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FROM THE CHAIR

I am pleased to share with you the Fall 2017 issue of In Our Opinion. Let me bring to your attention the summary of our last meeting under “Business Law Section 2017 Annual Meeting – Legal Opinions Committee” below, and in particular to the discussion of opinions on charter amendments increasing authorized stock. That discussion addresses an issue that has become a thorn in the side of many publicly-traded Delaware companies as they seek to preserve their access to the equity capital markets by ensuring that they have sufficient authorized, unissued shares of common stock. Based on my unscientific poll, while many companies fit the problematic fact pattern, the lawyers representing those companies have not in many cases identified the issue. As a segment of the plaintiffs’ bar is busy sending demand letters based on their review of proxy statements and standard “target selection,” there is an increasing number of companies in the cross-hairs. One of the things that least endears lawyers to clients is when legal issues impact similarly situated companies randomly – the “why me” syndrome. Unpopular as it may be, part of the mission of our Committee is to alert practitioners to issues they may not be familiar with, and probably wish they did not know much about. At our meeting in Washington, D.C. on November 17 we will conduct a follow-up discussion and explore constructive ideas for helping clients and protecting those of us who routinely give “validly issued” opinions in public and private offerings.

Opinions on Agreement Amendments. Let me also flag Don Glazer’s article under “Opinion Practice – Opinions on Amendments to Agreements.” This is the latest in a series of notes where we seek to contribute to the ongoing dialogue among opinion practitioners on issues that affect many and can use some “refreshing.” This is another part of the mission of our Committee. I also want to take this opportunity to call again, as I did in the last issue, for more content from our Committee’s members. Our newsletter can and should serve an important role alongside more formal projects and reports by our Committee, TriBar, the ABA Securities Law Opinions Subcommittee, and the Working Group on Legal Opinions (“WGLO”). Short articles authored by members of our Committee on practical topics on which they have expertise or which they have encountered in their practice are welcome. That could include “point-counterpoint” articles where several authors debate the pros and cons of different approaches – sometimes this format is a catalyst for continued debate and leads to progress on addressing thorny issues, as was the case on “EU Bail-In” regulations. I particularly encourage those who post questions on the ListServe and receive helpful answers to take the next step and pen a short note summarizing the conclusions reached. I would love to see the Newsletter become a natural downstream pool where issues that originate from the ListServe get fleshed out and further debate is fostered. That in turn could become the topic for a CLE program at a Section meeting or be repurposed as an article for publication in Business Law Today.

Statement of Opinion Practices. Nothing in the practice of law is ever settled for the ages. Many of us would not want it any other way. This is true in spades in the field of opinion practice, where we strive to balance the interests of opinion givers with the needs of clients on the opinion recipient side, knowing full well that the balancing act is always a dynamic and unstable one. At our meeting in Washington, D.C. on November 17 we will discuss in detail the current draft of the Statement of Opinion Practices (the “Statement”), a joint project of our Committee and WGLO. You may recall that at the Section’s Spring 2017 Meeting in New Orleans some members of our Committee voiced concerns about selected aspects of the draft Statement that had been presented for approval. They urged caution in moving towards publication because of the risk that

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1 See “Implications of the European Bail-In Legislation for Opinions on Credit Facilities in the United States” and the commentaries thereon in the Spring 2016 issue of the Newsletter (vol. 15, no. 3) at 11-22.
some segments of the bar would reject it on behalf of opinion recipients, and debate would re-open on fundamental aspects of opinion practice that have, over the years, become well settled. As Chair I was taken by surprise, but chose not to withdraw the request for Committee approval of the draft. I also asked for authority to approve, in my discretion, changes to that draft to address the concerns voiced at the meeting. That choice was criticized by some – I am happy to report that I quickly decided that exercising that authority, especially as to more than minor changes, would be the wrong path. Instead, I decided to push for a group effort to better understand the concerns voiced in New Orleans and move constructively and collaboratively towards consensus, rather than forcing issues on a “majority vote” basis. This is how I thought I would best discharge my duty as Chair of our Committee to accomplish the goal of the Statement: to refresh in an evolutionary, not revolutionary, manner fundamental principles of opinion practice and set them out in a clear, concise, high-level document that many bar groups across the country could endorse and that practitioners nationally could rely upon in their daily practice. The goal is neither perfection nor an everlasting shelf life.

