed in a legal opinion due to the complexity of the factual analysis. The “bankruptcy exception,” the uniformly accepted qualification in third-party closing opinions, applies to exclude fraudulent transfers from the remedies opinion. See TriBar Report § 3.3.2, 53 Bus. Law 591, 623-624 (1998).

19 The risk retention rules, jointly promulgated by the SEC, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and, as to certain provisions, the Secretary of Housing and Urban Development and the Federal Housing Finance Agency, appear in Regulation RR, 17 C.F.R. Part 246.
• Does the person who will hold the retained interest meet the requirements to be considered a member of the category of permitted holders (e.g., is the person a majority-owned affiliate of the sponsor under relevant legal analysis and, if applicable, generally accepted accounting principles)?

• Does the interest satisfy the rules as to the form and amount of the interest that must be retained?

• If applicable, do the assets meet the requirements for classification as “qualifying” assets within a particular category?

• Are any financing structures or capital raising activities of the sponsor or its affiliates consistent with the prohibitions on hedging the retained interest?

• Is the disclosure with respect to the retained interests and who holds them compliant with the requirements of the rules?

The Task Force understands that clients will seek guidance with respect to these questions and others. No doubt there will be some transactions for which the answers to these questions are clear and can be provided with a high degree of certainty. However, for the reasons given above there will likely be numerous cases in which the clarity required for the delivery of a third-party legal opinion is not attainable until common practices develop and regulators or courts provide interpretive assistance. In the absence of such clarity, the Task Force believes that clients should receive and will need to rely on a range of guidance, analysis, structuring options and risk assessments. This would include advice as to how best to conduct due diligence on “qualifying” assets, on the types of factual support a client should obtain, and on the type of accounting conclusions (and how these are expressed) that will need to be reached by the client’s auditors (or in some cases, another accounting firm). It could also include reasoned analyses evaluating proposed structures and key areas of legal uncertainty (which may or may not be in writing), including legal assessments, so that clients will be able to make their own determination of the amount of legal risk inherent in a particular structure or approach with the full benefit of their lawyers’ analysis and conclusions. Lawyers will likely find it easier to identify circumstances in which the rules are not met, or in which there is sufficient uncertainty that proceeding with a transaction would be unwise, than to identify circumstances in which a transaction clearly and cleanly falls within the rules. Certainly Task Force members do not currently expect such transactions to be identified with the regularity that would allow the market to establish a convention in which lawyers would be expected to state, to their clients or others, something along the lines of “This transaction will comply with the risk retention rules.”

20 The Task Force acknowledges that lawyers may have a higher degree of legal certainty with respect to some structures and circumstances than others. A vertical strip, for example, does not have the issues with respect to fair value that a horizontal interest presents. As another example, in structures where there is only a single entity that might be considered the sponsor and that entity holds the risk retention itself, rather than through an affiliate, lawyers will likely be fairly comfortable that the retained risk is held by an appropriate person. Transactions in which the sponsor obtained no financing to support the retained interests and had an enterprise-wide policy that prohibited hedging activity related to credit risk do not raise the same issues that are raised by comparable transactions in which financing is obtained or limited hedging—intended to be in compliance with the rule—is conducted. However, the Task Force believes that transactions that present few issues will be much rarer than those that present many, and a market standard regarding legal opinions should not be established based on what may be possible in the context of the simplest structures and least complicated facts.
Third-Party Legal Opinions

In light of the uncertainty in this area, and the qualified nature of the advice lawyers expect to have to give to their clients, Task Force members have had extensive discussions about the appropriateness of third-party legal opinions relating to risk retention and whether third parties, such as the underwriters of the securities being issued, would need or have a right to expect such opinions. Except to the extent of the underwriters’ statutory due diligence defense, which is discussed in the following paragraph, the Task Force believes the answer is that generally they would not.

