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FROM THE CHAIR

I am pleased to share with you the Winter 2018-2019 issue of In Our Opinion. Let me join Jim Fotenos in thanking Susan Cooper Philpot for her work as co-editor of this Newsletter for the past five years and congratulating her upon her retirement from active practice. Jim and Susan have made the process of getting this Newsletter out with the highest quality of content and impeccable timeliness easy. It is not. Thank you both. In Our Opinion is an invaluable channel for sharing with our members not only a wealth of information regarding the work of our Committee and other committees in which many of you are active, but also thought-provoking and important articles on substantive topics. It is a critical tool and I suspect Jim would like some help going forward. I encourage anybody who would like to become involved with In Our Opinion to contact me or Jim directly.

Cross-Border Article. Although it is bad form to talk about one’s own work, let me point your attention to an article that I have co-authored with Truman Bidwell: “Bringing Order Out of Chaos 2.0: The Cross-Border Space.” The topic is an important one and I hope the article will stimulate debate at our meeting in Vancouver in March. Our discussions in Austin and Washington, D.C. and discussions Truman and I have had with representatives from the International Bar Association’s Legal Practice Division in Rome give us a solid base for building momentum for the work of the cross-border task force.

Last year was the 50th anniversary of TriBar’s landmark 1998 report and we have had several opportunities to reflect upon the journey, including Arthur Norman Field’s excellent history of TriBar’s opinion reports in the Summer 2018 issue of In Our Opinion (“TriBar II (Third-Party ‘Closing Opinions’): A Product of the 1990s But Still Vital Today”). Truman has helped me gain a better understanding of how it all started when the initial members of TriBar gathered to discuss what has now become a wealth of guidance in the area of third-party closing opinions. Truman also has helped me better appreciate Jim Fuld’s stroke of genius in his landmark article entitled “Legal Opinions in Business Transactions – An Attempt to Bring Some Order Out of Some Chaos” (28 Bus. Law. 915 (1973)).

A few months ago during a WGLO dinner presentation by a distinguished group of early TriBar and ABA Legal Opinions Committee members, I was reviewing my thoughts for a panel the next day when I was struck by how similar the situation in which we find ourselves today with respect to cross-border opinion practice is to the early days of TriBar. So I threw out my prepared remarks for the panel and scribbled out a new draft because what the group was saying and what Jim Fuld pointed out in 1973 resonated with me. Back then he lamented that a few firms at the highest end of the New York legal market controlled opinion practice, though nobody really knew when or how that practice had come about. Fair play and rigorous legal analysis were not always foremost in the relationship between counsel for the opinion recipient and the opinion giver. Opinions were requested and given without a shared understanding of the process for doing so or the words used in third-party opinion letters. The relationship between opinion recipients and opinion givers was fraught with misunderstandings and friction. Many of those same problematic circumstances exist in 2019 in cross-border opinion practice.

So we pirated Jim Fuld’s title and penned an article attempting to draw from the lessons learned over the past decades in U.S. opinion practice and use them to chart a possible path forward for cross-border opinion practice. Starting in the early 1990’s, TriBar and our Committee have ushered in a new era, one where more and more firms adhere to better opinion practices, guided by the golden rule, widely-understood customary practice, and rigorous cost-benefit analysis. What used to be New York-centric axioms have gradually become a national consensus. In the process we
have all learned from each other and the giving and receiving of legal opinions has become more cost-efficient, less contentious and more consistent. Those are the objectives we should strive to achieve in cross-border opinion practice. U.S. and non-U.S. lawyers working together to make opinion practice “work” in today’s globalized marketplace will be as critical, and transformative, as the work that the early members of TriBar did in the domestic U.S. marketplace. If we do things right (and I have no doubt we will!), I suspect that some of the lessons we are going to learn in cross-border practice will have applications in domestic U.S. practice. I believe that is the definition of a virtuous cycle.

Survey of Law Firm Opinion Practices. Next let me congratulate John Power, Arthur Cohen and Rick Frasch for releasing the third confidential survey of law firm practices in preparing and giving third-party closing opinions. I have lost count, but I believe well over 800 firms have received it – this is a record by far. The requested return date is February 15: please be sure the survey is completed on behalf of your firm. If you have questions please send an e-mail to BLSOpinionSurvey@gmail.com.

I remember that when the task force started work on this third survey some felt it was too soon after the second one. Those who have been active in our Committee smiled – they knew it would take years to get the questions and the format just right. It did. The time has been well spent because the new survey is technologically sophisticated, clarifies some of the questions that may have been confusing in the last survey, and adds depth and texture to the questions. This was a monumental effort and we owe the leaders of the survey task force our gratitude.

Looking ahead, we will have three sets of survey data covering many years, thus giving us direct input from the profession on how opinion practices have evolved. I am sure that when the new survey data has been collected and analyzed we will have a treasure trove of information to work with and many jumping-off points for new projects. This is also a great opportunity to widen the reach of our Committee’s activities and membership. I cannot imagine anybody filling out the survey and not appreciating how impactful the guidance that our Committee disseminates has been.

Membership. While we are on the subject of membership, we need to keep our focus on attracting younger lawyers to our Committee. As I have said many times, we all need to actively cultivate “apprentices:” take an interest in them, show them that being active in our Committee helps practicing lawyers, pique their interest in what we do, and encourage them to invest time and energy in learning what most of us have spent many years developing. Among other things, this is an energizing way to keep our own interest in opinion practice fresh. I am surprised on a regular basis when young colleagues come forward with insightful questions that I had not thought of.

Content. Finally let me come back to a topic that is of paramount importance: as the ABA and the Business Law Section continue their intense effort to re-imagine and re-engineer the way in which they serve the profession, and particularly the content that is created and how that content is disseminated, we must do our part. Younger lawyers access information and build networks differently. The best content (and our Committee’s content surely ranks in the top quartile) loses its value if it is known only by a secret few. I know that many of our members think of Twitter as the least logical medium to discuss opinion issues because 140 or 280 characters are not enough to even state an issue, let alone dissect it. Yet Rick Frasch’s zeal in posting @ABALegalOpinion late-breaking cases, articles and developments in the field of legal opinion practice is a good way to integrate younger lawyers into an important ABA activity. If you do not have the time (or inclination) to follow on your own, please consider designating a young associate to follow our posts on Twitter. This can become a model for how a large, active committee like ours can rejuvenate its approach and serve up our learning in an easily accessible way that will, over time, broaden our reach and attract younger lawyers. This will make the
guidance we produce more powerful and more useful to the profession as a whole.

I hope to see you in Vancouver on March 28-30, 2019.

