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LEGAL OPINIONS IN REAL ESTATE FINANCING TRANSACTIONS

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INTRODUCTION

Third-party closing opinions are opinion letters delivered by a lawyer at the conclusion of a business transaction to a non-client. For instance, the lawyer for a Client in a commercial mortgage loan transaction may be called upon to deliver an opinion letter to the lender or the lawyer for a seller of assets may be called upon to deliver an opinion letter to the purchaser. In corporate transactions, counsel to an issuer of securities may be called upon to deliver an opinion letter to the underwriter[s].

In recent years, several opinion projects have sought to improve and provide uniformity and guidance in third-party closing opinion practice. In 1998, the Committee on Legal Opinions of the Business Law Section of the American Bar Association (the "Business Law Committee") issued its *Legal Opinion Principles*[1] providing suggestions for customary practice in closing opinions (the "***Principles***"). The Principles are attached hereto as **Appendix A**. Also in 1998, the TriBar Opinion Committee issued its *Third-Party Closing Opinions* report[2] ("***TriBar II***") and a committee composed of members of the Real Property Law Committee of the Association of the Bar of the City of New York and the Real Property Law Section of the New York State Bar Association published its *Mortgage Loan Opinion Report*[3] (the "***1998 Mortgage Loan Opinion Report***"). Lastly in 2002, the Business Law Committee issued *Guidelines for the Preparations of Closing Opinions*[4] providing further guidance on the preparation of closing opinions (the "***Business Law Guidelines***").

While the *Principles* and *Business Law Guidelines* are invaluable resources for real estate practitioners, closing opinions in real estate secured loan transactions present opinion issues not addressed in either document. For that reason, a joint subcommittee of the American College of Real Estate Lawyers and the Committee on Legal Opinions of the Real Property, Probate and Trust Section of the ABA undertook to adapt and expand the *Business Law Guidelines* to provide guidance with respect to closing opinions in real estate secured loan transactions, resulting in the

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1 SECTION OF BUSINESS LAW OF THE AMERICAN BAR ASSOCIATION, COMMITTEE ON LEGAL OPINIONS, *Legal Opinion Principles*, 53 BUS. LAW. 831 (1998) [hereinafter *Legal Opinion Principles*].

2 TRIBAR OPINION COMMITTEE (Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers' Association; Corporation Law Committee, The Association of the Bar of the City of New York; and Special Committee on Legal Opinions of the Business Law Section, New York State Bar Association), *Third Party "Closing" Opinions*, 53 BUS. LAW. 591 (1998).

3 COMMITTEE ON REAL PROPERTY LAW, SUBCOMMITTEE ON MORTGAGE LOAN OPINIONS, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK & ATTORNEY OPINION LETTERS COMMITTEE, REAL PROPERTY LAW SECTION, NEW YORK STATE BAR ASSOCIATION, *1998 Mortgage Loan Opinion Report*, 33 REAL PROP. PROB. & TR. J. 552 (1998) [hereinafter *1998 Mortgage Loan Opinion Report*].

4 SECTION OF BUSINESS LAW OF THE AMERICAN BAR ASSOCIATION COMMITTEE ON LEGAL OPINIONS, *Guidelines for the Preparations of Closing Opinions*, 57 BUS. LAW. 875 (2002).

issuance of the *Real Estate Opinion Letter Guidelines*[5] (the " ***Real Estate Opinion Letter Guidelines***"). The Real Estate Opinion Letter Guidelines are attached hereto as **Appendix B**.

This year a number of major national and state bar associations, committees and groups adopted the Statement on Customary Practice that is attached as **Appendix C**.

OPINION LETTER BASICS

Meaning of an Opinion

An opinion is not a guarantee of the predicted result, rather it is an expression of professional judgment. TriBar II describes a legal opinion as follows:

> An opinion on a legal issue provides the opinion recipient with the opinion giver's professional judgment about how the highest court of the jurisdiction whose law is being addressed would appropriately resolve the issues covered by the opinion on the date of the opinion letter.

Types of Opinions

"Unqualified Opinions" are opinions that are subject only to exceptions, assumptions and limitations which are customary for that type of opinion. The following is an example of an unqualified opinion:

> *The Loan Documents are enforceable in accordance with their terms.*

"Qualified Opinions" are opinions that are subject to exceptions, assumptions and limitations which are not customary for that type of opinion. . The following is an example of a qualified opinion:

> *Assuming that the Borrower and the General Partner of the Borrower have taken all organizational actions required to authorize the execution, delivery and performance of the Loan Documents, the Loan Documents are enforceable in accordance with their terms.*

"Reasoned" or "Explained Opinions" are opinions that are not stated in absolute terms, but provide the legal reasoning behind the conclusions. Reasoned or explained opinions often conclude that a court "would" or "should" reach a certain conclusion. Note here that the *Business Law Guidelines* suggest that "would" and "should" have the same meaning. A reasoned opinion may be qualified or unqualified; the inclusion of reasoning will not transform an unqualified opinion into a qualified opinion

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[5] AMERICAN COLLEGE OF REAL ESTATE LAWYERS ATTORNEYS' OPINION COMMITTEE & SECTION OF REAL PROPERTY PROBATE & TRUST OF THE AMERICAN BAR ASSOCIATION, COMMITTEE ON LEGAL OPINIONS IN REAL ESTATE TRANSACTIONS, *Real Estate Opinion Letter Guidelines*, 38 REAL PROP. PROB. & TR. J. 241 (2003) [hereinafter *Real Estate Opinion Letter Guidelines*].

"Conduit Opinions" are opinions that rely solely upon certificate of public official or some other external source of information as the sole factual support for the opinion. Conduit opinions are discouraged by the *Real Estate Opinion Letter Guidelines*

Format of Opinion Letters

Opinion letters tend to follow a customary format. They are typically written on the issuing law firm's letterhead, addressed to the lender and signed by either the opining attorney or merely with the firm's name. The body of the opinion letter can be divided into five categories.

1. Introduction. The first category is the introduction, usually being only one paragraph. It identifies the transaction, the parties to the transaction and which parties are represented by the opinion giver. Often the extent of the opinion giver's participation in the transaction is specified. For example, if the opinion giver is serving as local counsel to the borrower in a particular jurisdiction, that fact is usually stated. Sometimes the source of the requirement for the opinion is specified, such as the loan commitment or a particular section of the loan agreement.

2. Documents Reviewed. Next comes a list of the documents that have been reviewed by the opinion giver in connection with the opinion letter. These typically include the loan documents, as well as the organizational documents and certificates of good standing regarding the borrower, the borrower's managers or general partners and the guarantors (as the case may be). An opinion should not refer in generic terms to all documents related to a particular transaction (e.g. "all documents contemplated by the loan commitment"), but instead should identify each particular document.

3. Assumptions. Opinions are frequently based on a number of assumptions. These assumptions should be limited to factual matters and legal conclusions that are not otherwise the subject of a substantive opinion within the text of the opinion letter. Typical assumptions include:

- matters regarding the status of other parties to the transaction,
- the enforceability of the documents against other parties to the transaction,
- the competence of the parties signing the documents,
- the authenticity of the documents reviewed,
- the accuracy of representations, warranties and statements of fact set forth in the loan documents,
- the use of the loan proceeds, and
- the absence of certain factual or legal issues that could otherwise impact the opinions being rendered.

The assumptions will vary based on the role of the firm rendering the opinion, the nature of the transaction and the opinions being rendered.

4. Qualifications. Opinion letters normally contain a list of qualifications that set forth exclusions, disclaimers, exceptions and limitations with regard to the opinions rendered. The qualifications in any given opinion letter will, like assumptions, vary based on the role of the firm rendering the opinion, the nature of the transaction and the opinions being rendered. Some examples of common qualifications are:

- bankruptcy, insolvency, reorganization, receivership, fraudulent transfer, fraudulent conveyance, moratorium, redemption and similar laws relating to or affecting the rights or remedies of creditors generally, general principles of equity (whether applied by a court of law or equity) and limitations on the availability of equitable remedies,

- the perfection or enforceability of any lien on personal property other than security interests that arise under Article 9 of the Uniform Commercial Code of the applicable jurisdiction,

- the extent and meaning of opinions that are based on the knowledge or lack of knowledge of the opinion giver,

- matters excluded from the opinions rendered, such as the status of title to property and the priority of liens,

- the exclusion of certain substantive areas of law (e.g. securities, intellectual property and pension and employee benefit laws), and

- the exclusion of the laws of certain jurisdictions (e.g. the laws of any county, municipality or special political subdivision).