Despite the general lack of clarity with respect to the detailed application of the risk-retention rules, the Task Force recognizes that underwriters may require customary assurances with respect to disclosures about risk retention to support their due diligence defense under the Securities Act. The risk retention rules generally require specific disclosures regarding the person holding the retained interests, the form in which those interests are being held, and certain fair value determinations and assumptions. The customary assurances provided to underwriters would generally be in the form of a negative assurance or so-called “10b-5” letter, in which the issuer’s attorneys confirm that no matters have come to their attention that have caused them to believe that the disclosures made by the issuer in the disclosure document include any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. Such negative assurance or 10b-5 letters typically exclude financial and statistical information, as being outside the purview of the lawyers, and the Task Force would expect that exclusion to extend to and include any fair value calculations.

Negative assurance letters are not legal opinions. They are statements of belief, by the lawyers involved in preparing the relevant disclosure document and familiar with the relevant securities laws and other relevant legal matters. The 2008 revision to the report on negative assurance letters prepared by the Subcommittee on Securities Law Opinions of the Committee on Federal Regulation of Securities of the ABA Business Law Section noted that “[v]irtually all negative assurance letters state that counsel does not assume any 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.”21 The report further notes that:

When other counsel has been retained to advise the issuer on a particular aspect of a transaction (e.g., tax, foreign law, intellectual property, or regulatory matters), such counsel usually addresses the portion of the offering document dealing with that matter by giving an opinion on the accuracy of the description rather than by providing negative assurance.22

Given these limits on the role and scope of a negative assurance letter, the general consensus of the Task Force was that risk retention disclosures generally would not need to be excluded from negative assurance letters. The Task Force further concluded that, in giving such negative assurance letters, the provider would not be giving any positive assurance as to compliance with the risk retention rules or as to any other regulatory matters. Rather, counsel would be confirming that nothing had come to their attention that caused them to believe that the disclosures with respect to risk retention contain any untrue statement of a material fact or omit to state a material fact necessary in order to make such statements, in the light of the circumstances under which they were made, not misleading. Consistent with the longstanding meaning of that confirmation, recipients should

22 Id. at 404.
understand that they are not receiving an opinion as to compliance with law.

By contrast, the general consensus view of the Task Force was that third-party legal opinions would not be appropriate with respect to risk retention. Except as noted above with respect to disclosures, the obligation to comply, and the consequences of the failure to comply, generally falls entirely on the sponsor or securitizer. Accordingly, while disclosures about retained interests are important (and required under the rules) so that investors can better understand the alignment of interest between the sponsors and investors, the technical question of whether those retained interests are held as required under the rules does not have the same import. Thus, in light of the very significant issues discussed above, the Task Force is of the view that the uncertainty associated with giving third-party legal opinions—together with the lack of customary practice that would inform the recipient’s understanding of the scope and limits of such opinions—at the present time argues against providing such third-party legal opinions.23

Third-party closing legal opinions serve very specific and well understood purposes in transactions. Those purposes include providing comfort to the third party that the entity with which it is contracting has the legal standing to do so and has taken the steps necessary to enter into an enforceable agreement. Third-party legal opinions can also be used for a more focused analysis and make parties aware of areas of legal uncertainty with respect to a transaction. It is not, however, the lawyer’s role in giving a third-party legal opinion to insure the recipient against legal uncertainty.

The Task Force notes that, beginning as of the effective date of the risk retention rules (December 24, 2015 or December 24, 2016, as noted at the beginning of this report), it may be necessary for lawyers giving typical third-party closing legal opinions to ensure that their opinions do not inadvertently provide an opinion as to compliance with the risk retention rules. In particular, depending on the nature of current qualifications in their opinions, practitioners giving a “no violation of laws” opinion may wish to note expressly that they are not giving an opinion as to whether the transaction complies with the risk retention rules.

The Task Force expects practice with respect to risk retention opinions to develop over time, but believes that setting realistic baseline expectations regarding what is currently practicable may be helpful to all market participants.

- Ellen L. Marks
  Chair, Securitization and Structured Finance Committee of the Business Law Section
  Latham & Watkins LLP
  ellen.marks@lw.com

24 This report is the work product of the Task Force. The Chair wishes to thank, in particular, George Williams, Doug Rutherford, Paul Forrester, and Jim Rosenhauer for their contributions to the preparation and editing of this report.