- Ettore A. Santucci, Chair
  Goodwin Procter LLP
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EDITOR’S NOTE

I take this opportunity to pay tribute to my co-editor, Susan Cooper Philpot, who is retiring from her editor duties. Susan has been a productive and loyal companion in the editing of the Newsletter for the past five years. Susan undertook primary responsibility for editing the collection of the summaries of the seminars held by the Working Group on Legal Opinions, which appeared as addenda to the Newsletter two times each year, working closely with Gail Merel of Andrews Kurth Kenyon LLP, WGLO’s editor-in-chief. Editing the WGLO addenda was an enormous undertaking.

Susan, a 39-year partner of Cooley LLP, spent 30 (!) of those years as head of Cooley’s opinion committee. Susan brought enormous experience and insight from her opinion practice as editor of the Newsletter. We shall miss her, and thank her for assisting in the editing of the Newsletter for the past five years.

- James F. Fotenos
  Greene Radovsky Maloney Share & Hennigh LLP
  Editor

FUTURE MEETINGS

ABA Business Law Section
Spring Meeting
Vancouver, British Columbia
Vancouver Convention Center
Fairmont Waterfront
Pan Pacific and
Vancouver Marriott Pinnacle
March 28-30, 2019

What follows are the presently scheduled times of meetings and programs of the Spring Meeting that may be of interest to members of the Legal Opinions Committee. To confirm information on meeting times and rooms, check here.¹

Legal Opinions Committee

Friday, March 29, 2019

Survey of Opinion Practices Task Force:
7:30 a.m. – 9:00 a.m.

Cross-Border Opinions Task Force:
9:00 a.m. – 10:30 a.m.

Program: A Tale of Two (Legal) Opinions:
Customary Opinion Practice Regarding Status Under the Investment Company Act and Compliance with Margin Regulations
2:00 p.m. – 4:00 p.m.

¹ The URL is https://www.americanbar.org/content/dam/aba/events/business_law/2019/03/spring/alpha_schedule.pdf.
Legal Opinions Committee (continued)

Friday, March 29, 2019

Committee Meeting:
4:00 p.m. – 5:30 p.m.

Reception:
5:30 p.m. – 6:30 p.m.

Saturday, March 30, 2019

Intellectual Property Opinions Joint Task Force:
12:00 p.m. – 1:30 p.m.

Securities Law Opinions Subcommittee,
Federal Regulation of Securities Committee

Friday, March 29, 2019

Subcommittee Meeting:
1:00 p.m. – 2:00 p.m.

Law and Accounting Committee

Saturday, March 30, 2019

Committee Meeting:
9:00 a.m. – 10:00 a.m.

Audit Responses Committee

Saturday, March 30, 2019

Committee Meeting:
10:00 a.m. – 11:00 a.m.
The Business Law Section held its Fall Meeting in Washington, D.C. on November 16-17, 2018. The Section had a full complement of meetings and programs. The following are reports on meetings held at the Fall Meeting of interest to members of the Committee on Legal Opinions.

**Legal Opinions Committee**

The Legal Opinions Committee met on Friday, November 17, 2018. There follows a summary of the meeting.

**Statement of Opinion Practices.** Stan Keller (participating by phone) and Steve Weise reported on the status of the Statement of Opinion Practices (the “Statement”) and related Core Opinion Principles (the “Core Principles”) prepared by a committee (the “Project Committee”) jointly formed by the Working Group on Legal Opinions (“WGLO”) and this Committee. Stan has served as co-chair of the Project Committee (the other co-chair being Ken Jacobson (Katten Muchin Rosenman LLP)) and Steve has served as its reporter (with Pete Ezell (Baker, Donelson, Bearman, Caldwell & Berkowitz, PC) and Steve Tarry (Vinson & Elkins LLP) as co-reporters). The project has reached a critical milestone in that the Statement and Core Principles have been approved by this Committee (at its meeting on September 14, 2018) and by the WGLO Board and have been distributed to bar groups and others for approval. Some 20 bar groups have approved the Statement and Core Principles, and, when sufficient approvals have been given, the Statement and Core Principles will be published in The Business Lawyer.

Stan and Steve have written an article on the Statement and Core Principles in the Fall 2018 issue of In Our Opinion (“Obtaining National Consensus on Key Opinion Matters: The Statement of Opinion Practices”).

The Chair complimented the work of the Joint Committee on developing the Statement and Core Principles, and the leadership of Stan, Steve, and the other members of the leadership group.

**ABA Collection of Legal Opinion Reports.** Rick Paszkiet, Development Manager of the Content Committee of the Business Law Section, attended the meeting. Rick encouraged the Committee to update the volume of ABA and TriBar opinion reports published in 2009. The volume is very popular, and it was the consensus of the members that an updated edition should be prepared and published.


FIRRMA requires that regulations be prepared to implement its provisions to become effective no later than March 5, 2020. In the interim, FIRRMA authorizes CFIUS to conduct pilot programs to implement provisions of the Act.

On October 10, 2018, the Department of the Treasury published interim regulations for a FIRRMA pilot program that became effective on November 10, 2018. Under the pilot program, certain non-controlling investments by foreign persons in some U.S. businesses must be submitted to CFIUS for review before closing. (Such reviews are in addition to CFIUS’
historical review of transactions that could result in the control of a U.S. business by a foreign person. Under the pilot program, CFIUS will now review all controlling investments.) A foreign person includes not only a foreign individual, but also a foreign business entity such as a corporation, partnership, limited liability company, or the foreign equivalent of any of the foregoing. Under the pilot program, CFIUS’s can consider national security risks posed by a foreign investment regardless of where the investment originates.

The non-controlling investments by foreign persons that are covered by the pilot program are those that give a foreign investor:

- Access to any material nonpublic technical information in the possession of a U.S. business subject to the pilot program; or

- Membership or observer rights on the board of directors or equivalent governing body of a U.S. business subject to the pilot program or the right to nominate an individual to a position on the board of directors or equivalent governing body of such a U.S. business; or

- Any involvement, other than through the voting of shares, in substantive decision-making of a U.S. business subject to the pilot program regarding the use, development, acquisition, or release of critical technology.

The pilot program covers any U.S. business that produces, designs, tests, manufactures, fabricates, or develops a critical technology that is (i) utilized in connection with the U.S. business’s activity in one or more pilot program industries; or (ii) designed by the U.S. business specifically for use in one or more pilot program industries.

Pilot program industries are identified in an Annex to the interim regulation, and include, besides defense and defense-related industries, computer storage; device manufacturing; electronic computer manufacturing; alumina refining and primary aluminum production; optical instrument and lens manufacturing; basic inorganic chemical manufacturing; petrochemical manufacturing; powder metallurgy parts manufacturing; power, distribution, and specialty transformer manufacturing; primary battery manufacturing; radio and television broadcasting and wireless communications equipment manufacturing; research and development in nanotechnology; research and development in biotechnology; semiconductor and related device manufacturing; and telephone apparatus manufacturing.