5. Opinions. The most important component of any opinion letter is the expression of the opinions rendered, i.e. the lawyer's view of the law as it applies to one or more particular fact situations.

While the introduction and list of documents are usually the first two categories of an opinion letter, the order of the other three categories (i.e. the assumptions, the qualifications and the opinions) are of no consequence.

Requests for opinions typically come in two forms. Some lender's counsel provide only the text of the opinions that are desired. This affords maximum flexibility to borrower's counsel as to the format of the opinion letter. Other lender's counsel provide a suggested form of opinion letter. These forms are rarely adequate. In particular, they usually lack adequate assumptions and qualifications.

Guidelines for the Preparation of Closing Opinions

Opinions should be limited to reasonably specific and determinable matters that involve the exercise of professional judgment by the opinion giver. An opinion should warrant the time and expense required to prepare it.

Opinion requests should be limited to matters that are relevant to the transaction, and should not include assumptions, exceptions and limitations that do not relate to the transaction or the opinions given.

Opinion givers should not be requested to opine as to matters that are beyond their professional competence.

It is inappropriate to render an opinion that the opinion giver recognizes will mislead the recipient.

Conduit opinions, whereby the opinion giver merely recites the content of an official or client document, should be avoided since they do not add any additional value or content within the meaning of the opinion.

It is inappropriate in opinion negotiations to assert a specific opinion as "market" – i.e. that other lawyers are rendering in other transactions.

One is entitled to assume that an opinion recipient is familiar with customary practice concerning the preparation and interpretation of closing opinions.

No one is permitted to rely on a closing opinion to a greater extent than the addressee.

Opinion issues need to be addressed at the earliest stages of a transaction. Opinion recipients should be supplied with the specific opinions requested by the opinion recipient early and any opinion negotiations should be dealt with professionally as early in the transaction as possible. The parties have an obligation to work in good faith to resolve the opinion issues.

An opinion giver should not be requested opine as to the accuracy, or professionalism or reputation, of another opinion giver.

It is not necessary for an opinion giver to disclose any financial interests it may have in the client subject to the opinion, but it is customarily done nevertheless.

An opinion giver must be careful to avoid divulging any confidential information in a third party opinion without the client's consent. This consent may at times be inferred from the relevant transaction documents.

Golden Rule: An opinion giver should not be asked to render an opinion that counsel for the opinion recipient would not render if it were the opinion giver and possessed the requisite expertise. Similarly, an opinion giver should not refuse to render an opinion that lawyers experienced in the matters under consideration would commonly render in comparable

situations. Counsel should be guided by a sense of professionalism and not treat opinions simply as if they were terms in a business negotiation.

Opinion givers should avoid the use of materiality standards in favor of more objective criteria.

In qualifying opinions based on one's knowledge, the opinion giver should explain what is meant by the knowledge of the opinion giver.

As a general rule, one should avoid giving the following types of opinions: adequacy of document opinions, imprecise general assurances as to enforceability, real property title opinions, comprehensive foreign qualification and good standing, lender jurisdictional requirements and comprehensive legal and contractual compliance matters.

Legal Opinion Principles

The opinions contained in an opinion letter are expressions of professional judgment regarding legal matters addressed therein and are not a guarantee that a court will reach any particular results. The opinion letter merely represents a reasoned judgment by the opining attorney as to how the court in the cited jurisdiction(s) would decide a legal issue if the opining attorney presented that issue on the date of the opinion. In accepting an opinion letter, an opinion recipient need not take any action to verify the opinions contained therein under ordinary circumstances.

The opining attorney may vary the customary meaning of an opinion or the scope and nature of work usually required to give the type of opinion sought by expressly stating such variance or reaching an express understanding with the recipient of the opinion or their counsel.

An opinion speaks as of the date on which it is to be delivered, which is normally the closing date of the transaction. The opining attorney has no duty to update an opinion letter based upon events subsequent to the date of the opinion letter. An attorney giving an opinion has a duty to consider all laws that have been enacted, regulations which have been adopted, and decisions which have been published prior to the date of the opinion, including enacted laws and adopted regulations which have effective dates in the future. However, the attorney has no duty to investigate whether a proposed legislation or regulation would affect the opinion being given. If an attorney has actual knowledge that the proposed law or regulation would affect an opinion being given, this attorney should note the same in the opinion.

An opinion letter covers only law that an attorney licensed to practice in the jurisdiction(s) being covered by the opinion letter would reasonably be expected to recognize as being applicable to the entity, transaction, or agreement to which the opinion letter relates. An opinion letter generally addresses (i) all applicable federal and state statutes, laws, judicial decisions, rules and regulations within the specific jurisdiction(s) whose law the opinion letter is intended to cover that are generally available to attorneys in the relevant jurisdiction(s) and (ii) all substantive areas covered by the opinion, unless the opinion by its terms limits its review to specific areas of law or specifically excludes areas of law. An opinion letter should not be read to cover municipal or other local laws unless it expressly lists the same. Even when they are generally recognized as being directly applicable, some laws are understood as a matter of

customary practice to be covered only when the opining attorney refers to them expressly. Examples of these may include: (i) federal and state securities laws and regulations; (ii) federal and state anti-trust and unfair competition laws and regulations; (iii) all federal and state regulations concerning filing requirements.

The opining attorney customarily obtains from appropriate persons certificates covering factual matters that are not readily verifiable by the attorney and upon which the attorney must base the legal opinions. These matters usually include lists of material contracts to which the client is a party, locations where the client has offices or employees, the existence of liens or judgments affecting the client's assets, or pending litigation. An opining attorney should not base their opinion solely upon oral discussions with the client. Unless the opining attorney has knowledge to the contrary, they may rely upon the accuracy and truthfulness of the facts contained in the certificates of their clients. The opining attorney is not obligated to investigate the accuracy of the matters contained in the certificates of the client. The opining attorney may not base the opinion on the factual representations contained in the client's certificates that are tantamount to legal conclusions being expressed. An exception to this, however, is that legal conclusions contained in a certificate of a government official may be relied upon as a legal conclusion being expressed.

It is usually up to the opining attorney to prepare the certificate for execution by the appropriate person of the client, which is the person with knowledge of the facts in question. If the opinion relies on factual certificates, the opinion should so state and the factual certificates should be attached to the opinion in order to avoid confusion as to the facts upon which the opining attorney is relying.

While opinions are customarily based upon factual assumptions, some assumptions need not be expressly stated. Examples of such assumptions, include (i) signatures are genuine; (ii) copies of the documents are identical to the originals; and (iii) parties other than the opining attorney's client have power to enter into the transaction.

Statement on Customary Practice

The statement briefly and simply explains that one should look beyond the four corners of a legal opinion for meaning and context. The Statement originated within the ABA Section of Business Law but has been endorsed by a good number of other bar groups around the country who are listed on the attached, including the Real Property, Trust & Estate Section and the American College of Real Estate Lawyers.

The primary thrust of the Statement is that one cannot take a legal opinion overly literally; that legal opinions are rendered in the context of custom and practice. The Statement should help a judge who otherwise might not be familiar with legal opinion practice to accept the concept of customary practice as opposed to relying solely on the four corners of the opinion document to understand the meaning of the opinion itself and the roles of the lawyers and parties involved.

Terminology

As used in these materials, the following terms shall have the meanings assigned below:

"Client" means the client of the Opinion Giver on whose behalf an Opinion Letter is issued.

"Client Jurisdiction" means the state in which the Client is organized.

"Opinion Giver" means the lawyer or law firm issuing the Opinion Letter.

"Opinion Jurisdiction" means the state whose law governs the opinions in the Opinion Letter.

"Opinion Letter" shall mean a third-party closing opinion letter issued by the Firm to a non-client.

"Opinion Recipient" means the party to whom the Opinion Letter is addressed.

"Transaction Documents" means the documents executed and delivered by a Client in a transaction.

