The Troublesome Twenty Ten:
A Selection of Opinion Issues that Never Go Away

Ettore A. Santucci (moderator), Goodwin
Richard N. Frasch
Donald W. Glazer
Anna S. Mills, Womble Bond Dickinson
Robert S. Risoleo, Sullivan & Cromwell LLP

November 16, 2018
A Selection of Opinion Issues that Never Go Away

• Opinions covering enforceability of forum selection clauses in domestic and cross border transactions
  - mandatory vs permissive
  - inbound vs outbound
  - with or without governing statutes
  - coverage of *forum non conveniens*

• Opinions on transactions subject to CFIUS after the recent amendments to the regulations

• “As if” enforceability opinions in domestic and cross border transactions

• No registration opinions under the 1933 Act: basis, assumptions, customary diligence, limitations and recent SEC guidance
A Selection of Opinion Issues that Never Go Away

- Opinions on guaranties, including implied or excluded coverage for enforceability of the underlying obligations
- Opinions on arbitration clauses in domestic and cross border transactions
- Addressees of negative assurance letters (including “hybrid” transactions like equity lines and agented private placements)
- Opinions on provisions shortening or lengthening the period to sue permitted by the statute of limitations
A Selection of Opinion Issues that Never Go Away

- Opinions covering LLCs and LPs
  - power and action
  - valid existence of LP based solely on Secretary of State’s certificate
  - coverage of events leading to dissolution
  - limitation during liquidation
  - fully paid and non-assessable equity interests
  - limited liability
  - enforceability of the operating/partnership agreement

- Opinions on material amendments to agreements, including coverage of the amendment alone vs bring-down opinions on the original agreement as amended
A Selection of Opinion Issues that Never Go Away

- Inadvertent negative assurances and knowledge-based confirmations, including no conflict, no infringement, compliance with laws etcetera
- No litigation:
  - pending or threatened claims
  - knowledge-based confirmations and transaction-specific “counsel of record” confirmations
  - materially affecting the company/the transaction
- No violation of “law” versus “statutes and rules and regulations thereunder”
- Effect of so-called “Blue Laws” in states that still have them
- Opinions when the highest court hasn’t spoken and lower courts have come up with surprising or conflicting results.
Topics to be covered include the following: this is intended to be an interactive "conversation" about a number of recurring issues where one of the panelists will set up the issue and the panel will engage in a point-counterpoint discussions to give the audience the latest state of play, including cases and practical guidance from a variety of sources:

- “As if” enforceability opinions in domestic and cross border transactions

- Opinions covering enforceability of forum selection clauses in domestic and cross border transactions
  - mandatory vs permissive
  - inbound vs outbound
  - with or without governing statutes
  - coverage of forum non conveniens

- Opinions on governing law clauses in domestic and cross border transactions
  - restatement and other approaches
  - inbound vs outbound
  - with or without governing statutes

- Inadvertent negative assurances and knowledge-based confirmations, including no conflict, no infringement, compliance with laws etcetera

- No litigation:
  - pending or threatened claims
  - knowledge-based confirmations and transaction-specific “counsel of record” confirmations
  - materially affecting the company/the transaction

- Opinions covering LLCs and LPs
  - power and action
  - valid existence of LP based solely on Secretary of State’s certificate
  - coverage of events leading to dissolution
  - limitation during liquidation
  - fully paid and non-assessable equity interests
  - limited liability
  - enforceability of the operating/partnership agreement

- Opinions on arbitration clauses in domestic and cross border transactions

- No registration opinions under the 1933 Act: basis, assumptions, customary diligence, limitations
- Addressees of negative assurance letters (including “hybrid” transactions like equity lines and agented private placements)

- Opinions on material amendments to agreements, including coverage of the amendment alone vs bring-down opinions on the original agreement as amended

- Opinions on guaranties, including implied or excluded coverage for enforceability of the underlying obligations

- No violation of “law” versus “statutes and rules and regulations thereunder”

- Opinions on provisions shortening or lengthening the period to sue permitted by the statute of limitations

- Effect of so-called “Blue Laws” in states that still have them

- Opinions on transactions subject to CFIUS after the recent amendments to the regulations

- Opinions when the highest court hasn’t spoken and lower courts have come up with surprising or conflicting results.