The pilot program covers all foreign persons and is not country specific. Mandatory filing requirements apply to all foreign investments that fall within the scope of the pilot program. The filing must be submitted at least 45 days before the scheduled completion date of the investment. The penalties for failure to make required filings can include a civil penalty equal to the value of the transaction. 31 CFR § 801.409(a).

While not included in the pilot program, FIRRMA includes, in its statutory definition of a “covered transaction,” subject to some exceptions, the purchase or lease by, or a concession to, a foreign person of private or public real estate that:

- Is located in the United States; and

- Is, or is located within, or will function as part of, an air or maritime port; or

- Is in close proximity to a United States military installation or another facility or property of the United States Government that is sensitive for reasons relating to national security; or

- Could reasonably provide the foreign person the ability to collect intelligence on activities being conducted at such an installation, facility, or property; or
In Our Opinion

- Could otherwise expose national security activities at such an installation, facility, or property to the risk of foreign surveillance.


A lively discussion took place at the meeting regarding the scope of FIRRMA and its impact on closing opinions for transactions that might be subject to pre-closing review by CFIUS. FIRRMA raises issues for the no violation of law, consents, and enforceability opinions included in opinion letters that address such transactions.

Don Glazer predicted that many opinion givers will include an express exception in their closing opinions for foreign investment laws such as FIRRMA whenever they conclude that a pre-closing review might be required. One important reason is that the facts and circumstances regarding the opinion recipient often will be why a pre-closing filing with CFIUS is required. Moreover, in many transactions a legal opinion that a pre-closing filing is not required would be heavily dependent upon assumptions and qualifications that would limit the opinion’s usefulness.

Forum Selection Clauses. Don Glazer led a discussion of forum selection clauses, prompted by the recent decision of the New York Court of Appeals in Deutsche Bank National Trust Co. v. Flagstar Capital Markets Corp., 2018 WL 4976777 (Oct.16, 2018). In this decision, the New York Court of Appeals considered whether the parties to a contract governed by New York law could agree to defer the commencement of the running of New York’s six-year statute of limitations from the date of a breach of a representation and warranty to the date the breach was discovered. The Court held that the parties could not do so as a matter of public policy and, therefore, found the covenant unenforceable. Don’s conclusion from the case is that opinion preparers should examine transaction documents on which they are giving an enforceability opinion carefully for clauses that may have the effect of lengthening the period for bringing suit beyond the period otherwise permitted by the statute of limitations, such as clauses that expressly state that the statute of limitations for a breach of a party’s representations and warranties will not begin to run (or a cause of action will not accrue) until the breach is discovered.

Don also referred to the recent decision of the Massachusetts Supreme Judicial Court in Oxford Global Resources, LLC v. Hernandez, 106 N.E.3d 556 (September 7, 2018), in which the Court, in what previously was thought to be a modern-view state, held that Massachusetts courts could apply the doctrine of forum non conveniens to negate the parties’ choice of Massachusetts courts as the exclusive forum for adjudicating their disputes. In this case, the trial court dismissed an action to enforce a covenant not to compete against a California employee so that the action could be adjudicated in California. The Supreme Judicial Court affirmed the dismissal. Don suggested, based upon this and other recent decisions in other states in which courts decided to enforce mandatory forum selection clauses, that opinion givers consider excluding mandatory forum selection clauses from the coverage of their enforceability opinions.

Rick Frasch noted for the Committee recent tweets on forum selection decisions, including Sun v. Advanced China Healthcare, Inc., 901 F.3d 1081 (9th Cir. 2018) (affirming the district

On November 1, 2018, an alert was distributed by Rick Frasch, the Committee’s Social Media Director, to the Committee’s Listserv summarizing Don Glazer’s remarks at the WGLO meeting held in New York on October 30, 2018 on FIRRMA’s possible impact on closing opinions. The alert was summarized, with other recent tweets, in the Fall 2018 issue of In Our Opinion under “Recent Developments on Twitter.”

Don’s article on the case is included in the Fall 2018 issue of In Our Opinion (“Accrual Clause Unenforceable to Extend New York Statute of Limitations”).
court’s dismissal of a diversity action that had been filed in Washington Federal District Court based on a forum-selection clause in a share purchase agreement requiring that any disputes related to the parties’ agreements be adjudicated in a California state court); and Quanta Computer Inc. v. Japan Communications Inc., 230 Cal. Rptr. 3d 438 (2018) (in which the California Court of Appeal affirmed the trial court’s dismissal of an action brought by a Taiwanese company alleging breach of contract by a Japanese entity, notwithstanding the parties’ agreement requiring that any dispute between the parties be resolved in the California courts under California law).

Next Meeting. The next meeting of the Committee will be held at the Section’s Spring 2019 Meeting in Vancouver on March 28-30, 2019.

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

Audit Responses Committee

The Audit Responses Committee met on Friday, November 16, 2018. The principal discussion points are summarized below.

Discussion of Website Updates. Alan Wilson provided an update on the Business Law Section’s initiative to update all Section committee websites, which was announced in October 2018. Mr. Wilson noted that the website updates are experiencing functional impediments that the Section is addressing with its web developers. Among other changes, the website updates involve the replacement of the Committee’s listserve with new “discussion posts” and “blog” functions, accessible through the new members-only website. Mr. Wilson is continuing to work with the Section to preserve the content of the Committee’s historical listserve dialogues so that Committee members can access such content from the new website.

Business Law Today Publication Opportunities. Rick Paszkiet, the Section’s Content Development Manager, and Sarah Claypoole, Editor, Business Law Today, provided an update on the latest developments involving Business Law Today and the publication opportunities it offers for the Committee. Members asked about the breadth of Business Law Today’s distribution and the relative stability of content posted electronically on websites hosted by Business Law Today. Ms. Claypoole noted that Business Law Today reaches approximately 40,000 people, with 40% of its website traffic stemming from “organic searches,” meaning visitors who land on the webpage as a result of unpaid (“organic”) search results, such as from searches conducted via Google. Approximately 80% of Business Law Today’s content is publicly available. Mr. Paszkiet noted that Business Law Today tags all of its content, which improves searchability for users. In response to questions about the stability of the Business Law Today website, Mr. Paszkiet noted that the publication is hosted on a web platform separate from the ABA’s primary website and that its agreement with the ABA requires Business Law Today to maintain electronic content indefinitely.

In terms of publication opportunities, Mr. Paszkiet encouraged the Committee to consider topics that might be ripe for publication in the form of an article or a book. For books, Mr. Paszkiet reminded the Committee that books as short as 150 pages are acceptable for publication. He also mentioned that other committees, in an effort to ease the publication burden, have published books that were authored using a “crowdsourcing” approach in which various members authored separate chapters that were edited and combined into one publication. In light of the reach of Business Law Today, members of the Committee suggested reviewing articles published in prior editions of In Our Opinion that might be worth extrapolating and publishing as standalone articles on Business Law Today for broader public consumption.
Future Projects. The Committee discussed possible topics for future Committee programs, statements or other projects. Members commented on the list of topics following this summary, which had been circulated to the Committee ahead of the meeting. The Committee discussed differing interpretations among lawyers related to the relationship between the relevant “look-back” period under client audit inquiry letters on the one hand and attorney audit response letters on the other. As the Committee has discussed at prior meetings and in other forums, views differ when dealing with proceedings or claims that were settled during the look-back period. The Committee generally agreed that establishing a working group to address this topic would be a good next step and could foster valuable discussion of the issue.