Over the Summer and Fall the Joint Committee charged with developing the Statement has worked tirelessly under the leadership of Stan Keller, Steve Weise and many others, devoting a lot of time and energy to listening to everybody’s concerns, rethinking both the logic and the language of key portions of the draft, and pursuing thoughtful compromises that would resolve issues without watering down the Statement. The latest working draft has been posted and will be discussed at our meeting on November 17. I, for one, am proud of both the process and the product. Please take the time to read it (it is available both “clean” and redlined to show changes against the draft presented to our Committee in New Orleans). The objective for the upcoming meeting is to address any remaining issues of substance. We will also highlight aspects of the Statement that the Joint Committee is continuing to discuss. Depending on the discussion at our November 17 meeting, I may ask our Committee to approve the working draft of the Statement, substantially in the form posted, for distribution to interested bar and other opinion groups for their consideration as soon as the Joint Committee is ready for that step. Our Committee will be among those groups, so that all of you will have another opportunity to review a “final draft” of the Statement. I expect to be able to ask for approval by our Committee for publication of the Statement at the Section’s Spring Meeting in April 2018. As a reminder, the Joint Committee will also prepare a version of the Core Opinion Principles drawn from the Statement, along the lines of the version prepared for our Committee’s meeting in New Orleans on April 7, 2017, for use by those who wish a more concise document for incorporation or attachment to opinion letters.

I hope to see you at the Section’s Fall Meeting in Washington, D.C. on November 16-18.

- Ettore A. Santucci, Chair
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What follows are the presently scheduled times of meetings and programs of the Fall Meeting that may be of interest to members of the Legal Opinions Committee. As of the date of publication of this issue of the Newsletter, meeting rooms have not been set. For updated information on meeting times and places, check here.2

Legal Opinions Committee

Friday, November 17, 2017

Survey of Opinion Practices Task Force: 8:00 a.m. – 9:00 a.m.
Plaza Ballroom I, Ballroom Level

Committee Meeting: 9:30 a.m. – 11:00 a.m.
Plaza Ballroom I, Ballroom Level

Reception: 5:00 p.m. – 6:00 p.m.
Plaza Ballroom I, Ballroom Level

Legal Opinions Committee (continued)

Saturday, November 18, 2017

8:00 a.m. – 9:00 a.m.
Plaza Ballroom II, Ballroom Level

Intellectual Property Opinions Joint Task Force Meeting:
9:30 a.m. – 10:30 a.m.
Plaza Ballroom I, Ballroom Level

Cross-Border Opinions Task Force Meeting:
10:30 a.m. – 11:30 a.m.
Plaza Ballroom I, Ballroom Level

Audit Responses Committee

Friday, November 17, 2017

Committee Meeting:
3:30 p.m. – 4:30 p.m.
The Washington, Ballroom Level

Law and Accounting Committee

Friday, November 17, 2017

Committee Meeting:
2:00 p.m. – 3:30 p.m.
The Washington, Ballroom Level

Securities Law Opinions Subcommittee, Federal Regulation of Securities Committee

Saturday, November 18, 2017

Subcommittee Meeting:
10:00 a.m. – 11:00 a.m.
Ritz Ballroom Salon IIIB, Ballroom Level

2 The URL is https://www.americanbar.org/content/dam/aba/events/business_law/2017/11/fall/alpha_schedule.authcheckdam.pdf.
The Business Law Section held its Annual Meeting in Chicago on September 14-16, 2017. The Section had a full complement of meetings and programs. The following are reports on meetings held at the Annual Meeting of interest to members of the Committee on Legal Opinions.

Legal Opinions Committee

The Legal Opinions Committee met on Friday, September 15, 2017. The meeting was attended, in person or by phone, by approximately 50 members of the Committee. There follows a summary of the meeting.

The Business Law Section held its Annual Meeting in Chicago on September 14-16, 2017. The Legal Opinions Committee met on Friday, September 15, 2017. The meeting was attended by some 50 members in person or by conference call. The following is a summary of the meeting.

Statement of Opinion Practices. Stan Keller updated the Committee on the status of the Statement of Opinion Practices (the “Statement”). The Statement is the work product of a Joint Committee sponsored by the Working Group on Legal Opinions (“WGLO”) and the Legal Opinions Committee. The Statement and related Core Principles derived from the Statement were addressed at length at the Spring 2017 meeting of the Committee held in New Orleans on April 7, 2017, as reported in the summary of that meeting published in the Spring 2017 issue of the Newsletter (vol. 16, no. 3) at 3-4.3

Since the New Orleans meeting of the Committee, a working group of the Joint Committee has been addressing the concerns raised at that meeting. Revised drafts of the Statement have been prepared and are being discussed by the Joint Committee. The principal focus of the discussions so far has been on the provisions dealing with facts and assumptions (Section 5 of the Statement).

Stan is hopeful that the revised Statement will be in a form suitable for review by the Committee at its Fall meeting, to be held in Washington, D.C. on November 17, 2017.