23 The Task Force also expects to continue its discussions of third-party legal opinions in the context of the risk retention rules after the issuance of this report.
Opinion White Paper
(§ 316(b), Trust Indenture Act)

On April 25, 2016, 28 leading U.S. law firms published an opinion white paper (the “Opinion White Paper”) addressing recent decisions of the United States District Court for the Southern District of New York interpreting Section 316(b) of the Trust Indenture Act of 1939, as amended (the “TIA”) in the Marblegate and Caesars Entertainment cases. These decisions contain language that suggests a significant departure from the widely understood meaning of TIA § 316(b) that had prevailed for decades among practitioners. They have introduced interpretive issues that have disrupted established legal opinion practice and created new obstacles for out-of-court debt restructurings.

Section 316(b) of the TIA generally provides that, notwithstanding any other provision of a qualified indenture to the contrary, the right of any holder of an indenture security to receive payment of principal and interest on or after the due dates expressed in the security may not be impaired or affected without the consent of that holder. These recent decisions suggest that TIA § 316(b) protects more than the legal right to receive payment of principal and interest in the context of a debt restructuring. As the court stated in the first Marblegate decision: “Practical and formal modifications of indentures that do not explicitly alter a core term ‘impair’ or affect a bondholder’s right to receive payment in violation of the Trust Indenture Act only when such modifications effect an involuntary debt restructuring. … The mechanism by which [this transaction] is to be carried out operates, in context, to effect a complete impairment of dissenters’ right to receive payment. … The Trust Indenture Act simply does not allow the company to precipitate a debt reorganization outside the bankruptcy process to effectively eliminate the rights of nonconsenting bondholders.” 75 F. Supp. 3d at 614-17.

The Opinion White Paper, attached as Annex A to this issue of the Newsletter, presents general principles that can guide opinion givers until the interpretive questions raised by these recent cases are resolved through future judicial opinions or legislative action.

- David A. Brittenham
dabrittenham@debevoise.com

Peter J. Loughran
pjloughran@debevoise.com

Jeffrey E. Ross
jeross@debevoise.com

Debevoise & Plimpton LLP

LEGAL OPINION REPORTS

(See Chart of Published and Pending Reports on following page.)

## Chart of Published and Pending Reports

[Editors’ 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 March 31, 2016.]

### A. Recently Published Reports

<table>
<thead>
<tr>
<th>Section</th>
<th>Year</th>
<th>Report Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABA Business Law Section</td>
<td>2009</td>
<td>Effect of FIN 48 – Audit Responses Committee</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Negative Assurance – Securities Law Opinions Subcommittee</td>
</tr>
<tr>
<td></td>
<td>2010</td>
<td>Sample Stock Purchase Agreement Opinion – Mergers and Acquisitions Committee</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 – Legal Opinions Committee</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Legal Opinions in SEC Filings (Update) – Securities Law Opinions Subcommittee</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Revised Handbook – Audit Responses Committee</td>
</tr>
<tr>
<td></td>
<td>2014</td>
<td>Updates to Audit Response Letters – Audit Responses Committee</td>
</tr>
<tr>
<td></td>
<td>2015</td>
<td>No Registration Opinions (Update) – Securities Law Opinions Subcommittee</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Cross-Border Closing Opinions of U.S. Counsel</td>
</tr>
<tr>
<td>ABA Real Property Section (and 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></td>
<td>Comprehensive Report Update</td>
</tr>
<tr>
<td></td>
<td>2009</td>
<td>Venture Capital Opinions</td>
</tr>
<tr>
<td></td>
<td>2014</td>
<td>Sample Venture Capital Financing Opinion</td>
</tr>
<tr>
<td></td>
<td>2015</td>
<td>Revised Sample Opinion</td>
</tr>
<tr>
<td>Florida</td>
<td>2011</td>
<td>Comprehensive Report Update</td>
</tr>
<tr>
<td>Georgia</td>
<td>2009</td>
<td>Real Estate Secured Transactions Opinions Report</td>
</tr>
</tbody>
</table>

---

26 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/](http://apps.americanbar.org/buslaw/tribar/). Reports marked with an asterisk have been added to this Chart since the publication of the Chart in the last quarterly issue of this Newsletter.