Members of the Committee also suggested other issues for the Committee to consider as possible topics for future projects:

- Treatment of government investigations in audit response letters;
- Guidance for preparing in-house counsel responses to auditors; and
- Special issues related to audit response letters for pension plan clients.

With respect to government investigations, some members of the Committee suggested that the topic would be of great interest to practitioners but may not be ripe for a project in light of pending case law and the current resources available on the topic, including recent articles published by Stan Keller and Thomas White and discussions regarding treatment of *qui tam* matters, all of which are available on the Committee’s website.⁴

Next Meeting. The Committee’s next meeting is scheduled for the Section’s Spring Meeting in Vancouver, B.C., March 28-30, 2019.

- Noël J. Para, Chair⁵
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Possible Topics for Discussion and/or Committee Projects

- Understanding the look-back period (“we advise you that since [date of beginning of fiscal year under audit {e.g., January 1, 2017}] we have not been engaged to give substantive attention to loss contingencies coming within the scope of Clause (a)…”)
- Relevant date for existence of loss contingencies (“your response should include matters your firm was handling at [balance sheet date {e.g., December 31, 2018}]…”)
- Treatment of matters arising after fiscal period end-date and before publication of the financials (“… and from that date to the date of response”)
- Treatment of matters settled or otherwise disposed of prior to fiscal period end-date,

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⁵ 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.
including custom of “exit description” for previously reported matters

- Treatment of materiality thresholds – “matters involving amounts exceeding $_________ individually or in the aggregate”
- Undertaking re further advice and consultation (ABA Statement of Policy, Para. 6)
- Handling lateral lawyers (arriving or departing) when preparing audit letter responses
- Handling of matters where Firm is not lead counsel
- Interplay between PCAOB AS 3101 (“The Auditor’s Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion”) and the ABA Statement of Policy

Law and Accounting Committee

The Committee met on Friday, November 16, 2018. A summary of the meeting follows:

Presentation by Chief Accountant of the SEC’s Division of Corporation Finance. Kyle Moffatt, the Chief Accountant of the SEC’s Division of Corporation Finance, reviewed recent developments in the Division, including the following:

- In 2014, the FASB issued a new revenue recognition standard (ASC 606) that substantially changed the accounting for revenue from contracts with customers. The standard became effective for public organizations for annual reporting periods that began after December 15, 2017, including interim reporting periods within that reporting period, and for nonpublic companies and organizations (including not-for-profits) for annual reporting periods that began after December 15, 2018, and interim and annual reporting periods after those reporting periods. Since the new standard was adopted, the SEC has been issuing comment letters addressing, among other things, steps that companies have been taking to understand and implement the new standard. Mr. Moffatt discussed the status of the SEC’s review of compliance with the new standard.

- Pursuant to Rule 3-13 of the SEC’s accounting regulation, Regulation S-X, the SEC may, upon the informal written request of a registrant, and where consistent with the protection of investors, permit the omission of one or more of the financial statements required by Regulation S-X or the filing in substitution therefor of appropriate statements of comparable character. SEC Chair Jay Clayton has, in public statements, encouraged companies to consider whether a request for Rule 3-13 relief would be helpful in connection with their capital-raising activities. Mr. Moffatt discussed certain areas in which the Division has provided Rule 3-13 relief to registrants, as well as the process for requesting relief.

- The Division has expressed concern regarding compliance by registrants with the SEC’s rules regarding non-GAAP financial measures. A non-GAAP financial measure is a numerical measure of a registrant’s historical or future financial performance, financial position or cash flows that:
  (i) Excludes amounts, or is subject to adjustments that have the effect of excluding amounts, that are included in the most directly comparable measure calculated and presented in accordance with GAAP

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in the statement of comprehensive income, balance sheet or statement of cash flows (or equivalent statements) of the registrant; or

(ii) Includes amounts, or is subject to adjustments that have the effect of including amounts, that are excluded from the most directly comparable GAAP measure so calculated and presented.

Among other things, when a registrant publicly discloses material information that includes a non-GAAP financial measure, the registrant must accompany that non-GAAP financial measure with:

(i) A presentation of the most directly comparable financial measure calculated and presented in accordance with GAAP; and

(ii) A reconciliation (by schedule or other clearly understandable method), which shall be quantitative for historical non-GAAP measures presented, and quantitative, to the extent available without unreasonable efforts, for forward-looking information, of the differences between the non-GAAP financial measure disclosed or released with the most comparable financial measure or measures calculated and presented in accordance with GAAP.

The GAAP financial measure must be presented with equal or greater prominence than the non-GAAP measure.8 Mr. Moffatt discussed recent Division comments to registrants regarding the use of non-GAAP financial measures.

- Mr. Moffatt also briefly discussed the SEC’s accounting-related rulemaking, principally the SEC’s recent rule proposal relating to amendments to Rules 3-10 and 3-16 of Regulation S-X.9 Rule 3-10 sets forth financial disclosure requirements for guarantors and issuers of registered guaranteed securities. Rule 3-16 sets forth financial disclosure requirements for issuers’ affiliates whose securities collateralize registered securities. The amendments are intended to improve the disclosure requirements for both investors and registrants, including removing unnecessary disclosure burdens relating to such securities.

Presentation by Tom White. Following Mr. Moffatt’s presentation, Tom White, a member of the FASB’s Financial Accounting Standards Advisory Council (“FASAC”), discussed the topics addressed at the September meeting of the FASAC, including the accounting implications of certain of the changes effected by the Tax Cuts and Jobs Act and the SEC’s Disclosure Update and Simplification Project; pursuant to the latter Project the SEC has requested the FASB to review certain accounting and disclosure requirements under GAAP.10

Presentation by Alan Wilson. Alan Wilson of WilmerHale discussed the 2018 Audit Committee Transparency Barometer recently published by the Center for Audit Quality (“CAQ”).11 The CAQ, together with Audit Analytics, undertook an effort to gauge how public company audit committees approach the public communication of their external auditor oversight activities, by measuring the robustness of proxy disclosures by a large number of public companies. The Barometer details the five-year trends and provides certain examples of disclosures to illustrate best practices. Among

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8 SEC guidance with respect to non-GAAP financial measures is available at https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm.
10 For topics addressed at the FASAC meeting, visit https://www.fasb.org/cs/ContentServer?c=FASBContent_C&cid=1176171404233&d=&pagename=FASB%2FFASBContent_C%2FAdvisoryGroupsPage.
11 For background, see https://www.theqa.org/2018-audit-committee-transparency-barometer.
other things, the Barometer found that 40% of S&P 500 companies disclose the factors they consider in appointing their audit firm, 28% of S&P 500 companies provide an explanation of a change in fees paid to the audit firm, 46% of S&P 500 companies discuss the criteria considered when evaluating the audit firm, and 52% of S&P 500 companies state that the audit committee is involved in audit partner selections.