Status Opinion

The Status Opinion is given for Clients that are entities, as opposed to individuals. A typical form of this opinion is as follows:

The Client is a [limited partnership/corporation/LLC], validly existing [and in good standing] in the State.

The standard of care required in giving the Status Opinion includes obtaining current certified copies of the organizational documents and a certificate of existence from the appropriate public authority. If the entity is not one for which public filing is required (*i.e.* – a general partnership or joint venture), then a certificate of one or more of the principals in such entity verifying the facts necessary to support the opinion should be sufficient.

If the Client is not organized in the Opinion Jurisdiction, the Opinion Giver should either assume that the Client is properly organized and validly existing, or rely upon an opinion of counsel from the Client Jurisdiction to that effect.

Authorization Opinion

The Authorization Opinion is also given for Clients that are entities, as opposed to individuals. A typical form of this opinion is as follows:

> *All actions or approvals by the Client, and its [shareholders/partners/members], necessary to bind the Client under the Transaction Documents have been taken or obtained.*

The Authorization Opinion will not be given if the entity is not organized in the Opinion Jurisdiction; rather, the Opinion Giver should assume that the Transaction Documents have been properly authorized or rely upon the opinion of counsel licensed in the Client Jurisdiction.

Execution and Delivery Opinion

The Execution and Delivery Opinion is fairly straightforward, but should not be given unless the Opinion Giver has actual knowledge that the execution and delivery of the Transaction Documents by the Client has occurred. A typical form of this opinion is as follows:

> *The Client has duly executed and delivered the Transaction Documents [and authorized the filing of the Financing Statements] for valid consideration.*

If the Opinion Giver is not physically present at the closing, it should request that copies of the executed Transaction Documents be faxed or otherwise delivered to it. If the Opinion Giver is not provided copies of executed Transaction Documents, the Execution Opinion cannot be rendered, and due execution and delivery of the Transaction Documents should be assumed.

Qualification to do Business Opinion

The Qualification Opinion can take one of two common forms:

> *The Client has duly qualified to do business in the State as a foreign [corporation/partnership/LLC].*

or

> *The Client is not required to qualify to do business as a foreign [corporation/partnership/LLC].*

The former opinion (that the Client is qualified to do business in the Opinion Jurisdiction) is a "conduit" opinion if it is based entirely upon a certification issued by a public official. Conduit opinions are discouraged by Section 1.5.b of the *Real Estate Opinion Letter Guidelines*, as they contain no substantive assurance by the Opinion Givers that is not already provided in the public official certification.

The latter opinion (that the Client is not required to be qualified to do business in the Opinion Jurisdiction), if given, will usually be a reasoned or explained opinion, in that determining whether an entity is "doing business" in a state is normally a fact-driven analysis. If

an opinion to the effect that the Client is not required to qualify is given, the Opinion Recipient may also request an opinion regarding the consequences of failing to qualify (if it is determined that the Client should have done so), whether such failure is capable of being cured and, if so, the steps needed to effect a cure.

Remedies Opinion

Remedies Opinions are opinions to the effect that the Transaction Documents are legal, valid and enforceable against the Client. The "valid and binding" opinion is actually a separate opinion which is for the most part governed by the laws of the Client Jurisdiction, while the "enforceable" opinion is governed by the laws of the jurisdiction chosen by the parties in the Transaction Documents[6]. Regardless of the formulation used to describe a Remedies Opinion, *e.g.*, "legal, valid, binding and enforceable" or just "enforceable", in order to give a Remedies Opinion, the Opinion Givers must conclude that, under the law of contracts of the Opinion Jurisdiction, the Transaction Documents form a contract, that a remedy will be available with respect to the agreements in the Transaction Documents or such agreements will otherwise be able to be given effect, and each remedy provided for in the Transaction Documents will be given effect as stated in the documents.

Remedies Opinions are often requested because the Opinion Recipient may not have its own counsel in the Opinion Jurisdiction. Remedies Opinion practice differs in different areas of the country. These differences are not concerned with the wording of the opinion but rather the meaning of the opinion itself. Does the opinion (i) cover each obligation in the agreement, (ii) cover only the material (or essential) obligations set forth in the agreement, (iii) merely state an agreement has been formed and that certain obligations under it are binding without reference to any specific allegation, (iv) address nothing but the specific remedies set forth in the agreement (even if the agreement provides that no recitation of specific remedies is meant to exclude any other remedy available at law and equity), or (v) relate to all obligations in the agreement except for certain "judicial housekeeping" matters (*e.g.*, governing law, choice of venue, submission of jurisdiction).[7]

The disparity in national practice regarding the treatment of the Remedies Opinion is magnified in real estate secured transactions because real estate Transaction Documents contain numerous provisions, including remedies that may or may not be enforceable under the law of the Opinion Jurisdiction. Due to this imprecision regarding the exact meaning of a Remedies Opinion, Remedies Opinions are usually subject to specific exceptions and qualifications. These qualifications fall into three general categories: the bankruptcy and insolvency qualification, the equitable principles qualification, and other common or specific qualifications.

Every Remedies Opinions should be subject to a bankruptcy and insolvency exception and an equitable principles limitation, such as the following:

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[6] *See* Laurence G. Preble, *The Remedies Opinion Revisited: A Primer for Real Estate Lawyers*, 33 REAL PROP. PROB. & TR. J. 63 (1998).

[7] TRIBAR OPINION COMMITTEE, *Special Report: The Remedies Opinion*, 46 BUS. LAW. 959, 961 (1991).

The opinion set forth in Paragraph ____ of this Opinion Letter [the "Remedies" Opinion] is subject to the effect of bankruptcy, insolvency, reorganization, fraudulent transfer or conveyance, receivership, moratorium and other similar laws affecting the rights and remedies of creditors generally.

The opinion set forth in Paragraph ____ of this Opinion Letter [the "Remedies" Opinion] is subject to the effect of general principles of equity, whether applied by a court of law or equity. No opinion is rendered herein regarding the availability of the remedies of specific performance or receivership.

Additionally, the Remedies Opinion should be subject to either a "laundry list" or a "generic" exception. A "laundry list" or "generic" exception is often accompanied by a form of assurance that notwithstanding these various exceptions (whether specific or general) the Opinion Recipient is still entitled to certain benefits. One type of assurance is the "practical realization" assurance, which has been criticized as being imprecise. As stated by the *Real Estate Opinion Letter Guidelines*

> . . . there is a growing consensus in favor of the use of a version of the ACREL formulation of generic exception: that is, that certain provisions of the Transaction Documents may be unenforceable; however, such unenforceability will not render the transaction documents invalid as a whole nor preclude judicial enforcement of repayment, acceleration of the note or foreclosure on the collateral in the event of a material breach of a payment obligation or other material provisions of the transaction documents.[8]

In certain situations Opinion Givers may wish to add to the generic ACREL assurance with respect to specific matters that are unique to the Opinion Jurisdiction, such as unusual limitations on judicial or non-judicial remedies of which an out-of-state Opinion Recipient may not be aware (*e.g.*, anti-deficiency foreclosure and one-form of action legislation).[9]

Opinion Givers should keep in mind that the Remedies Opinion (as well as the No Violation of Laws Opinion) implicitly includes an opinion that the transaction is not usurious. In most jurisdictions, it is not possible to give an unqualified Usury Opinion. For that reason, it may be appropriate to carve out from the Remedies Opinion (and the No Violation of Law Opinion) the issue of usury and give a separate Usury Opinion. See the discussion of the Usury Opinion below.

Frequently, the law governing the Transaction Documents (especially loan agreements) may be different than the law of the Opinion Jurisdiction. In these situations, Opinion Givers must either make an assumption that the law governing the Transaction Documents is the same as the law of the Opinion Jurisdiction (and there is some question as to whether this opinion gives any value) or opine as if the law of the Opinion Jurisdiction will be applied notwithstanding the express choice of law of a different jurisdiction.

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[8] *Real Estate Opinion Letter Guidelines, supra* note 5, § 4.0, 4.0.a.

[9] *Id.* § 4.0.

A Remedies Opinion does not address any issues related to the attachment, creation, perfection or priority of any liens or security interests granted by any of the Transaction Documents which are the subject of the opinion. Instead, these should be the subjects of specific opinions.