27 This Report is the product of the Committee on Legal Opinions in Real Estate Transactions of the Section of Real Property, Trust and Estate Law, Attorneys’ Opinions Committee of the American College of Real Estate Lawyers, and the Opinions Committee of the American College of Mortgage Attorneys (collectively, the “Real Estate Opinions Committees”).
### Recently Published Reports (continued)

<table>
<thead>
<tr>
<th>Location</th>
<th>Year(s)</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>City of London</td>
<td>2011</td>
<td>Guide</td>
</tr>
<tr>
<td>Maryland</td>
<td>2009</td>
<td>Update to Comprehensive Report</td>
</tr>
<tr>
<td>Michigan</td>
<td>2009</td>
<td>Statement</td>
</tr>
<tr>
<td></td>
<td>2010</td>
<td>Report</td>
</tr>
<tr>
<td>Multiple Law Firms</td>
<td>2016</td>
<td>White Paper- Trust Indenture Act §316(b)</td>
</tr>
<tr>
<td>National Association of</td>
<td>2011</td>
<td>Function and Professional Responsibilities of Bond Counsel</td>
</tr>
<tr>
<td>Bond Lawyers</td>
<td>2013</td>
<td>Model Bond Opinion</td>
</tr>
<tr>
<td></td>
<td>2014</td>
<td>501(c)(3) Opinions</td>
</tr>
<tr>
<td>National Venture Capital</td>
<td>2013</td>
<td>Model Legal Opinion</td>
</tr>
<tr>
<td>Association</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New York</td>
<td>2009</td>
<td>Substantive Consolidation – Bar of the City of New York</td>
</tr>
<tr>
<td></td>
<td>2012</td>
<td>Tax Opinions in Registered Offerings – New York State Bar Association Tax Section</td>
</tr>
<tr>
<td>North Carolina</td>
<td>2009</td>
<td>Supplement to Comprehensive Report</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>2007</td>
<td>Update</td>
</tr>
<tr>
<td>South Carolina</td>
<td>2014</td>
<td>Comprehensive Report</td>
</tr>
<tr>
<td>Tennessee</td>
<td>2011</td>
<td>Report</td>
</tr>
<tr>
<td>Texas</td>
<td>2006</td>
<td>Supplement Regarding Opinions on Indemnification Provisions</td>
</tr>
<tr>
<td></td>
<td>2009</td>
<td>Supplement Regarding ABA Principles and Guidelines</td>
</tr>
<tr>
<td></td>
<td>2012</td>
<td>Supplement Regarding Entity Status, Power and Authority Opinions</td>
</tr>
<tr>
<td></td>
<td>2013</td>
<td>Supplement Regarding Changes to Good Standing Procedures</td>
</tr>
<tr>
<td>TriBar</td>
<td>2008</td>
<td>Preferred Stock</td>
</tr>
<tr>
<td></td>
<td>2011</td>
<td>Secondary Sales of Securities</td>
</tr>
<tr>
<td></td>
<td>2011</td>
<td>LLC Membership Interests</td>
</tr>
<tr>
<td></td>
<td>2013</td>
<td>Choice of Law</td>
</tr>
<tr>
<td>Multiple Bar Associations</td>
<td>2008</td>
<td>Customary Practice Statement</td>
</tr>
</tbody>
</table>

*In Our Opinion* 30  
*Spring 2016*  
*Vol. 15 ~ No. 2*
### B. Pending Reports

<table>
<thead>
<tr>
<th>ABA Business Law Section</th>
<th>Sample Asset Purchase Agreement Opinion – Merger and Acquisitions Committee</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Updated Survey – Legal Opinions Committee</td>
</tr>
<tr>
<td></td>
<td>Debt Tender Offers – Securities Law Opinions Subcommittee</td>
</tr>
<tr>
<td></td>
<td>Resale Opinions – Securities Law Opinions Subcommittee</td>
</tr>
<tr>
<td></td>
<td>Third-Party Closing Opinions of Local Counsel&lt;sup&gt;28&lt;/sup&gt;</td>
</tr>
<tr>
<td></td>
<td>Opinions on Risk Retention Rules White Paper – Securitization and Structured Finance Committee &amp; Legal Opinions Committee</td>
</tr>
</tbody>
</table>