Alan also reviewed a report by Audit Analytics on recent trends in SEC comments regarding non-GAAP financial measures, both relating to the number of comment letters issued and the subject matter of those comment letters. The most frequent comment related to the presentation of non-GAAP information with undue prominence.

_Presentation by Jeffrey Rubin._ Jeffrey Rubin of Ellenoff Grossman & Schole LLP discussed an Audit Analytics report on adverse internal control assessments and attestations. Pursuant to Section 404 of the Sarbanes-Oxley Act of 2002, companies are required to review their internal control over financial reporting (“ICFR”) and determine whether they are “effective” or “ineffective.” Larger companies are required to have their auditors audit the assessments and to file auditor attestations. Smaller companies, or non-accelerated filers, are not required to file an auditor attestation; they are only required to file management’s assessment of the company’s ICFR. The report found, among other things, that in 2017 4.9% of auditor attestations were adverse and 38.1% of management-only assessments were adverse.

Mr. Rubin also discussed the accounting portions of the 2018 Main Street Investor Survey conducted by the CAQ, relating to the degree of confidence that investors place in audited financial statements and in public company auditors.

_Next Meeting._ The next meeting of the Committee will be held in conjunction with the Spring meeting of the Business Law Section in Vancouver on March 30, 2019.

- Jeffrey W. Rubin, Chair
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## BRINGING ORDER OUT OF CHAOS 2.0: THE CROSS-BORDER SPACE

Publication by the ABA Legal Opinions Committee in 2015 of a report providing guidance to U.S. lawyers on outbound cross-border opinion practice (“Cross-Border Closing Opinions of U.S. Counsel,” 71 Bus. Law. 139 (Winter 2015-2016) – the “ABA C/B Report”) has been followed by growing debate on the role of legal opinions in cross-border transactions. The common theme has been a desire to find ways to make the giving and receiving of legal opinions less contentious, more consistent and more cost-effective. Reflecting on this debate, however, we could not help but wonder whether

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it suffers from a failure to recognize major differences in opinion practice in international transactions as compared to purely domestic transactions; in both areas the word “opinion” is commonly used, but the word can, and often does, have very different meanings. George Bernard Shaw is famously reported to have remarked that Britain and America are two countries divided by a common language. Something similar could be said about lawyers practicing in the cross-border context, where English has become the universal language for negotiating and drafting documents, but commonly used words are often understood very differently by parties and their counsel in different countries.

A. A Bit of History

The ABA C/B Report describes U.S. opinion practice as follows:

“As a condition to closing financial transactions in the United States, legal counsel for one party often delivers to the other party a letter expressing counsel’s opinion on various legal issues relating to its client and the transaction. That opinion letter is commonly referred to as a ‘third-party closing opinion’ or simply a ‘closing opinion’.”

71 Bus. Law at 141.

This practice evolved in the U.S. commercial finance market over many decades: lenders required borrower’s counsel to give the lender a closing opinion providing comfort to the lender on a number of legal issues, including most notably the enforceability of the loan agreement (the so-called “remedies opinion”). The lender could as easily have asked its own counsel, which had drafted the loan agreement, to advise it on those issues, as is and was the practice in England; however, for reasons lost in the sands of time, that was not how the practice evolved. Third-party closing opinions became a standard condition to closing in financing transactions, and the credit agreement typically set out the opinions the lender expected to receive from borrower’s counsel. Negotiations followed on the coverage and wording of the closing opinion. This use of the word “opinion” leads to the concepts of “the opinion giver” and “the opinion recipient.” The former is a lawyer whose client, the borrower, is a commercial counterparty of the lender, but whose work product (the closing opinion) is addressed to a non-client, the lender; the latter is a sophisticated financial institution represented by its own counsel, which typically does not give the lender a legal opinion on the transaction but negotiates on its client’s behalf the opinion that counsel for the borrower delivers at closing.

Third-party closing opinions are a uniquely American “invention.” In many, if not most, non-U.S. jurisdictions, the practice of giving them still is unusual, if not non-existent. While U.S. lawyers ordinarily use the word “legal opinion” to refer to third-party closing opinions, non-U.S. lawyers use the term to describe different work products, ranging from an opinion to one’s own client on selected issues (which is often reasoned legal advice), to glorified due diligence reports prepared by counsel for its client and then made available to other parties (e.g. so-called “vendor due diligence reports”), to an analysis of technical legal matters by an expert retained for the purpose (sometimes called opinions “pro veritate”). This cacophony is unhelpful when lawyers from different jurisdictions come together in cross-border transactions to discuss what should or should not be covered by an “opinion” and who should give what to whom. The cacophony is usually accompanied by a babel of legal norms with respect to rules of professional practice and the duties of a lawyer to a client. Even less uniformity, or clarity, exists across jurisdictions with respect to a lawyer’s liability to a non-client to whom that lawyer is instructed by its client to deliver a work product called “an opinion” for the purpose of facilitating the closing of a transaction in which the lawyer’s primary duty is to a party — i.e. a client — who is adverse to the opinion recipient. This babel creates many problems when U.S.-style third-party closing opinions are requested and given in cross-border
transactions where the transaction’s center of gravity is not in the United States (and sometimes even where it is).

In recent years cross-border transactions have increased dramatically, as a consequence of which U.S. lawyers have increasingly been asked to give third-party closing opinions to non-U.S. recipients. Initially, established opinion forms for U.S. domestic transactions were simply adapted to transactions involving both U.S. and non-U.S. parties. This occurred in part a result of non-U.S. branches of U.S. financial institutions being involved in a transaction and looking to U.S. precedents. However, as the number and complexity of these transactions grew and significant portions of transactions came to be governed by laws other than the law of New York or other U.S. states, opinion givers and counsel for opinion recipients came to recognize that cross-border closing opinions are “different.” The concerns to which this gave rise were the impetus behind the ABA C/B Report, which sought to inform both U.S. and non-U.S. lawyers of the scope and coverage of third-party legal opinions that U.S. lawyers can be expected to give in the context of a cross-border transaction. Although that report covers only a limited number of typical U.S.-style opinions and does not explore the customs of, and limitations imposed on, lawyers in other countries, the ABA C/B Report highlights the uncertainty concerning what opinions should and should not be requested of, or given by, U.S. lawyers. Bar groups in Canada and England have also published guidance, which, like the ABA C/B Report, focuses on what may be expected from lawyers giving legal opinions to non-clients in their jurisdictions, including selected areas of cross-border opinion practice.