True Sale Opinions. Steve Weise updated the Committee on the resuscitated effort by the American Institute of Certified Public Accountants (“AICPA”) to revise the disclosures (and related support) concerning off-balance sheet entities. The AICPA has been exploring this project on and off for over five years. See, e.g., the discussion of the project at the November 22, 2013 meeting of the Committee, summarized in the Winter 2013 issue of the Newsletter (vol. 13, no. 2 at page 5). The project is back under consideration by the AICPA, including an exploration of requiring more extensive true sale opinions from audit clients’ counsel, requiring counsel to address all relevant laws in giving a true sale opinion, including fraudulent conveyance laws and alter ego principles. The ad hoc group representing the Section in its discussions with the AICPA includes Steve, Stan Keller, Tom White, and Will Buck.

The ad hoc group convinced the AICPA some years ago not to pursue an expansion of the scope of true sale opinions given by audit clients’ counsel, and is renewing its efforts to

3 The March 28, 2017 drafts of the Statement and the Core Principles are accessible from the Committee’s website under “Discussion Documents.” The URL is http://apps.americanbar.org/dch/committee.cfm?com =CL510000.
persuade the AICPA that expanded opinion coverage is neither necessary nor appropriate. The ad hoc group has suggested to the AICPA that, instead, a list of red flags be developed to provide guidance to auditors in assessing off-balance sheet entities and their obligations. The effort is ongoing.

True sale opinions are often given together with non-consolidation opinions. See generally TriBar Opinion Committee, Special Report of the TriBar Opinion Committee: Opinions in the Bankruptcy Context: Rating Agency, Structured Financing, and Chapter 11 Transactions,” 46 Bus. Law. 717 (1991). While non-consolidation opinions exclude from their scope veil-piercing doctrines (since such doctrines are typically invoked based on the subsequent conduct of the entity’s business), Steve summarized a recent decision of the California Court of Appeal in Curci Investments, LLC v. Baldwin, 14 Cal. App. 5th 214, 2017 WL 3431457 (August 10, 2017), a reverse veil-piercing case in which a judgment creditor sought to add to the judgment it had secured against the debtor an LLC owned by the debtor. Steve emphasized the unique facts that convinced the Court of Appeal to conclude that reverse veil piercing might be appropriate in this case, including that the target LLC was 99% owned by the debtor and 1% owned by his spouse; that the debtor made no payments on the $5.5 million promissory note he had issued to the creditor or, once judgment was entered on the note for $7.2 million, on the judgment, notwithstanding that, during the time that the debtor was making no payments to the creditor, the LLC had distributed $178 million to him and his wife; and that there was no “innocent” member of the LLC that would be adversely affected by adding it to the judgment against the debtor.

Social Media. Rick Frasch reported on his, Christina Houston’s, and Anna Mills’ efforts to expand the Committee’s use of social media, including Twitter. Rick encouraged members to access the ABA’s Twitter account (@ABALegalOpinion) and the Twitter account of the Legal Opinions Committee of the California Business Law Section (twitter@CalOpinions). Rick and Christina passed out cards providing instructions (including links to a website) on how to download Twitter on phones and computers. For those interested in such guidance, they should contact Rick directly at rmfrasch@gmail.com.

Newsletter Content. Ettore Santucci, Chair, encouraged the members and their colleagues to provide content for the Committee’s Newsletter, In Our Opinion. Submissions need not be lengthy. Notes on issues affecting current opinion practice are welcome. The Chair also reported on the reformulation of the ABA Business Law Section’s Business Law Today (“BLT”), to be launched in October 2017. Christina Houston will serve as the Executive Editor of the Legal Opinions & Ethics Practice Area for BLT. Articles and notes published in In Our Opinion will be eligible for reprinting in BLT.

Opinions on Charter Amendments Increasing Authorized Stock. The Chair and Don Glazer led a discussion of an issue that recently has arisen relating to stockholder approval of charter amendments authorizing additional shares of common stock. Many proxy statements soliciting approval of those charter amendments have stated that the proposal to increase the number of authorized shares is “non-routine” and therefore, unless the beneficial holder of shares held in street name directs how those shares are to be voted on the proposal, those shares will not be voted on the proposal – which would thus have the same effect as if those shares had been voted against the proposal. That statement has proven to be incorrect because Broadridge, acting
independently and without input from the corporation, apparently coded these proposals as “routine,” meaning that brokers have voted shares held in street name in their discretion when not instructed by the beneficial owner. Plaintiffs lawyers have seized on the difference between what proxy statements have said and how shares have been voted by brokers as the basis for sending demand letters to the corporations involved challenging the approval of the amendments in question. One complaint was filed in Delaware, but the case has been settled.

The Chair and Don explained that the difference between corporations’ and Broadridge’s position on whether a proposal to authorize additional common shares was routine derives from the fact that NYSE Rule 452.11 prohibits the voting of undirected shares on a proposal to increase the number of authorized preferred shares but is silent with regard to a like proposal for common shares. Whatever the reason, however, the disconnect between what proxy statements have said and how shares, in fact, were voted presents for lawyers the question whether they can give a “duly authorized and validly issued” opinion on stock authorized pursuant to a proxy statement indicating that shares held in street name would not be voted absent instructions by a beneficial owner. Don pointed out that a corporation cannot ascertain whether the outcome would have been different had Broadridge coded the proposal as non-routine because it has no way to determine which broker voted which shares or the basis for each broker’s decision how to vote undirected shares.