Usury Opinion

In loan transactions, it is common for a Lender to request an opinion that the Transaction is not usurious. The law of the state which has been chosen to govern the promissory note and the loan agreement determines whether the Transaction complies with usury laws.

Even if the promissory note is not governed by the laws of the Opinion Jurisdiction, Opinion Givers are frequently asked to render an opinion to the effect that, if the courts of the Opinion Jurisdiction should determine that the promissory note is governed by the laws of the Opinion Jurisdiction, the rates of interest and other amounts required to be paid as specified therein will not be usurious.

While usury opinions in many states will be reasoned opinions, a sample form of usury opinion is as follows:

> *In the event that the courts of the Opinion Jurisdiction determine that the Note is governed by the laws of the Opinion Jurisdiction, and assuming that no fees, charges, benefits, or other compensation will be paid, directly or indirectly to Opinion Recipient or for Opinion Recipient's benefit, except as specified in the Transaction Documents, and assuming that no amounts to be paid as specified in the Transaction Documents constitute a penalty, the Transaction, as evidenced by the Transaction Documents, does not violate the usury laws of the Opinion Jurisdiction.*

An opinion that interest rates and other amounts required to be paid as specified in the Transaction Documents are not usurious is implicitly included in the Remedies Opinion. However, since compliance with usury statutes is seldom a clear-cut issue, Opinion Givers should consider excluding usury from the Remedies Opinion and rendering an express Usury Opinion, if a Usury Opinion is to be given.

Opinion Givers should take care to consider separately each rate of interest and other amounts required to be paid. The base rate of interest may be enforceable, while default rates or post-judgment rates are not.

No Violation of Laws Opinion

The *Real Estate Opinion Letter Guidelines* do not condone opinions that address comprehensive legal compliance, taking the position that it is inappropriate to request a No Violation of Laws Opinion.[10] However, the *Real Estate Opinion Letter Guidelines* stop short of an outright prohibition, stating there is no intention to preclude a request for, where otherwise

[10] *Id.* § 4.3.

appropriate, an opinion as to whether specified activities comply with the requirements of specific statutes.

In rendering the No Violation of Laws Opinion, Opinion Givers have several concerns: (i) the breadth of the actions that are covered by the opinion, (ii) the specific laws covered, and (iii) the due diligence necessary to render the opinion. As to the first concern, Opinion Givers should limit the opinion to specific and easily identifiable actions of the Client, such as the "execution and delivery of the documents by the Client," and the "payment of the obligations in the Transaction Documents." The request is often too broad, seeking an opinion as to the "performance of all actions contemplated by the Transaction Documents." Transaction Documents typically require the Client to perform numerous acts with respect to the loan and the security. It is unrealistic to expect the opinion to cover every such covenant and requirement beyond the most important covenant, *i.e.*, to pay the Loan.

Opinion Givers can address the second concern by limiting the opinion to statutory laws and regulations that counsel, in the exercise of customary professional diligence, would expect to apply. An example of this limitation is set forth in the following sample opinion:

> *Execution and delivery by the Client of, and performance by the Client of its payment obligations in, the Transaction Documents neither are prohibited by applicable provisions of statutory law or regulation of the Opinion Jurisdiction nor subject the Client to a fine, penalty or other similar sanctions under, any statutory law or regulation of the Opinion Jurisdiction. Our opinion in this Paragraph relates only to statutory laws and regulations that we, in the exercise of customary professional diligence, would reasonably recognize as being directly applicable to the Client, the Transaction, or both.*

This is consistent with the *Principles*, which provide that when an Opinion Letter limits its coverage to specified statutes or regulations, the Opinion Letter should not be read to cover the substance or effect of other statutes or regulations.[11] In addition, the *Principles* provide that an Opinion Letter covers only law that a lawyer in the applicable jurisdiction exercising "customary professional diligence would reasonably be expected to recognize as being applicable to the entity, transaction, or agreement to which the Opinion Letter relates."[12] Furthermore, the *Principles* state that an opinion letter is not to be read to cover municipal or other local laws unless it does so expressly.[13]

Of course, if the opinion recipient is concerned about particular laws and would like to have these addressed, then that should be clarified so Opinion Givers can focus on and limit the opinion to such specific laws. Opinion Givers should perform the same level of due diligence as other lawyers in the area would perform. Opinion Givers should be able to rely on the facts set forth in the Transaction Documents and/or in a certificate of the Client. However, because this

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[11] *Legal Opinion Principles, supra* note 1, § II.A.

[12] *Id.* § II.B.

[13] *Id.* § II.C.

opinion involves conclusions of law, it would be inappropriate to rely entirely on a certificate of the Client that simply regurgitates the legal conclusions required by this opinion. Opinion Givers should follow the guidance of the *Principles* which discourages basing an opinion on "a factual representation that is tantamount to the legal conclusion being expressed."[14]

Prudent lawyers will consider including in the qualification portion of the opinion a laundry list of laws excluded from the opinion, such as land use, zoning, tax, usury, antitrust, securities, OSHA, ERISA and banking. The *Principles* support this approach by providing that even though certain laws would be expected to have application to a transaction, such as securities, tax and insolvency laws, they "are understood as a matter of customary practice to be covered only when an opinion refers to them expressly."[15]

No Required Consents Opinion

The No Required Consent Opinion is generally considered with the same apprehension as the No Violation of Laws Opinion.

The *Real Estate Opinion Letter Guidelines* also discourage these types of opinions: It is inappropriate to request an opinion that the Client "possesses all necessary licenses and permits or has obtained all approvals and made all filings required for the conduct of the [Client's] business."[16]

Similarly, as with the No Violation of Laws Opinion, the *Real Estate Opinion Letter Guidelines* do not prohibit a request, if otherwise appropriate, on whether a specified activity of the Client complies with a specific statute. An example would be the request that a specific agency has issued to the Client a specific permit pursuant to a specific regulation. The opinion would be limited and based on receipt of a certification of the appropriate government official. The *Principles* are helpful in providing that an opinion of this sort may be based on legal conclusions contained in a certificate of a governmental official.[17]

The following is an example of a broadly-worded No Required Consents Opinion:

> *It is not necessary to obtain the consent, authorization or approval of any state, regional or local governmental authority of the Opinion Jurisdiction in connection with the execution, delivery and performance of any of the Transaction Documents.*

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[14] *Id.* § III.C.

[15] *Id.* § II.D.

[16] *Real Estate Opinion Letter Guidelines*, *supra* note 5, § 4.3.

[17] *Legal Opinion Principles, supra* note 1, § III.C.

No Litigation Opinion

A No Litigation Opinion concerns the existence of pending or threatened legal or administrative proceedings affecting the client. Since no legal issue or professional judgment is typically involved in rendering these type opinions, the information may be furnished in the form of a factual confirmation as opposed to a legal opinion. *The Real Estate Opinion Letter Guidelines* discourage these type opinions, and say they normally should not be requested. In order to render a No Litigation Opinion, the opinion giver needs to review its firm's litigation docket to identify any cases that may involve litigation, certificates of the client, and any representations or warranties or schedules to the closing documents that may list litigation. Often times these opinions are limited to the knowledge of the opinion giver or the other members of the firm who had actually participated in the work leading to the opinion. However, as the *Dean Foods* case below illustrates, these limitations on knowledge will not always be respected.

It is recommended that these opinions be limited to litigation involving the client that has actually been filed and not to pending or threatened litigation. In addition, a customary closing opinion does not evaluate the merits of litigation absent extraordinary circumstances. When an opinion is given with respect to the evaluation of the merits of litigation, the opinion giver should follow the rules of the *ABA Statement of Policy Regarding Lawyers Response to Auditors Request for Information (1975)*.

The *Dean Foods* case [18] underscores the dangers in a No Litigation Opinion. As is customarily done by many law firms, the opinion had specific language limiting the opinion to knowledge of litigation, and then only as to the knowledge of those persons who worked on the opinion or the transaction. However, another attorney in the firm knew of a prior criminal investigation regarding a customer of the client, but he told the opinion preparer that it appeared the investigation had ended. That was not the case, the matter was adversely decided, a multi-million dollar fine paid by the client, and the law firm was sued for malpractice and lost. In light of the *Dean Foods* decision, more and more firms are resisting giving broad No Litigation Opinions and instead arguing that the opinion recipient rely solely on representations and warranties of the client.