B. The Challenge

Our purpose in this article is not to illustrate, or expand upon, the ABA C/B Report or to compare and contrast U.S. opinion practice with opinion practice in other jurisdictions. It is for national and international bar groups to develop meaningful guidance in these areas, and it will take much collaboration and time for that process to play out. The premises of our thinking in the remainder of this article are that in cross-border transactions: (1) U.S. lawyers are regularly asked, and regularly ask non-U.S. lawyers, to give opinions covering matters different from those typically covered in purely domestic transactions, and (2) U.S.-style third-party closing opinions (sometimes referred to in the London market as “across-the-table” opinions) are different in fundamental ways from the practice in many (if not most) other jurisdictions, where lawyers give transactional opinions exclusively or primarily to their own client. To circle back to the ongoing debate about cross-border opinions generally, we may all have run past a threshold issue: deep differences across national markets have been masked by the use of the common English words “legal opinion” by market participants and their counsel in cross-border transactions. Maybe the time has come to reflect on those differences, trace our steps back to some first principles in the practice of law, and define terms more carefully to frame a dialogue that takes into account the inevitable differences among market standards, legal regimes and professional rules around the world.

C. The Meaning of “Opinion”

The U.S. domestic world in which the term “opinion” was hatched was far simpler than the one existing in today’s international markets. Relatively few firms were involved in representing lenders and borrowers in large loan transactions, and those that did tended to be on one side of transactions or the other, representing primarily borrowers or lenders. The cross-border world in which the term “opinion” is now used is far different – in actuality it is a world made up of many different worlds. Thus, we believe it is unhelpful for U.S. lawyers to hold on to their attachment to opinion practice as it has evolved in the U.S. market when they try to develop a workable approach in cross-border opinion practice. We believe it is equally unhelpful for non-U.S. lawyers to feel bound by past practices, either as “foreign lawyers” giving third-party opinions in transactions with their center of gravity in the United States or as recipients of third-party opinions from U.S.
counsel in transactions whose center of gravity is outside the United States.

As a catalyst for moving forward in constructive ways towards developing a robust cross-border opinion practice, we believe it would be better to start with a different term than “opinion,” a new term that is not so loaded with meaning stemming primarily from only one market – the United States. To do so, let us go back to basics: in every commercial cross-border transaction a “space” exists between the end of the principals’ commercial bargain and the completion of the transaction. In that space float a number of technical legal matters relevant to the transaction that are of great interest to one or more parties. Contrary to domestic practice, in cross-border practice those legal matters often cut across the market practices, laws and professional rules of multiple national jurisdictions. Let’s call this space the “cross-border space”:

1. At its boundary on one side sit contract terms like pricing, affirmative and negative covenants, representations, warranties, conditions precedent, risk-allocation provisions and other commercial matters that the parties have negotiated with assistance from their respective counsel in the role of advocates;

2. At its boundary on the other side sit the full set of documents laid out on a closing table to be delivered by both principals and professionals, including accountants, experts, company officers, notaries, agents such as title insurers and collateral agents, and, of course, the parties’ lawyers; and

3. At its core lies a broad collection of legal issues including:

   a. foundational issues such as the status and power of legal entities, actions required to be taken by them to enter into the transaction and, in particular, the actions necessary to ensure that the lender in a loan transaction has a valid security interest in the collateral and the ability to realize on it, requirements for governmental filings and/or approvals to consummate the transaction, and the transaction’s compliance with applicable statutes, rules and regulations;

   b. procedural issues such as the choice of the law governing different aspects of the transaction, the manner in which disputes arising in connection with the transaction will be resolved, including forum selection or arbitration, and related matters such as submission to jurisdiction, service of process, sovereign immunity and the international recognition and enforcement of judgments rendered by national courts or arbitral awards rendered by national or international arbitration panels; and

   c. substantive issues such as the enforceability of core commercial terms, creditors’ relative rights in collateral of different types in different locations, and the reliability of credit enhancement features such as guaranties and make-whole provisions.

The lender in a cross-border financing understandably wants comfort from counsel on many, often most, of these issues as a condition to closing the transaction. Typically its expectation is that such comfort be embodied in a lawyer’s work product (namely an opinion), because the process that lawyers across jurisdictions follow – (i) framing legal issues, (ii) identifying and reconciling applicable laws, (iii) determining the factual underpinnings for the legal analysis, (iv) checking documents and records and (v) coming to a professional conclusion that the matters covered in their work product for the closing were analyzed, structured and documented in such a way as to implement the parties’ intent – ordinarily leads to the level of diligence that financial institutions and their stakeholders expect before completing a transaction.

D. An Alternative Approach

In light of the foregoing, maybe the right starting point for collaboration among lawyers and bar groups from different countries in the area of cross-border opinion practice is not to start with a product called a “legal opinion” at
all but rather to start with a process like the following:

1. Agree on recurring issues in commercial transactions within a typical cross-border space;

2. Decide which issues lend themselves to the particular role and skill of lawyers applying their expertise not as advocates but as experts;

3. Agree on broad rules of engagement to govern the parties’ and their counsel’s interaction in covering those items for the closing, including a cost-benefit analysis and the so-called “golden rule;”

4. Identify which lawyers are the most logical and economical source of comfort on particular matters; and

5. Defer to the market practices, laws and professional rules of those lawyers’ own country to determine the form and content of the comfort available to the parties in order to enable them to complete the transaction.

These are admittedly first principles – what, why, who and how – but they may serve well where all too often the mix of different legal systems, cultural approaches, market practices, rules governing the attorney-client relationship and liability regimes for lawyers make it hard to achieve consensus. Misunderstandings among counsel and confusion among clients too often turn “opinions” in cross-border transactions into a raucous, contentious, time-consuming and expensive exercise that in the end may not serve the parties’ needs – that is not a good outcome for anybody.

1. The U.S. Experience.

As we undertake this journey, we may learn some useful lessons from an examination of the development of third-party opinion practice in the United States over the past four-plus decades. The similarities between opinion practice in the U.S. in the 1970s and in cross-border transactions today are striking. The first writing on the subject of legal opinions in the U.S. in the transactional context was an article by James Fuld in 1973. Mr. Fuld, a partner in a New York law firm, had been asked to give an opinion that he knew the requesting lawyer would not give. His musings over a long holiday week-end resulted in the publication of an article entitled “Legal Opinions in Business Transactions – An Attempt to Bring Some Order Out of Some Chaos,” 28 Bus. Law. 915 (1973). The gist of the article was that the giving and receiving of a legal opinion should not be a negotiation to get “the best deal possible” but rather a determination of the impact of relevant law on the transaction. To that end he proposed the adoption of a “golden rule” – “do not ask for an opinion that you would not give.”