The Chair indicated that, even though a proxy statement indicated that undirected shares would not be voted, many Delaware lawyers are comfortable giving a duly authorized opinion on shares authorized more than three years ago on the basis that the three-year period provided in the Delaware statute of limitations has run (which statute, although not applicable to the Delaware Court of Chancery, would likely be applied when the disclosure error was innocent, as it typically would be). He indicated, however, that Delaware lawyers have not yet gotten comfortable giving an unqualified duly authorized opinion on common shares authorized by a charter amendment approved in the last three years. Although Delaware lawyers view the equities of the situation to be favorable to the corporation, they would likely

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4 See Patel v. Galena Biopharma, Inc. (“Galena”) (Del. Ch. # 2017-0325-JTL). Plaintiff’s allegations are detailed in its Verified Stockholder Class Action Amended and Supplemented Complaint, dated June 2, 2017. Settlement of the case was announced on July 28, 2017. See Galena’s 8-K (Event Date: July 24, 2017).

Galena elected to seek its stockholders’ ratification of the allegedly defective stockholder approvals of increases in the number of shares of its authorized common stock, and an allegedly defective stockholder approval of a reverse stock split, pursuant to Section 204 of the Delaware General Corporation Law. Galena’s stockholders approved the ratifications at a special meeting held July 6, 2017. See Galena’s Proxy Statement, dated June 8, 2017, and its 8-K (Event Date: July 6, 2017) announcing the results of the meeting. (In its Proxy statement, Galena disclosed that, under the rules of the NYSE, the stockholder ratifications were deemed “routine” matters.)

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5 Rule 452.11 provides that, after proxy material has been reviewed by the Exchange, each meeting will be designated by an appropriate symbol in the list of meetings of stockholders appearing in the NYSE’s Weekly Bulletin to indicate (a) that the members may vote a proxy without instructions from the beneficial owners, or (b) that members may not vote specific matters on the proxy, or (c) that the members may not vote the entire proxy. Generally speaking, a member may not give or authorize a proxy to vote shares without instructions from the beneficial owners when the matter to be voted upon includes, inter alia, the authorization or creation of preferred stock or increases in the authorized amount of existing preferred stock. Rule 452.11(7).
note this issue in the opinion because, when the statute of limitations has not run, they believe that there is not an absolute “time-barred” defense to a disclosure-based claim with respect to the amendment.

Typically, the issuer has no role in how Broadridge codes a proposal and does not even know whether a proposal has been coded as indicated in its proxy statement. Therefore, Don and the Chair expressed the view that, considering that a corporation has no control over Broadridge and has no responsibility under state corporation law beyond turning proxies over to the inspector of elections, it is difficult to see how Broadridge’s coding creates a legal issue for a corporation when (i) the inspector of election has certified the vote on the basis of properly submitted proxies and (ii) the corporation in its proxy statement disclosed the non-routine nature of the proposal in good faith, based on its interpretation of NYSE Rule 452.11.

Don noted the problem, if one existed, applied equally to corporations organized in states other than Delaware and asked whether those at the meeting practicing in other states would be willing to give an unqualified opinion on corporations organized in their states. Though this was the first time they had considered this question, lawyers practicing in California, New York, Illinois and Massachusetts said they would.

The Chair concluded the discussion by saying that he was hopeful that Delaware would find a way to fix the problem legislatively so as to avoid Delaware corporations having to resort to a Section 204 stockholder ratification or some other “cleansing” process to eliminate the risk of their being unable to obtain an unqualified opinion when they wish to issue common shares in a financing.

Auditing Standard 3101. Tom White (WilmerHale) reported on the recent approval by the Public Company Accounting Oversight Board (“PCAOB”) of new Auditing Standard 3101, “The Auditor’s Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion.” Tom referred the Committee to his recent article on this topic in the current issue of In Our Opinion (Summer 2017, vol. 16, no. 4, at 13-16). The most important change to be made by the new standard is the requirement that auditors discuss “critical audit matters” (“CAMs”) in their audit reports. That discussion will supplement the audit report’s traditional “pass/fail” opinion on whether or not an issuer’s financial statements fairly present, in all material respects, the company’s financial condition, results of operations and cash flows in accordance with U.S. generally accepted accounting standards.

The new standard raises questions about how it may apply to auditing of loss contingencies, and therefore how, if at all, the statement may affect audit letter requests furnished to the company’s counsel.

The new standard is subject to approval by the SEC. Tom referred Committee members to his article for a discussion of the potential impact of the new audit report standard, in which he concludes that “the potential impacts of the new audit report standard suggests that a dialogue between the legal and auditing professions may be worthwhile to address potential concerns before the CAM standard takes effect.”