A more tailored form of No Litigation Opinion, limited to knowledge, reads as follows:

> *We hereby confirm to the Lender, pursuant to the request set forth in Section __ of the Agreement, but without investigation, analysis or review of court or other public records or our files, other than our litigation docket and information provided us by the Client, that there are no actions or proceedings against the Client, pending or overtly threatened in writing, before any court, governmental agency, or arbitrator which (i) seek to affect the enforceability of the Agreement or (ii) except as disclosed in the Agreement or an officer's certificate delivered pursuant to the Agreement.*

[18] *Dean Foods Company v. Pappathanasi* (18 Mass. L.Rptr. 598, 2004); WL 3019442 (Mass. Supr.)

Choice of Law Opinion

As stated in Section 4.9 of the *Real Estate Opinion Letter Guidelines*, when Transaction Documents specify that they are governed by the substantive law of the Opinion Jurisdiction, a general enforceability opinion includes the enforceability of such choice of law.

In other cases, Opinion Givers may be asked to opine that the choice of law clause in the Transaction Documents that selects as the governing law the law of a state other than the Opinion Jurisdiction will be given effect. If a Choice of Law Opinion in this type of situation is given, it will likely be a reasoned opinion based upon certain factual assumptions such as domicile of the Opinion Recipient and Client, place of negotiation of the transaction, place of closing, place where Loan payments will be made, location of the project, etc. If should be noted that if such choice of law provisions in the Transaction Documents are given effect, Opinion Givers will not be opining about the enforceability of the substantive provisions of the Transaction Documents governed by the law of a foreign jurisdiction because the Opinion Giver is not purporting to be an expert in the laws of the foreign jurisdiction. In such cases, presumably, other counsel involved in the transaction, often the lead counsel, will be giving a Remedies Opinion with respect to the Transaction Documents. See sample opinions (1) and (2) below.

Another approach to opining on a choice of law clause that selects a foreign jurisdiction is to assume that a choice of law clause will not be given effect, but instead to assume that the law of the Opinion Jurisdiction will control the Transaction Documents. Using this approach, Opinion Givers would opine that the Transaction Documents would be enforceable if they were controlled by the law of the Opinion Jurisdiction. This will be of use in a situation in which neither Opinion Givers nor counsel for the opinion recipient is admitted to practice in the state whose law is selected by the Transaction Documents, and it is not expedient or cost appropriate to engage counsel who practices in that state. See sample opinion (3) below.

> *(1) The choice of law provisions set forth in the Transaction Documents should be respected by a court in the Opinion Jurisdiction.*
>
> or
>
> *(2) The choice of law provisions contained in the Transaction Documents should be upheld and enforced by the courts of the Opinion Jurisdiction and federal courts [sitting in and] applying the laws of the Opinion Jurisdiction. The Transaction Documents, other than the Deed of Trust [designated for recording in the Opinion Jurisdiction], provide that they shall be construed and enforced in accordance with the substantive laws of the State of Choice. We believe that a state court or federal court sitting in the Opinion Jurisdiction as the forum state and applying conflict of law rules of the Opinion Jurisdiction (in either case, a "Court of the Opinion Jurisdiction") should give effect to the designation by the parties of the law of the State of Choice as the governing substantive law with respect to such agreements as set forth in the preceding sentence, unless the Court of the Opinion Jurisdiction were to determine that (i) the State of Choice has no reasonable relationship to the*

transaction contemplated by the Transaction Documents, or (ii) the result obtained from applying choice of law rules of the State of Choice would be contrary to the public policy of the Opinion Jurisdiction. Because choice of law issues are decided on a case by case basis depending upon the facts of the particular transaction, we are unable to conclude with certainty that a Court of the Opinion Jurisdiction would give effect to those provisions designating State of Choice law as the governing law. Nevertheless, based on the following assumptions, we believe that a Court of the Opinion Jurisdiction should conclude that the State of Choice has a reasonable relationship to the transaction.

Assumptions: All Transaction Documents were negotiated, executed, and delivered in the State of Choice; payments under the Transaction Documents are required to be made in the State of Choice; the Opinion Recipient is located in the State of Choice; and neither the Opinion Jurisdiction nor any other state has a materially greater interest than the State of Choice in any issue arising under the Transaction Documents other than with respect to issues under the Deed of Trust [of the Opinion Jurisdiction] relating to the creation, perfection, and enforcement of security interests in the Mortgaged Property.

However, a Court of the Opinion Jurisdiction may apply the internal law of the Opinion Jurisdiction to determine the perfection and effect of perfection or non-perfection of the liens created under the Transaction Documents and the application of remedies in enforcing such liens with respect to property located in the Opinion Jurisdiction.

or

(3) For purposes of this opinion, we have assumed that the Transaction Documents are governed by the law of the [Opinion Jurisdiction].

EXCLUDED MATTERS

As previously discussed, Remedies Opinions often contain exceptions to the breadth of their coverage. Matters commonly excluded from an Opinion Letter include usury (unless a usury opinion is expressly given), choice of law (again unless it is expressly given), title to collateral, priority of liens or security interests, and local law issues (including zoning and compliance with local laws).

A normal Remedies Opinion covers matters related to usury and choice of law unless appropriate qualifications are given; conversely, a Remedies Opinion is not considered to include any opinions with respect to the creation, perfection, priority or title to collateral or local law issues.

RELIANCE

The *1998 Mortgage Loan Opinion Report* contains an excellent discussion of the reliance issues presented by Opinion Letters.[19] Obviously, the addressees of an Opinion Letter should be entitled to rely on it. Often, counsel to the Opinion Recipient ask to be included among those who may rely on Opinion Letters. To the extent that such counsel provides written or implicit opinions to its own client[s], it is reasonable to provide that such counsel may rely on the Opinion Letter in connection with the Transaction. Opinion Givers should consider limiting the persons or entities, in addition to the addressees, who are entitled to rely on the Opinion Letter and also limiting those persons or entities to whom the Opinion Letter may be disclosed. For instance, while it would be reasonable to allow subsequent transferees of a promissory note (and corresponding loan and security documents) to rely upon an Opinion Letter issued at the loan closing, it might not be reasonable to allow every lender in a syndicate to rely upon the Opinion Letter. In the latter context, Opinion Givers should consider allowing disclosure of the Opinion Letter to syndicate members, but only allowing the agent for the syndicate to rely upon and make a claim upon the Opinion Letter.

In either context, the Opinion Giver should clearly state that it has no duty to update the Opinion Letter, to anticipate subsequent issues or to deal with issues that arise after the date of the Opinion Letter.

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[19] *See 1998 Mortgage Loan Opinion Report*, *supra* note 3, at n.64.

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APPENDIX A

REAL ESTATE OPINION LETTER GUIDELINES

January 15, 2003

By the American College of Real Estate Lawyers Attorneys' Opinion Committee and the American Bar Association Section of Real Property Probate and Trust Law Committee on Legal Opinions in Real Estate Transactions[*]

The American College of Real Estate Lawyers and the Real Property, Probate and Trust Section of the American Bar Association have jointly adopted the following Guidelines for the preparation and negotiation of the third party legal opinions rendered in connection with real estate secured loan transactions. These Guidelines accept and adopt in their entirety the provisions of the Guidelines for Preparation of Closing Opinions[1] promulgated in 2001 by the Section on Business Law of the American Bar Association and the Legal Opinion Principles[2] previously adopted by the Business Law Section in 1998.[3] While the Business Law Section Guidelines and Principles both address many issues that are common to both real estate and business law opinion practice, by their own terms they do not address several important subjects of particular relevance and significance to real estate secured loan transactions, by far the most typical context for real estate opinion letters. These Guidelines are intended to fill that void with a single, integrated set of opinion Guidelines,[4] reflecting the current state of customary real estate

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[*] Drafting Subcommittee. Chair: Robert A. Thompson, San Francisco, CA. Members: William B. Dunn, Detroit, MI; Kenneth P. Ezell, Jr., Nashville, TN; Kenneth M. Jacobson, Chicago, IL; Edward J. Levin, Baltimore, MD; Thomas G. Roberts, Los Angeles, CA; James H. Wallenstein, Dallas, TX; and Sterling S. Willis, New Orleans, LA.