Jim Fuld’s article did far more than cast a light on what had become an unfortunate norm – firms had two sets of opinion files: ones they gave and ones they sought. The article was a catalyst for lawyers to examine the meaning of the words used in closing opinions and the work required to give them. It is hard to believe that this examination had never been done in a systematic way even though opinions had been given for decades. In fact, no common understanding of the meaning of the language used in third-party closing opinions existed. Moreover, lawyers had not focused on the fact that asking for an opinion they would not give was simply inappropriate.

Jim Fuld’s article prompted the formation of the TriBar Opinion Committee (“TriBar”), which originally consisted of lawyers from the three New York bar associations. At the outset it was far from clear that a consensus could be reached on the meaning of language used in opinions and the diligence required to give them. After much hard work, however, consensus on customary opinion practice was reached, and a first TriBar report was published, which included a glossary defining the meaning of words used in legal opinions. That report

15 See Arthur Norman Field’s excellent history of TriBar’s opinion reports in the Summer 2018 (vol. 17, no. 4) issue of In Our Opinion, “TriBar II (Third-Party ‘Closing Opinions’): A Product of the 1990s But Still Vital Today,” at 5-11.
became the basis for future discussions and led during the last fifteen years of the last century to a period of intense activity – TriBar issued a second, updated and expanded, report, the first meeting of lawyers from across the country was held at Silverado, California, many state bar associations published their own reports, the ABA published Model Rules of Professional Conduct, and in 2000 the American Law Institute published the Restatement of the Law Governing Lawyers. The process which Jim Fuld’s article began blossomed with guidance coming from many sources on the preparation and giving of closing opinions.

Giving opinions in U.S. domestic transactions is easier, as compared to cross-border practice, because U.S. lawyers across the country more or less speak the same language, even though the law differs from state to state. Nevertheless, reaching a national consensus on the core meaning of the words in legal opinions and appropriate practices in the giving and receiving of third-party opinions has taken over forty years – and the process is ongoing. An updated statement of basic principles relating to those meanings and practices has recently been prepared by a national group of lawyers working under the direction of a joint committee of the ABA Legal Opinions Committee and the Working Group on Legal Opinions and has been, or will be, adopted by many bar groups around the United States. While practice is constantly evolving, U.S. lawyers now have many sources to which they can look for guidance when an opinion issue arises.


Has the time come to bring some order out of some chaos in cross-border opinion practice? If we go back to the era preceding Jim Fuld’s article, lawyers were giving and receiving legal opinions without a common understanding of the meaning of the language they were using. Lenders asked borrowers to instruct borrower’s counsel to provide the lenders comfort on a host of legal issues as a condition of making loans. Lawyers for the lender did not always have fair play as a top priority in negotiating opinions, yet borrower’s counsel ultimately had little choice but to give the requested opinions so that their client could complete the financing. As Jim Fuld’s article indicated, the situation was chaotic. In many ways the situation in which lawyers giving cross-border opinions find themselves today is similar to that of lawyers in the United States way back then. Both sides may think they know what they are doing, but the ground rules are not clear, and too often lawyers on opposite sides of a cross-border transaction are the legal equivalent of the proverbial ships passing in the night – both sides think they have found safe passage, but, in reality, they are in dangerous waters.

Where do we go from here? Some think that extending U.S.-style practice on third-party closing opinions to cross-border transactions is equivalent to exporting the plague. Others think that after the success of the past four decades in creating consensus in the United States among opinion givers and opinion recipients and building a comprehensive body of customary opinion practices, it is logical to extend their reach into international markets. While we are reluctant to disagree with both sides, we think that they both miss the mark. Third-party closing opinions developed in a specific market at a specific time to address a specific set of circumstances. Jim Fuld’s genius was to look at the situation in 1973 and see what should and could change – and over the ensuing decades much has changed and continues to change. Cross-border opinion practice needs a dose of

16 “Statement of Opinion Practices” (the “Statement”), which has been posted on the ABA Legal Opinions Committee website under the Legal Opinion Resources Center (under Multi-Bar Group Reports), and can be accessed at the following link: https://www.americanbar.org/groups/business_law/migrated/tribar/. It will be published in The Business Lawyer in the Summer of 2019.

that same genius. We can see what’s there: different practices in different jurisdictions leading to frequent misunderstandings, too often leading to acrimony, high cost, and disappointment. Our suggestion is that we attempt to learn what should and can change – hence the idea of experienced lawyers and international bar groups collaborating in an effort to improve practice by examining what we have called “the cross-border space” in the same way that TriBar in the early days looked at the two sets of opinion files which were anathema to Jim Fuld. To do so effectively, the lawyers involved will have to suspend judgment as to whether “their” practice is best, and all parties will have to conclude that the current situation is chaotic and that the restoration of some order will be to their benefit.

3. Cross-Border Opinion Challenges

Let us consider just a few examples of the current chaos in cross-border opinion practice:

1. U.S. lawyers typically give opinions to foreign banks based on customary U.S. opinion practice, relying on customary diligence, which is not stated within the opinion, and using customary language that is not “plain English.” Non-U.S. lawyers representing the opinion recipient, as well as the opinion recipient itself, often know little about these concepts.

2. The ABA C/B Report recommends that U.S. opinion givers, for clarity, state expressly that their opinions are to be interpreted in accordance with the customary practice of U.S. lawyers who regularly give, and U.S. lawyers who regularly advise recipients regarding, similar opinions in U.S. practice. Yet, nobody really knows whether a non-U.S. court deciding a dispute concerning the opinion would in fact do that, as opposed to holding the opinion giver to some other standard of diligence or liability.

3. U.S. lawyers giving opinions to opinion recipients outside the United States ordinarily know little about the law of the recipient’s jurisdiction governing the attorney-client relationship and the liability of lawyers to clients and non-clients. Nonetheless, U.S. practice (unlike the practice in many other countries) is not to cover in closing opinions issues relating to choice-of-law and forum selection matters relating to how disputes regarding the opinion will be resolved.

4. In England, from which the U.S. legal system derives, “across-the-table” opinions are rare and third-party remedies opinions in particular are exceedingly rare (instead lender’s counsel typically gives that opinion to its own client). Yet, in the cross-border context U.S. and English lawyers (and Canadian, Dutch and other lawyers) argue endlessly about the remedies opinion, particularly the rather bizarre version typically referred to as an “as if” enforceability opinion in which the opinion giver assumes that the agreement is governed by the law upon which it is opining, even though that is not the law the agreement provides as the governing law and a court would apply the chosen law, not the law covered in the opinion, in interpreting the agreement.

5. Most firms giving opinions on English law or the law of continental European countries typically require that any lawsuit against them relating to their opinion letter be brought in and under the law of their home jurisdiction. U.S. lawyers representing opinion recipients ordinarily accept these opinions even though they likely have little understanding of how the foreign law on giving and receiving legal opinions compares to U.S. law.