Legal Opinions for Participants in the Cannabis Industry. Some 30 states and the District of Columbia permit some form of legalized cannabis use. With the passage in California of Proposition 64, legalizing recreational marijuana use for adults 21 and older (to be effective January 1, 2018), there is intense interest by participants and prospective participants and their advisors in the cannabis industry and the legal aspects of the industry, due in no small measure to the tension between the law of the many states that now permits production and sale of cannabis and federal law, which continues to treat cannabis as an illegal drug. See generally B. Reinhart, “Dazed & Confused,” Criminal Justice 4-9 (Winter 2017).
Jim Fotenos (remotely by conference telephone) gave a brief report on the challenges for opinion givers in assisting participants in the cannabis industry. All appear to agree that counsel may advise clients who are participants (or contemplating becoming participants) in the industry as to the meaning, scope, and application of state and federal laws regulating cannabis. Issues, however, confront counsel in going further and “assisting” clients in the industry by, for example, entity formation, contracting, licensing, and fundraising. The approach of counsel varies widely, with some counsel declining to engage in any “assistance,” and other counsel providing assistance, in reliance on the enforcement forbearance policy of the Department of Justice (as stated in Memoranda from James M. Cole, Deputy Attorney General, re “Guidance Regarding Marijuana Enforcement,” dated August 29, 2013 and February 14, 2014), and the statutory prohibition on the expenditure of funds by the Department of Justice to prevent a state from implementing its medical marijuana laws (currently under review by Congress). For a good discussion of the issues from a state law standpoint, Jim referred Committee members to Ethics Opinion No. 1024 by the New York State Bar Association (September 29, 2014) and, for an example of counsel’s assistance with fundraising, the IPO Prospectus of Innovative Industrial Properties, Inc. (Prospectus dated November 30, 2016), the registration statement for which included Exhibit 5 and Exhibit 8 opinions by issuer’s counsel.

Next Meeting. The next meeting of the Committee will be held at the Section’s Fall meeting in Washington, D.C. on November 17-18, 2017.

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Audit Responses Committee

The Audit Responses Committee met on Saturday, September 16, 2017. The principal discussion points are summarized below.

The Committee met on September 16, 2017. The principal discussion points are summarized below.

Update on Law and Accounting Committee. Randy McClanahan provided an overview of the topics discussed during the ABA Business Law Section Law and Accounting Committee meeting, which immediately preceded the Committee’s meeting. Primary topics discussed at that meeting included new Public Company Accounting Oversight Board AS 3101 (The Auditor’s Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion) and PCAOB AS 2405 (Illegal Acts by Clients). Other discussion points included input that members of the Law and Accounting Committee received during a call with Financial Accounting Standards Board Vice Chairman James L. Kroeker regarding new accounting standards for revenue recognition and leases. With respect to PCAOB AS 2405, Noël Para commented that some accounting firms include nonconforming requests in their audit inquiry letters that ask lawyers to opine on whether the client has committed illegal acts. Stan Keller commented that illegal acts, by definition, would constitute unasserted claims and privileged matters, the disclosure of which would frustrate the fundamental purpose of the ABA Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information (the “ABA Statement”). Mr. McClanahan also noted that the Law and Accounting Committee was working on a comment letter discussing FASB’s exposure drafts amending FASB Concepts Statement No. 8, Conceptual Framework for Financial Reporting, intended to clarify the concept of “materiality,” and Proposed Accounting Standards Update, Notes to Financial Statements (Topic 235): Assessing Whether Disclosures Are Material.
In Our Opinion

Report on PCAOB Release 2017-001. Thomas White discussed new AS 3101 in the context of his recent article, Will the PCAOB’s New Audit Report Standard Affect Audit Letter Practice?, featured in the Summer 2017 edition of In Our Opinion. Mr. White provided background on the new standard, which retains the traditional “pass/fail” approach but changes the auditor’s report in a number of respects, the most important of which is a new requirement that the auditor discuss “critical audit matters” (“CAMs”). A CAM is defined as a matter arising from the financial statement audit “that was communicated or required to be communicated to the audit committee and that: (1) relates to accounts or disclosures that are material to the financial statements and (2) involved especially challenging, subjective, or complex auditor judgment.” The Committee noted the requirement to satisfy both elements before a matter becomes a CAM, including the requirement that the matter relate to an account or disclosure that is material to the financial statements, rather than to whether the matter itself is material to the company taken as a whole.