[1] Section of Business Law of the American Bar Association, Committee on Legal Opinions, *Guidelines for the Preparation of Closing Opinions, 57 Bus. Law.* 875 (2002). The Business Law Section Guidelines were also published in a slightly different, earlier version in *57 Bus. Law.* 345 (2001).

[2] Section of Business Law of the American Bar Association, Committee on Legal Opinions, *Legal Opinion Principles, 53 Bus. Law.* 831 (1998). A copy of the *Legal Opinion Principles* is included with these *Guidelines* as Appendix A.

[3] The 2001 Business Law Guidelines were intended to replace the "Guidelines" included in the Business Law Section's 1991 *Third-Party Legal Opinion Report, Including the Legal Opinion Accord (47 Bus. Law.* 167 (1991)) [hereinafter BLS Accord] and to "reflect developments in customary practice in the decade since 1991." In response to the Business Law Section's original "Accord" Report, the ACREL/ABA Joint Committee in 1993 promulgated and published a *Report on Adaptation of the Legal Opinion Accord of the Business Law Section of the American Bar Association for Real Estate Secured Transactions, 29 Real Prop. Prob. & Tr. J.* 569 (1994) and in 1999 adopted the *Inclusive Real Estate Secured Transaction Opinion In Which Are Incorporated the Principal Concepts of the ABA Section of Business Law Legal Opinion Accord and the ABA Section of Real Property Probate and Trust Law and The American College of Real Estate Lawyers' Report on Adaptation of the Legal Opinion Accord* (www.aba.net.org/rppt/inclu-sive-art.html; www.acrel.org), both of which were intended to allow adaptation and use of the Accord in real estate opinion practice. Numerous state bar association opinion committees followed suit with their own Accord-based opinion reports, reflecting variations in local law and opinion practice.

[4] The following Guidelines set forth the original Business Law Section Guidelines in ordinary print with supplementary provisions adopted by the ACREL/ABA Joint Committee in bold face. No inference should be

opinion letter practice.[5] As with both the Business Law Guidelines and Principles, these Guidelines are intended to apply to both non-Accord and Accord-based opinions and to provide guidance[6] regarding closing opinions whether or not referred to in the opinion letter.

1. PURPOSE, SCOPE, AND RELIANCE

1.1 Purpose.

The agreement for a business transaction will often condition a party's obligation to close on its receipt of a closing opinion covering specified legal matters from counsel for another party. When received, the closing opinion serves as a part of the recipient's diligence, providing the recipient with the opinion giver's professional judgment on legal issues concerning the opinion giver's client, the transaction, or both, that the recipient has determined to be important in connection with the transaction.

1.1.a Role of Opinion Giver.

In rendering a third-party closing opinion in a real estate secured loan transaction, the opinion giver normally represents its client, the borrower, in providing limited advice and information to a non-client lender or its counsel. Occasionally, the borrower's counsel is asked to render an opinion as if the recipient were a client or to act as "counsel to the transaction." Such requests that local counsel in effect represent both parties to a loan transaction, through written legal opinions or otherwise, raise considerable ethical issues, including potential or actual conflicts of interest and competing duties of primary loyalty vis a vis the respective "clients." These conflicts may be waivable in some jurisdictions; however, in such cases the opinion giver should first obtain the client's consent after the client is adequately informed concerning important possible effects on the client's interest (see Restatement (Third) The Law Governing Lawyers §95) and should not be deemed implied from loan documents providing for a third party opinion (cf. infra § 2.4). Where concerns for minimizing transactional costs dictate use of only one local counsel, absent a prior existing relationship between the opinion giver and the borrower or a resulting conflict of interest with the lender, such counsel should be retained by and formally represent the lender.

1.1.b Adequacy of document opinions.

Third party opinion recipients sometimes seek assurance that loan documents are legally adequate for the lender's intended purposes or contain "all customary provisions and remedies." Such opinions should not be requested or given. In rendering a third party legal opinion to a

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drawn from this differentiation as to the importance of, or the commitment of the ACREL/ABA Committee to, various provisions of these Guidelines.

[5] For a discussion of the concept of "customary practice," s*ee, e.g., Restatement (Third) of the Law Governing Lawyers,* §§ 51(2), 95 [hereinafter "Restatement"]; TriBar Opinion Committee, *Third-party Closing Opinions, 53 Bus. Law.* 592 (1998) [hereinafter "1998 TriBar Report"].

[6] In appropriate circumstances opinion givers and opinion recipients (or their counsel) may together decide not to follow these Guidelines in particular respects.

lender, the opinion giver does not give legal advice to a client, but rather provides an "evaluation" of discrete legal issues specifically included in the opinion request. An opinion request addressing matters that are beyond specific legal issues and that are of the nature of the "broader guidance and counsel" that a lawyer provides to one's own client (see BLS Accord § 7) is inappropriate in scope. Accordingly, a request for an assurance that the loan documents are legally adequate for the lender's intended purposes is inappropriate (see supra §4.0a).

Where a lender is not represented by, or has not had its loan documents reviewed by, its own local counsel, and the chosen in-state lawyer is unable to represent the lender directly, in order to save the cost of additional local counsel, borrower's counsel may be asked to give a more limited assurance to the effect that the loan documents do not omit essential remedies that in the opinion giver's experience are generally found in similar documents for comparable mortgage loan transactions in the opinion giver's jurisdiction. In itself, the giving of such a limited assurance does not raise ethical issues and, in fact, constitutes a report of information based upon the experience of the opinion giver, as opposed to a legal opinion; however, in the event such an assurance cannot be given, the opinion giver may not provide further response without obtaining the client's informed consent (see, supra §1.1a, and also Model Rule of Professional Conduct 2.3(b)).« In addition, the inference created by refusal to provide such an assurance when it cannot be given places the opinion giver in an ethical dilemma in the same manner as in the case of dual representation (see supra, 1.1a). It is for this reason that this opinion request itself is regarded as inappropriate by many experienced opinion givers.

1.2 Coverage.

The opinions included in a closing opinion should be limited to reasonably specific and determinable matters that involve the exercise of professional judgment by the opinion giver. The benefit of an opinion to the recipient should warrant the time and expense required to prepare it.[7] In particular, opinions from borrower's counsel in intrastate transactions (or in a multistate transaction for which the lender has retained its own local counsel for the purposes of advising it) with respect to the enforceability of loan documents prepared by the lender normally should not be necessary and may not be cost justified.

1.2.a Applicable Law

Opinions cover only the law of the jurisdiction in which the opinion giver is licensed to practice and occasionally other specified law (such as Delaware law with respect to organizational status or Federal law). Local counsel in interstate loan transactions who serve for the limited purpose of passing on the legality, validity and enforceability of specific security documents and transaction obligations, as opposed to providing an opinion with respect to a foreign contracting entity and the transaction itself, normally are expected to address matters of applicable state law only, and should not be expected or requested to evaluate or address matters

[7] When the benefit of an opinion to the recipient is not sufficient, depending on the circumstances, the scope of the particular opinion could be limited (*e.g.*, the opinion on an agreement could be limited to due authorization, execution and delivery) or the opinion could be omitted entirely (*see infra* § 4.2 (opinion on all of a company's outstanding equity securities may not be cost justified)).

of Federal law. Unless specified to the contrary, an opinion does not by implication address Federal law. (See BLS Accord § 1.)

1.3 Relevance.

Opinion requests should be limited to matters that are reasonably related to the transaction. Closing opinions should not include assumptions, exceptions, and limitations that do not relate to the transaction and the opinions given.

1.4 Professional competence.

Opinion givers should not be asked for opinions that are beyond the professional competence of lawyers. To the extent a matter such as financial statement analysis, economic forecasting, or valuation is relevant to an opinion, an opinion giver may properly rely on a factual certificate or assumption.

1.5 Misleading opinions.

An opinion giver should not render an opinion that the opinion giver recognizes will mislead the recipient with regard to the matters addressed by the opinions given.[8]

1.5.a Implied opinions.