6. Local counsel in jurisdictions where collateral is located are often asked to give opinions covering the borrower’s actions in granting security interests and the lender’s rights in the collateral covered by those interests, even though the rights and remedies of the creditor typically arise under an agreement governed by the law of another jurisdiction. Nobody knows whether borrower’s counsel, who typically coordinates the delivery of the package of closing opinions to the lender, possibly including its own remedies opinion, has a responsibility to make sure that the rights in the collateral and the remedies in the loan agreement actually work as intended. Further, nobody knows whether counsel for the lender, who
wrote the opinion request to local counsel in a faraway jurisdiction, has a responsibility to advise the recipient as to the meaning or adequacy of such local counsel’s opinions.

The above are just a few examples of current recurring situations, but they demonstrate that opinion givers and opinion recipients operate in an uncertain landscape in cross-border transactions. The resources available for guidance are limited, and the gaps are wide. As U.S. lawyers we know how to deal with our clients doing business in various states, but when we venture into the cross-border space things are not so clear. Here are just a few examples:

(i) U.S. style closing opinions cover entity status, power and actions required under the corporation, limited liability or partnership statute of an entity’s U.S. state of organization (most often Delaware), while in many non-U.S. jurisdictions those issues are dealt with not by legal opinions but through the use of centralized records or by notaries or other officials responsible for certifying those matters.

(ii) The relationship between the federal law of the United States and the law of the different states is clear to U.S. lawyers but arcane to most non-U.S. lawyers (e.g., although most legal entities are formed in Delaware, the chosen law for the relevant agreements often is not Delaware); further, mandatory conflict-of-law principles such as the internal affairs doctrine may affect the application of the chosen law in litigation brought against a party; finally, the extent of federal pre-emption of state law can be unclear; and federal and state courts share/compete for jurisdiction.

(iii) The core of U.S. domestic third-party opinions is the remedies opinion, but U.S. lawyers cannot give that opinion when the agreement is governed by non-U.S. law; the “as if” enforceability opinion construct does not work well, if at all, in cross-border transactions; and remedies opinions are not given across the table in many, if not most, non-U.S. jurisdictions.

(iv) An extensive body of U.S. customary opinion practice governs the work that U.S. lawyers are required to do to give opinions and the meaning of those opinions, whether or not the opinion letter expressly says so. In most other countries third-party legal opinions either are not given at all or practice limitations are spelled out in the opinion, which is completely self-contained (e.g. in England there seems to be no reported case law on the question of whether an opinion giver can rely on “customary practice” being implied into an opinion letter).

E. A Way Forward

Third-party opinions in the United States have evolved to a point where giving and receiving them is a relatively smooth process – a matter of conventional and well-accepted practice. Where U.S. lawyers dealing with other U.S. lawyers find themselves today, however, came about over decades and was the result of efforts to identify the reasonable needs of each party and apply cost-benefit analysis to determine who is best in a position to satisfy them; this was not by any means a linear process or always the product of systematic analysis from first principles. Take as a prime example the object of Jim Fuld’s attention back in 1973: borrower’s counsel giving an opinion to the lender covering the enforceability of an agreement that the lender and its counsel drafted – and knew far better than the borrower and its counsel ever could – and further an opinion that Jim Fuld knew the requesting lawyer would not give. That was a matter of established tradition, and although much progress has been made since 1973 in addressing the problems that Jim Fuld identified, U.S. lawyers continue to debate whether the very notion of an across-the-table enforceability opinion makes sense – our London colleagues, for example, believe it does not.

Cross-border opinion practice is still in the formative stage. So, rather than simply transferring U.S. opinion practice to it or engaging in adversarial discussions over whose practice should apply, a far greater opportunity exists than it did in the formative stage of U.S.
opinion practice to engage in rigorous analysis based upon first principles to determine what makes sense for clients and their counsel in different jurisdictions. Today, discussions between opposing counsel on cross-border opinions often start on the wrong foot because “tradition” is allowed to rule without sufficient thought, and the opinion request is based on the law/practice of the requesting counsel’s jurisdiction. As Jim Fuld pointed out in 1973, opinion giving should not be a negotiation to get “the best deal possible”; rather, now accepted wisdom is that it should be a professional exercise where counsel for the parties, working together, collectively give comfort on the application of the law relevant to the transaction. Jim Fuld’s breakthrough idea of a “golden rule” was the right step at the right time to counter a situation that all realized was unfair, inappropriate and often uneconomic. Counsel for the opinion recipient was tempted to demand from the opinion giver the broadest opinion it could think of, often resulting in the opposite of a collaborative, professional exercise. Today, as a result of adherence to the golden rule, application of a cost-benefit analysis, and guidance TriBar and other bar groups have provided to opinion givers and opinion recipients and their counsel, the noxious practices identified by Jim Fuld have largely disappeared.

We believe that, with the benefit of these lessons, progress in cross-border practice should follow an easier path. Third party closing opinions are not as well established in cross-border transactions as they are in the United States. The greater flexibility still existing in the cross-border space permits, we believe, the reasonable needs of the parties to be addressed not just by U.S.-style third-party closing opinions but by a combination of across-the-table opinions, opinions to one’s own client, and opinions or other comfort provided by local counsel retained jointly by the parties to work “for the transaction” as experts rather than as advocates. Notaries, agents and other professional advisors may well complement the parties’ counsel to fill gaps with additional work product at a cost justified by its benefit. The outcome may depend on the circumstances and the particular jurisdictions involved.

Bringing some order to the new world of giving and receiving legal opinions in cross-border transactions will require collaboration and patience. We have worked and are working on several projects that seek to accomplish, or at least seek to help to accomplish, the goals we have discussed in this article. We hope that lawyers and associations of lawyers, both national and international, will want to walk down this road with us.

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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 January 31, 2019.

### A. Published Reports Available From Legal Opinions Resource Center

| 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 | Revised Sample Opinion  
| | 2014 | Sample Venture Capital Financing Opinion  
| | 2016 | Third-Party Closing Opinions: Limited Liability Companies and Partnerships

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17 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, [https://www.americanbar.org/groups/business_law/migrated/tribar/](https://www.americanbar.org/groups/business_law/migrated/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.

18 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”).
### Published Reports Available From Legal Opinions Resource Center (continued)

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<td>Real Estate Secured Transactions Opinions Report</td>
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<th>TriBar</th>
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#### B. Pending Reports

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19 See note 18.

20 A joint project of the ABA Legal Opinions Committee and the Working Group on Legal Opinions, each of which has approved the documents, along with some other bar groups; approval by other bar groups is pending.
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 April 2019. Please forward cases, news and items of interest to Ettore Santucci (esantucci@goodwinprocter.com) or Jim Fotenos (jfotenos@greeneradovsky.com).

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