Emanating from investor demands for a better understanding of the key judgments made by auditors in the course of the audit, the new standard, Mr. White noted, underwent over six years of PCAOB review before being approved by the PCAOB. Mr. White also noted that AS 3101 was subject to approval by the Securities and Exchange Commission, which approval was granted after the date of the Committee meeting, on October 23, 2017, under SEC Release No. 34-81916, File No. PCAOB-2017-01. As approved by the SEC, the new standard will become effective in phases, with the changes in the auditors’ reports other than CAMs disclosure being required in auditors’ reports for audits of fiscal years ending on or after December 15, 2017, and the CAMs disclosure being required in auditors’ reports for audits of fiscal years ending after June 30, 2019 (for large accelerated filers) and after December 15, 2020 (for all other reporting companies). The new CAMs disclosure requirement is not required for audits of emerging growth companies and certain other companies, though the other changes to the auditors’ report will apply for all audits.

As a general observation, Mr. White noted that AS 3101 does not modify auditing standards governing auditors’ confirmation of legal matters nor does it modify the ABA Statement. While AS 3101 might prompt auditors to seek additional information from counsel, in practice in recent years auditors have often sought more information about litigation contingencies, particularly when auditing management’s judgments with respect to investigations. The Committee noted that attorneys will want to remain vigilant when receiving audit inquiry letters, monitoring closely for new requests resulting from the new CAMs disclosure requirement.

Mr. White also discussed the possibility that an auditor could conclude that a loss contingency is a CAM, which may raise questions about the appropriate content of disclosure about the CAM in the auditor’s report. As noted in Mr. White’s article, AS 3101 allows the auditor to disclose non-public information about the company if doing so “is necessary to describe the principal considerations that led the auditor to determine that a matter is a critical audit matter or how the matter was addressed in the audit.” Noting that management might take a different view from the auditors with respect to loss contingency accruals and disclosures, the Committee observed that two levels of judgment apply – first, management makes a determination, and second, the auditors evaluate that judgment. Should management take a divergent view from the auditors, Mr. White noted that it is technically possible that CAMs disclosure could provide more detail than management’s disclosure in the financial statements; in practice, management, counsel and auditors will have the opportunity to discuss the CAMs disclosure before the auditor issues its report. Mr. Para commented that CAMs, by definition, are matters involving “complex auditor judgment,” not a complex management judgment. Mr. Keller suggested that this could
be an area where auditors increasingly want to rely on the guidance of outside counsel in determining the reasonableness of management’s judgments.

Report on Church & Dwight Co., Inc. SEC Comment Letter. Mr. Keller discussed a recent SEC comment letter issued to Church & Dwight Co., Inc. (“CHD”), 6 Notably, the second topic in the SEC’s initial comment letter requested, with respect to matters for which the company believes it is at least reasonably possible that a material loss has been incurred but for which the company is unable to estimate the amount of the loss, a description of “(a) the procedures you undertake on a quarterly basis to attempt to develop a range of reasonably possible loss for disclosure and (b) the specific factors that are causing your inability to estimate and when you expect those factors to be alleviated for each matter.” Mr. Keller commented on the typical detailed company description of its various committee and legal, accounting and operational meetings that occur on a quarterly basis to assess and determine whether it can estimate a range of potential loss under ASC 450 for the legal proceedings in which it is involved. Mr. Keller also noted that in the past, the Division of Corporation Finance often issued comment letters asking companies to explain why an accrual for a loss contingency occurred several periods after the event giving rise to such loss contingency. Looking forward, Mr. Keller noted that the CHD comment letter was issued before the current Director of the Division of Corporation Finance was appointed, and the issues addressed therein may not be of particular focus in comment letters going forward.

Future Committee Discussion Topics/Projects. The Committee next discussed ideas for future Committee discussion topics, which could also serve as the basis for future Committee Statements. A list of possible topics was circulated at the meeting with the meeting agenda. Among other additional topics, the Committee suggested adding to the list the following: (a) PCAOB AS 3101, and (b) practical issues arising in the preparation of audit response letters (e.g., treatment of litigation that concludes prior to the issuance of the financial statements).

Next Meeting. The Committee’s next meeting is scheduled for the Business Law Section’s Fall Meeting in Washington, D.C., on November 17, 2017, at 3:30 p.m. EST.

- Noël J. Para, Chair
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Law & Accounting Committee

The Law and Committee met on Saturday, September 16, 2017. The principal discussion points are summarized below.

The Law and Accounting Committee met on September 16, 2017. The principal items of discussion are summarized below.

1. Summary of Financial Accounting Standards Advisory Council Meeting (FASAC). Tom White reported on the FASAC meeting that had occurred earlier in the week at FASB’s offices.

2. Discussion of PCAOB’s Audit Report Proposal. Jeffrey Rubin led a spirited discussing regarding potential issues and concerns with the PCAOB’s proposal for a new auditors’ reporting model. The discussion focused heavily on the disclosures of critical audit matters. 8

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6 The SEC’s common letter is dated April 20, 2017, and CHD’s response is dated May 2, 2017. Both letters are available through EDGAR.