A legal opinion speaks only to the specific issues that it expressly addresses. Opinions as to other matters should not be inferred, but rather explicitly requested. Examples of opinions that in the real estate secured loan context should not be implied by a general enforceability opinion, and are not to be deemed to have been given unless expressly stated, include opinions regarding land use laws, environmental laws and other similar matters (see infra § 4.3.a).

1.5.b "Conduit" opinions.

"Conduit opinions" (that is, opinions that rely exclusively upon public agency certificates, title policies, UCC searches or other third party sources) are generally objectionable, as they contain no substantive assurance by the opinion giver and may be misconstrued by the opinion recipient as reflecting independent evaluation of the underlying source or other due diligence by the opinion giver. As with opinions regarding qualification to do business or good standing in foreign jurisdictions based on public agency certificates (see infra § 4.1), the delivery of the underlying public agency documents, title policies or other primary sources should suffice.

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[8] For a general discussion of this subject (including the role of disclosure), *see 1998 TriBar Report supra* note 3-5 at 602-03, 607. This *Guideline* does not preclude limiting the matters addressed by an opinion through the use of specific language if the limitation itself will not mislead the recipient. *See Legal Opinion Principles* §§ I.B, I.C. For an opinion giver's ethical obligations to its client, *see infra* § 2.4.

1.6 "Market" opinions.

An assertion that a specific opinion is "market" – i.e., that lawyers are rendering it in other transactions – does not make it appropriate to request or render such an opinion if it is inconsistent with these Guidelines.

1.7 Reliance [by Recipient].

An opinion giver is entitled to assume, without so stating, that in relying on a closing opinion the opinion recipient (alone or with its counsel) is familiar with customary practice concerning the preparation and interpretation of closing opinions. On occasion, a closing opinion expressly authorizes persons to whom it is not addressed (for example, assignees of notes) to rely on it. Those persons are permitted to rely on the closing opinion to the same extent as – but to no greater extent than – the addressee.

2. PROCESS

2.1 Opinion request and response.

Early in the negotiation of the transaction documents, counsel for the opinion recipient should specify the opinions the opinion recipient wishes to receive. The opinion giver should respond promptly with any concerns or proposed exceptions, providing, to the extent practicable, the form of its proposed opinions. Both sides should work in good faith to agree on a final form of opinion letter. Discussion of opinion issues while the transaction documents are being prepared can produce constructive adjustments in the documents and the transaction structure and help to avoid delays in closing the transaction. Should a problem be identified that might prevent delivery of an opinion in the form discussed, the opinion giver should promptly alert counsel for the opinion recipient.

2.2 Other counsel's opinion.

When the opinion giver lacks the legal expertise to render a requested opinion, consideration should be given to whether that opinion should be sought from other counsel. An opinion of other counsel should be sought by the opinion recipient only when the opinion's benefits justify its costs. A primary opinion giver normally should not be asked to express its concurrence in the substance of an opinion of other counsel.

2.3 Financial interest in or other relationship with client.

Lawyers preparing a closing opinion do not normally attempt to determine whether others in their firm have a financial interest (including an equity or prospective equity interest) in, or other relationship with, the client nor do they ordinarily disclose in an opinion letter any such interest or relationship that they or others in the firm may have. Although some lawyers may choose to make such disclosures, disclosure does not excuse those preparing a closing opinion from considering whether a financial interest in, or relationship with, the client that is known to them will compromise their professional judgment in delivering the closing opinion.

2.4 Client consent and confidential information.

Subject to the need for express and informed client consent when the counsel's role extends beyond provision of a typical third party opinion (see supra § 1.1.a), when the client's consent to the delivery of a closing opinion is required by applicable rules of professional conduct, that consent normally may be inferred from a provision in the agreement that makes delivery of a closing opinion a condition to closing. The opinions contained in a closing opinion ordinarily do not disclose information the client would wish to keep confidential. If, however, an opinion would require disclosure of information that the lawyers preparing the opinion are aware the client would wish to keep confidential, the implications should be discussed with the client and the opinion should not be rendered unless the client consents to the disclosure.

3. CONTENT

3.1 Golden Rule.

An opinion giver should not be asked to render an opinion that counsel for the opinion recipient would not render if it were the opinion giver and possessed the requisite expertise. Similarly, an opinion giver should not refuse to render an opinion that lawyers experienced in the matters under consideration would commonly render in comparable situations, assuming that the requested opinion is otherwise consistent with these Guidelines and the opinion giver has the requisite expertise and in its professional judgment is able to render the opinion. Opinion givers and counsel for opinion recipients should be guided by a sense of professionalism and not treat opinions simply as if they were terms in a business negotiation.

3.2 Materiality.

When possible, an opinion giver should avoid use of a materiality standard by using objective criteria (for example, a particular dollar amount, a specific category, or inclusion on a specified list) when limiting the matters addressed by an opinion.

3.3 Presumption of regularity.

An opinion giver may rely upon the presumption of regularity[9] for matters relating to its client, such as actions taken at meetings during the period covered by a missing minute book, that are not verifiable from the client's records (assuming the matters are not inconsistent with those records). Opinion givers ordinarily need not disclose their reliance on the presumption.[10]

3.3.a Limitations on document review and due diligence.

Absent qualification, the opinion giver may be presumed to have undertaken such legal research, reviewed such documentation, and investigated such matters as is professionally

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[9] *See Rogers v. Hill,* 289 U.S. 582, 591 (1933).

[10] An exception is when, based on the available facts, the lawyers preparing the opinion conclude that the deficiency in company records is likely to be significant.

appropriate to render the opinions given. (See BLS Accord § 2.) However, any expressly stated limitations as to documents reviewed or the scope of legal and factual inquiry will be given effect. Such limitations may be particularly appropriate where the opinion giver is local counsel without a long standing client relationship with the borrower or first hand involvement in the negotiation of transactional documents.

3.4 Use of the phrase "to our knowledge."

Certain factually oriented opinions, such as the opinions on the existence of legal proceedings,[11] ordinarily are expressed as being to the opinion giver's knowledge. [12] To avoid a possible misunderstanding over the meaning of "knowledge," the opinion preparers should consider describing in the opinion letter the factual inquiry they have conducted (for example, by stating what they intend "to our knowledge" to mean or by indicating that they are rendering the opinion based solely on their personal knowledge without making any inquiry).[13]

3.4.a Definition of knowledge.

Qualifications as to the knowledge of the opinion giver are often stated in terms of the actual knowledge of the opinion author and identified other individuals in his or her law firm, e.g., a "primary lawyer group" including the opinion author, lawyers involved in preparing or supporting the opinion and lawyers actively involved in the transaction and, occasionally, the attorney who is the primary client contact. The term "actual knowledge" (or words to that effect) means that the opinion in question is being limited to the conscious awareness of the identified persons, with no other investigation or inquiry having been made (see BLS Accord § 6-B), and such limitations will be given effect.

3.5 Explained opinions; "would/should."

Although closing opinions ordinarily do not set forth any legal analysis, opinion givers may include their legal analysis in an opinion when they believe it involves a difficult or uncertain question of professional judgment and have decided that the conclusions expressed should not be stated without setting forth the underlying reasoning. Such an opinion, which is commonly referred to as an "explained" or "reasoned" opinion, may be unqualified or qualified (i.e., subject to exceptions that are not customary for opinions of the type involved).

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[11] Because these opinions lack legal analysis, some lawyers prefer to refer to them as “confirmations.”

[12] “To our knowledge” is also sometimes used in opinions that address other factual matters, such as the no breach or default opinion. The trend today in many types of transactions is away from using “to our knowledge” to limit the scope of the opinion. Instead, for example, when giving a no breach or default opinion, lawyers often prefer to identify the contracts covered by referring expressly in the opinion to an existing list or a list prepared specifically for opinion purposes.

[13] Such a description would not be required if the opinion preparers have conducted the inquiry described in the 1998 TriBar Report, *supra* note 5, at 618-9, 659, 664-65 or there otherwise is no risk of misunderstanding.

Opinions have the same meaning whether stated as "would" or "should."[14] Either way they express the opinion giver's professional judgment in the circumstances.