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

| Real Estate Opinions Committees (Among Others)<sup>29</sup> | Local Counsel Opinions |

| Texas                   | Comprehensive Report Update                                                   |

| TriBar                  | Limited Partnership Opinions                                                 |
|                        | Opinions on Clauses Shifting Risk                                             |
|                        | Bring Down Opinions                                                          |

| Washington              | Comprehensive Report                                                         |

| Multiple Bar Associations | Commonly Accepted Opinion Practices |

<sup>28</sup> A joint project with WGLO and other groups.

<sup>29</sup> See note 27.
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 2016. Please forward cases, news and items of interest to Tim Hoxie (tghoxie@jonesday.com), Jim Fotenos (jfotenos@greeneradovsky.com), or Susan Cooper Philpot (philpotsc@cooley.com)

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

Opinion White Paper

(TIA § 316(b))
The purpose of this White Paper is to provide guidance to practitioners in their consideration of the application of recent judicial opinions relating to Section 316(b) of the Trust Indenture Act of 1939, as amended (the “TIA”). It was prepared by the law firms named below, but does not necessarily reflect the view of any law firm regarding the proper interpretation of the TIA or the recent judicial opinions discussed below. The guidance set forth in this White Paper is subject to change in light of future judicial opinions interpreting Section 316(b) of the TIA or applicable legislative action. The contents of this White Paper are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters, nor does the distribution of this publication to any person constitute the establishment of an attorney-client relationship.

A. BACKGROUND

The recent decisions of the United States District Court for the Southern District of New York in the Marblegate1 and Caesars Entertainment2 cases contain language that suggests a significant departure from the widely understood meaning of TIA Section 316(b) that has prevailed among practitioners for decades. These cases have introduced interpretive issues that have disrupted established opinion practice. These opinion issues arise where the relevant indenture is qualified under the TIA. Similar interpretive issues may exist where the relevant indenture or other agreement is not subject to the TIA but includes wording substantially similar to the text of TIA Section 316(b), although the applicable law and interpretive principles may differ.

This White Paper presents a set of general principles that can guide opinion givers until such time as the interpretive questions raised by these recent cases are resolved through future judicial opinions and/or legislative action.

B. GENERAL PRINCIPLES

1. Under the recent cases, TIA Section 316(b) is implicated if (a) there is an amendment to an indenture that affects “core terms” – that is, payment terms – or (b) there is collective action on the part of the issuer and some or all of its creditors that constitutes a “debt restructuring” (also referred to in the cases as a

---


“debt readjustment plan” or an “out-of-court debt reorganization”) that has the
effect of impairing the ability of the issuer to make all future payments of principal
and interest to non-consenting noteholders when due.

2. Absent unusual circumstances, a law firm should be able to render an unqualified
legal opinion to a trustee in connection with proposed amendments to one or
more “non-core” terms of an indenture, including amendments to material
covenants, either (a) outside the context of a “debt restructuring,” or (b) in the
context of a debt restructuring where the opinion givers have received evidence
satisfactory to them that the issuer will likely be able to make all future payments
of principal and interest to non-consenting noteholders when due after giving
effect to the Related Transactions (as defined below). Similarly, as discussed
below in Section D, absent unusual circumstances, a law firm should be able to
render an unqualified legal opinion to other transaction participants in these
same circumstances.

- For these purposes, "non-core" terms include all terms other than payment
terms. This conforms to opinion practice prior to the Marblegate and
Caesars Entertainment decisions. Since these cases only addressed the
application of TIA Section 316(b) in the context of a debt restructuring,
opinion givers should be able to rely on this historically understood
meaning of TIA Section 316(b) outside the context of a debt restructuring.