7 Alan J. Wilson, Esq., of Wilmer Cutler Pickering Hale and Dorr LLP, Content Director of the Committee, served as secretary of the meeting and prepared these minutes.

8 For a detailed discussion of the topic, see Tom White’s article, “Will the PCAOB’s New Audit Report Standard Affect Audit Letter Practice?” in the Summer 2017 (vol. 16, no. 4) issue of In Our Opinion.
3. **FASB Exposure Draft on Materiality.** The Committee discussed whether or not it would be appropriate to send a comment letter on the FASB’s exposure draft on materiality. The consensus was that the Committee should prepare a response. Mike Scanlon offered to resend his draft of a comment letter to the Committee leadership.

4. **FASB Update.** Randy McClanahan gave an update of current FASB developments, including the Committee leadership’s recent conversation with FASB’s Jim Kroeker and Sue Casper. The discussion focused on the definition of materiality, distinguishing liabilities from equity, the new auditing going concern standard, the conceptual framework project and the revenue recognition standard.

5. **Implementation Issues of Current Standards.** The Committee discussed implementation issues regarding the revenue recognition standard and the leasing standard.

6. **Discussion of Recent SEC Remarks Concerning Accounting.** Rani Doyle led a discussion regarding recent comments by the SEC Commissioner Jay Clayton on accounting and its role in the capital markets.

7. **Private Company Council Accounting.** Randy McClanahan led a discussion regarding recent remarks by FASB Chairman Russ Golden on the role of the Private Company Council (an advisory body established by the Board of Trustees of the Financial Accounting Foundation in 2012 to improve the Financial Accounting Standards Board’s standard-setting process for private companies) and how this organization was currently performing.

8. **Next Meeting.** The next meeting of the Committee will be held at the Business Law Section’s Fall meeting in Washington, D.C. on Friday, November 16, 2017.

- Randall D. McClanahan, Chair
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**Opinion Practice**

**Opinions on Amendments to Agreements**

When a loan agreement is being amended, counsel for the borrower sometimes is asked for an opinion on the enforceability of the amendment. That opinion can take two forms. One is on the amended agreement as a whole. The other is on the amendment alone. Not much has been written on opinions on amendments. This note is based on my discussions with experienced opinion practitioners. The focus is on amendments to loan agreements, but the analysis should apply to amendments to other agreements as well.

When giving an opinion on the enforceability of an amended loan agreement as a whole, borrower’s counsel needs to do the same work as is required for an opinion on any agreement—plus a little more. Thus, borrower’s counsel needs to confirm (i) that the agreement and the amendment have received the approvals the borrower is required to obtain under the law under which the borrower was organized and its charter and bylaws, and (ii) that the agreement and the amendment have been executed and delivered and that, subject to standard qualifications, their terms are enforceable under the law covered by the opinion. The “plus” is that the opinion preparers also need to confirm that the amendment has received the approvals required by the original agreement (excluding any approvals the lender is required to obtain).

When the opinion preparers have given an opinion on the enforceability of the original agreement, all they will need to do to give an opinion on the enforceability of the amended agreement, besides satisfying themselves that the amendment has been properly approved, executed and delivered, is to confirm that the approvals they relied on in giving their opinion on the original agreement have not been
rescinded and that the law they are covering has not been changed in a way that renders any of the terms of the original agreement no longer enforceable.

So far, the analysis is straightforward. The analysis becomes more challenging – at least in one respect – for an opinion that is limited to the enforceability of the amendment.

Like an enforceability opinion on an amended agreement as a whole, an enforceability opinion on an amendment alone requires the opinion preparers to satisfy themselves that the amendment has received the necessary approvals, that it has been duly executed and delivered and that the terms of the amendment are enforceable. In addition, if they have given an enforceability opinion on the original agreement, the opinion preparers, whether or not technically required to do so, ordinarily will update that opinion by confirming, as they would for an opinion on the amended agreement, that the original approvals have not been rescinded and the law governing the terms of the original agreement has not changed. Further, and again whether or not required to do so, opinion preparers (even those who have given an opinion on the original agreement) often will include in the opinion letter an express assumption that the original agreement is enforceable. (If the agreement has been previously amended and they have given an opinion on each amendment, they would need to make the same inquiry for each amendment.)

As the “whether or not” clauses in the previous paragraph highlight, a question remains whether an opinion limited to an amendment covers the enforceability of the terms of the original agreement – i.e. whether a limited opinion requires the opinion preparers either to update their original opinion, if they gave one, or, if they did not and do not want to replicate the work the original opinion would have required, to include an express assumption that the original agreement is enforceable. After much back and forth, I have come to the conclusion that they do not. The reason is based not on logic (after all, how can an amendment be enforceable if the agreement being amended is not?) but on the purpose served by limiting the opinion to the amendment. That purpose is to permit the opinion preparers to avoid the time and expense of confirming the enforceability of the terms of the agreement apart from the amendment, and that purpose would be undercut if the limited opinion required the opinion preparers to do the same work they would have had to do to give an opinion on the amended agreement as a whole. A recipient that wants assurance that an agreement continues to be enforceable following its amendment should request an enforceability opinion on the entire agreement. If, on the other hand, the recipient is willing to accept an enforceability opinion that by its terms covers only the amendment, it should be deemed to have understood that the opinion it is receiving is limited to the amendment and does not cover the terms of the agreement apart from the amendment.

As noted above, opinions on amendments to agreements have not received (or at least have not received much) attention in the literature on opinions. This note represents my take on that subject. I readily concede, however, that opinions on amendments to agreements could benefit from the intense discussion that accompanies the preparation of a bar association report. I hope, therefore, that this note will prompt further consideration by bar association groups and others and perhaps at some point lead to a bar association report on the subject.

- Donald W. Glazer
dwglazer@goodwinprocter.com

**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 October 31, 2017.]

A. Recently Published Reports

| ABA Business Law Section | 2009 | Effect of FIN 48 – Audit Responses Committee
| | | Negative Assurance – Securities Law Opinions Subcommittee
| | 2010 | Sample Stock Purchase Agreement Opinion – Mergers and Acquisitions Committee
| | 2011 | Diligence Memoranda – Task Force on Diligence Memoranda
| | 2013 | Survey of Office Practices – Legal Opinions Committee
| | | Legal Opinions in SEC Filings (Update) – Securities Law Opinions Subcommittee
| | | Revised Handbook – Audit Responses Committee
| | 2014 | Updates to Audit Response Letters – Audit Responses Committee
| | 2015 | No Registration Opinions (Update) – Securities Law Opinions Subcommittee
| | | Cross-Border Closing Opinions of U.S. Counsel
| | 2016 | Report on the Use of confirmation.com – Audit Responses Committee
| | 2017 | Opinions on Debt Tender Offers — Securities Law Opinions Subcommittee

| ABA Real Property Section (and others) | 2012 | Real Estate Finance Opinion Report of 2012
| | 2016 | Local Counsel Opinion Letters in Real Estate Financing Transactions

| Arizona | 2004 | Comprehensive Report

| California | 2007 | Remedies Opinion Report
| | | Comprehensive Report
| | 2009 | Venture Capital Opinions
| | 2014 | Sample Venture Capital Financing Opinion
| | 2015 | Revised Sample Opinion
| | 2016 | Third-Party Closing Opinions: Limited Liability Companies and Partnerships

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

10 These Reports are 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”).
<table>
<thead>
<tr>
<th>State</th>
<th>Year(s)</th>
<th>Title</th>
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<tbody>
<tr>
<td>Florida</td>
<td>2011</td>
<td>Comprehensive Report Update</td>
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<td>Georgia</td>
<td>2009</td>
<td>Real Estate Secured Transactions Opinions Report</td>
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<td>City of London</td>
<td>2011</td>
<td>Guide</td>
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<td>2017</td>
<td>Guide Update*</td>
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<td>Multiple Bar Associations</td>
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<td>Customary Practice Statement</td>
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<td>Multiple Law Firms</td>
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<td>White Paper – Trust Indenture Act §316(b)</td>
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<td>2009</td>
<td>Supplement Regarding ABA Principles and Guidelines</td>
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<td>Supplement Regarding Entity Status, Power and Authority Opinions</td>
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<td>Supplement Regarding Changes to Good Standing Procedures</td>
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Recently Published Reports (continued)

| TriBar        | 2008  | Preferred Stock          |
|              | 2011  | Secondary Sales of Securities |
|              | 2011  | LLC Membership Interests |
|              | 2013  | Choice of Law            |
|              | 2017  | Limited Partnership Opinions* |

B. Pending Reports

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<th>ABA Business Law Section</th>
<th>Sample Asset Purchase Agreement Opinion – Merger and Acquisitions Committee</th>
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<td>Updated Survey – Legal Opinions Committee</td>
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<td>Resale Opinions – Securities Law Opinions Subcommittee</td>
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<td>Opinions on Risk Retention Rules White Paper – Securitization and Structured Finance Committee &amp; Legal Opinions Committee</td>
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<td>Core Opinion Principles</td>
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<td>Local Counsel Opinions†</td>
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<td>Bring Down Opinions</td>
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| Washington               | Comprehensive Report                                                |

† A joint project of the ABA Legal Opinions Committee, the Working Group on Legal Opinions, and other bar groups.
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@wcsr.com.

NEXT NEWSLETTER

We expect the next newsletter to be circulated in January 2018. Please forward cases, news and items of interest to Ettore Santucci (esantucci@goodwinlaw.com), Jim Fotenos (jfotenos@greeneradovsky.com), or Susan Cooper Philpot (philpotsc@cooley.com).

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