- Whether a transaction or series of transactions constitutes a “debt
restructuring” is a factual matter and may be difficult to discern. The
cases provide little in the way of guidance; however, they do suggest that
a “debt restructuring” is only implicated if the issuer is experiencing
sufficient financial distress that, absent debt modifications, it will likely be
unable to pay its debts when due or will be likely to file for protection under
the bankruptcy code (or any similar regime). Particular attention should be
given to transactions that include releases of material guarantors of the
subject notes, releases of all or substantially all of the collateral securing
the subject notes or a transfer of all or substantially all of the assets of the
issuer and its subsidiaries to entities that will not provide ongoing credit
support for the subject notes.

- The term “Related Transactions” means (1) where one or more indenture
amendments are involved, the proposed indenture amendments and all
related transactions, including the contemplated transactions facilitated by
the proposed indenture amendments, and (2) where no indenture
amendment is involved, the relevant transaction or series of related
transactions.

- Whether an issuer will likely be able to make all future payments of
principal and interest to non-consenting noteholders when due after giving
effect to any particular Related Transactions is a factual matter that will
depend on the issuer’s particular circumstances. As with other factual matters, opinion givers “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 (together, “unreliable information”). . . . If the opinion preparers identify information as “unreliable,” they must find other information to establish the facts. Alternatively, they may include an express assumption regarding those facts in order to give the opinion.”

Opinion givers may, in some cases, conclude that reliance on a customary solvency certificate from a responsible officer of the issuer to the effect that the issuer will be solvent after giving effect to the Related Transactions is sufficient to establish that the issuer will likely be able to make all future payments of principal and interest to non-consenting noteholders when due. In other cases, opinion givers may conclude that reliance on a third-party solvency opinion is more appropriate. The opinion givers are not responsible for independently assessing the accuracy of or analysis underlying the conclusions set forth in such a solvency certificate or third-party solvency opinion.

- If the opinion givers both (a) have reason to believe that the Related Transactions, taken together, constitute a debt restructuring, and (b) have not received evidence satisfactory to them that the issuer will likely be able to make all future payments of principal and interest to non-consenting noteholders when due after giving effect to the Related Transactions, the opinion givers may determine that an unqualified opinion to the trustee or other transaction participants in connection with the Related Transactions is inappropriate or that their opinion should include a discussion of, or reference to, the recent cases.

- However, even in situations where the opinion givers have reason to believe that the Related Transactions, taken together, constitute a debt restructuring and have not received evidence satisfactory to them that the issuer will likely be able to make all future payments of principal and interest to non-consenting noteholders when due after giving effect to the Related Transactions, if the opinion givers have received evidence satisfactory to them that the issuer’s ability to make all future payments of principal and interest to non-consenting noteholders when due is not harmed by, or is improved by, the consummation of the Related Transactions, the opinion givers may conclude that there is no impairment within the meaning of TIA Section 316(b) and that they can therefore deliver an unqualified opinion to the

---

trustee or other transaction participants in respect of the proposed Related Transactions (with or without a discussion of, or reference to, the recent cases).

3. As a matter of customary opinion practice, legal opinions speak as of the date on which they are delivered. We do not believe the decision in Caesars II, in which the court stated that compliance with TIA Section 316(b) can only be determined as of the date on which payment is required, will or should alter customary opinion practice. The determination whether a transaction or series of transactions constitutes a debt restructuring that impairs the issuer’s ability to make all future payments of principal and interest to non-consenting noteholders when due must, of necessity, be based solely on the facts in existence on the date of the opinion. Accordingly, the opinion in Caesars II should not prevent opinion givers from providing, or opinion recipients from accepting, opinions that, per customary practice, speak only as of their date.

C. LEGAL OPINIONS TO INDENTURE TRUSTEES

Set forth below is a non-exclusive list of situations in which the general principles stated above should permit law firms to render legal opinions to trustees in respect of indenture amendments. All of the following situations assume that either (a) the opinion givers have reason to believe that the Related Transactions, taken together, do not constitute a debt restructuring or (b) if the opinion givers have reason to believe that the Related Transactions, taken together do constitute a debt restructuring, the opinion givers have received evidence satisfactory to them that the issuer will likely be able to make all future payments of principal and interest to non-consenting noteholders when due after giving effect to the Related Transactions.

1. Absent unusual circumstances, a law firm should be able to render an unqualified opinion to a trustee in respect of an amendment to an indenture that releases guarantees or collateral when such amendment is allowed by the terms of the indenture with less than a unanimous vote of noteholders.

2. Absent unusual circumstances, a law firm should be able to render an unqualified opinion to a trustee in respect of a waiver of a change of control offer or an amendment to the definition of “Change of Control” when such waiver or amendment is allowed by the terms of the indenture with less than a unanimous vote of noteholders.

3. Absent unusual circumstances, a law firm should be able to render an unqualified opinion to a trustee in respect of an exit consent for a customary covenant strip or other indenture amendments to non-core terms in connection with a refinancing of outstanding notes implemented by way of a cash tender offer or exchange offer.
• The analysis does not change whether the transaction is financed with cash on hand or the proceeds of, or through the issuance of, new equity or new debt (whether such new debt is pari passu with or structurally, contractually or effectively senior to the refinanced debt or matures prior to the stated maturity of the refinanced debt).

4. Absent unusual circumstances, a law firm should be able to render an unqualified opinion to a trustee in respect of one or more amendments to non-core terms of an indenture to facilitate, or in connection with, a leveraged buyout even where that transaction results in an increase in the amount of the issuer’s total indebtedness, or in the amount of the issuer’s indebtedness that is structurally, contractually or effectively senior to, or that matures prior to the stated maturity of, the notes issued under the indenture.

5. Absent unusual circumstances, a law firm should be able to render an unqualified opinion to a trustee in respect of an indenture amendment to permit an internal reorganization involving asset transfers among the issuer and its subsidiaries.

D. CLOSING OPINIONS

The following additional general principles should be used to determine the appropriateness of customary closing opinions.

1. Absent unusual circumstances, a customary opinion provided to a financing source or underwriter/initial purchaser upon the closing of a new money financing, to a dealer manager in connection with an exchange offer (each, a “Financial Intermediary”), or to a trustee under the indenture for newly issued notes, should still be appropriate notwithstanding the recent TIA Section 316(b) cases. For example:

• Routine opinions with respect to the enforceability of an indenture that is qualified under the TIA (and thus incorporates TIA Section 316(b)) or contains a contractual provision substantially similar to TIA Section 316(b). These opinions only address whether the agreement is enforceable in accordance with its terms, not how it will be enforced.

• Routine “no conflicts” opinions that a new money financing, debt exchange or other transaction does not violate an existing indenture, or that a new indenture does not violate another financing agreement. These opinions are given on the basis of the facts as they exist on the date of the opinion and should not be impacted by a future contingency such as a hypothetical future amendment or transaction.

2. However, in circumstances where the opinion givers both (a) have reason to believe that the Related Transactions, taken together, constitute a debt restructuring and (b) have not received evidence satisfactory to them that the issuer will likely be able to make all future payments of principal and interest to
non-consenting noteholders when due after giving effect to the Related Transactions, opinion givers delivering “no conflicts” and/or enforceability opinions to Financial Intermediaries may determine that an unqualified opinion is inappropriate or may wish to consider including a discussion of, or reference to, the recent cases.

Baker Botts LLP
Cleary Gottlieb Steen & Hamilton LLP
Chadbourne & Parke LLP
Covington & Burling LLP
Cravath, Swaine & Moore LLP
Davis Polk & Wardwell LLP
Debevoise & Plimpton LLP
Dechert LLP
Fried, Frank, Harris, Shriver & Jacobson LLP
Goodwin Procter LLP
King & Spalding LLP
Kirkland & Ellis LLP
Latham & Watkins LLP
Mayer Brown LLP
Morgan, Lewis & Bockius LLP
Morrison & Foerster LLP
O’Melveny & Myers LLP
Paul Hastings LLP
Pepper Hamilton LLP
Proskauer Rose LLP
Ropes & Gray LLP
Sidley Austin LLP
Simpson Thacher & Bartlett LLP
Shearman & Sterling LLP
Skadden, Arps, Slate, Meagher & Flom LLP
Sullivan & Cromwell LLP
Vinson & Elkins LLP
Weil, Gotshal & Manges LLP