4. SPECIFIC OPINIONS

4.0 Enforceability opinions; [General Exceptions and Assurances]

The inclusion of some form of generic exception to an enforceability opinion, with a corollary assurance from the opinion giver, is nearly universal in real estate secured loan transaction opinions. In one form of assurance that is commonly used in connection with the generic exception, the opinion giver states that, notwithstanding a general exception to enforceability, such exception will not impair the "practical realization of the principal benefits included in loan documents" (or words to that effect). The "practical realization" assurance is increasingly disfavored, inasmuch as the parties may have significantly different understandings of the meaning of "practical realization" or "principal benefits". Instead, there is a growing consensus in favor of the use of a version of the ACREL formulation of generic exception: that is, that certain provisions of the loan documents may be unenforceable; however, such unenforceability will not render the transaction documents "invalid as a whole" nor preclude judicial enforcement of repayment, acceleration of the note or foreclosure of collateral in the event of a material breach of a payment obligation or other material provisions of the transaction documents.

Given the breadth of most formulations of generic exception and assurance and the scope of the generally accepted equitable principles exception, the typical "laundry list" of additional specific exceptions to enforceability in most cases can be considerably shortened or eliminated altogether. Such specific exceptions, when taken, should be unnecessary except with respect to (i) matters that may not be clearly encompassed by the bankruptcy, equitable principles or generic exceptions, and (ii) matters that may be of notable importance to the opinion recipient, such as unusual limitations on judicial or non-judicial remedies of which an out-of-state lender may not be aware (e.g., anti-deficiency foreclosure legislation) or contractual provisions that are known by the opinion giver to have been controversial or heavily negotiated during the preparation of transactional documents.

4.0.a General assurances.

Requests for a general assurance to the effect that, notwithstanding specifically stated exceptions to enforceability (e.g., bankruptcy, equitable principles and other specific exceptions), such exceptions will not impair the practical realization of the principal benefits included in loan documents (or comparable language) are inappropriate. Once identified by the opinion giver, the importance of specific exceptions to enforceability should be evaluated by the opinion recipient.

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[14] *See* TriBar Opinion Committee, *Opinions in the Bankruptcy Context: Rating Agency, Structured Financing, and Chapter 11 Transactions*, 46 *Bus. Law*. 717, 733 (1991); *1998 TriBar Report, supra* note 5, at 607 n. 37. Closing opinions may be different in this regard from tax opinions.

4.0.b Usury opinions.

An enforceability opinion includes by implication an opinion that the loan evidenced by transaction documents is not usurious because the remedies opinion addresses the enforceability of the borrower's agreement to pay interest at the rate stated in the loan documents. It is common practice that such opinions are expressly stated. If a usury opinion is not intended to be given, it should be expressly excluded.

When a usury opinion is given or implied, the opinion giver may assume without so stating that the lender will not receive, directly or indirectly, any fees, charges, benefits or other compensation except as set forth in the transaction documents. When a usury opinion is based upon an exemption related to the identity or status of the lender, the involvement of a real estate broker or other special circumstances, such facts need not be stated; however, the better and customary practice is to expressly state such factual understandings as opinion assumptions or qualifications.

4.0.c Real property title opinions.

Because of the availability of title insurance, the existence of difficult factual issues, and the need for title searches beyond the capacity and expertise (and/or the scope of engagement) of most real estate attorneys, opinions requested as to the ownership of property, the effectiveness of the lien of security instruments or exceptions to or encumbrances on title to real property are inappropriate. Opinions as to the form of a mortgage or deed of trust necessary to create a lien against real property collateral and a recitation of the procedures necessary to perfect and provide record notice of such lien are, on the other hand, frequently given. Neither such a "form of documents" opinion nor a general enforceability opinion implies a substantive title opinion, and no express disclaimer of such opinion is necessary.

4.0.d Personal property security interest opinions.

Because of the often disproportionate amount of time and effort required and the relatively limited value of the typically heavily qualified opinions on such matters, requests for personal property security interest opinions are appropriate only when the transaction involves personal property constituting a significant part of the loan collateral (e.g., the financing of hotel or hospital projects). Opinions describing the form of documents and procedures necessary to create, perfect and maintain a security interest in real property are frequently requested and given. A substantive opinion, if any, as to the status of the security interest in personal property collateral should be given separately from the general enforceability opinion and is not implied by an enforceability opinion. Such opinions are commonly limited to property covered by Article 9 of the Uniform Commercial Code because of uncertainties as to the status of other types of property.

4.1 Foreign qualification and good standing [of Borrower].

An opinion giver should not be asked for an opinion that the opinion giver's client is qualified to do business as a foreign corporation in all jurisdictions in which its property or activities require qualification or in which the failure to qualify would have a material adverse effect on the client. Analysis of the "doing business" requirements of each jurisdiction in which

the client has property or conducts activities would require an extensive factual inquiry and a review of the law of jurisdictions as to which the opinion giver cannot reasonably be expected to have expertise. This analysis rarely would be cost-justified. Because an opinion on qualification to do business or good standing in foreign jurisdictions is based solely on certificates of public officials, delivery of those certificates without an opinion ordinarily should be sufficient to satisfy the needs of the opinion recipient.

4.1.a Jurisdictional requirements [for Lender].

Opinion requests in multistate secured loan transactions sometimes address (a) the necessity, by virtue of the transaction in question, for the lender to qualify to do business in a given jurisdiction, (b) the consequences of failure to qualify, (c) the ability to rectify any failure to qualify, and (d) whether making the loan, in and of itself, will subject the lender to taxation imposed by the relevant jurisdiction. Such opinion requests are generally not cost justified in view of the extensive and time consuming legal and factual inquiry required and the often limited value of the resulting opinion.

Opinions with respect to the need to qualify to do business with respect to an individual loan transaction are often difficult to give because of the inability to isolate relevant issues through factual assumptions, which themselves may be vitiated by facts or subsequent business activities of the lender, both of which are more readily known by the lender and its counsel. Similar challenges exist for opinions that a single loan transaction will not subject the lender to local taxation. An opinion based on assumptions which may be rendered false by previous unknown activities of the lender or probable additional transactions in the future rarely justifies the cost and effort. Indeed, the decision to qualify to do business in a given jurisdiction and to structure operations in a manner to avoid jurisdictional taxes is a decision that may have little to do with a given transaction. Such issues may often be best addressed by lender's own counsel, who has greater familiarity with the lender's overall operations and is in a position to provide advice to its client on these matters, as well as the state-by-state consequences of various business operations and strategies regarding taxation of the lender, rather than by counsel for the borrower in a single loan transaction. On the other hand, where the law is sufficiently clear, an advisory opinion as to the consequences of, and the ability to cure, improper failure to qualify to do business locally may be more feasible for the opinion giver and valuable to the recipient.

The foregoing may be distinguished from situations, which exist in some states, with respect to taxation of mortgages, notes, and other transactional documents and various tax minimization strategies lawfully utilized in such jurisdictions. As these situations are often specific to a given transaction and not necessarily related to the overall operations of the lender or borrower, opinions with respect to such forms of taxation may be appropriate if the factual circumstances and legal analysis support the conclusions to be provided in the requested opinion. In such cases, in light of the relative costs and benefits of the opinion, the parties may determine, in those jurisdictions where such coverages are available, that an appropriate mortgage tax endorsement to a title insurance policy provides the requisite assurances to the lender.

4.2 Outstanding equity securities.

An opinion that all outstanding equity securities of the client are duly authorized, validly issued, fully-paid, and non-assessable can require an extensive legal and factual inquiry (for example, when the client has been in existence for a long time and has had many stock issuances). Consideration should be given to whether the benefit of the opinion to the opinion recipient justifies the cost and time required to support it.

4.3 Comprehensive legal or contractual compliance.

An opinion giver should not be asked for an opinion that its client possesses all necessary licenses and permits or has obtained all approvals and made all filings required for the conduct of the client's business. Similarly, an opinion giver should not be asked for an opinion that its client is not in violation of any applicable laws or regulations or that its client is not in default under any of the client's contractual obligations.[15] Neither a materiality exception nor a knowledge limitation makes these opinions appropriate. Any legal compliance opinion should be expressly and specifically requested and limited to specific laws. In some cases (e.g., with respect to land use and environmental matters), such opinions may not be appropriate (see infra § 4.3.a).

4.3.a Land use and environmental opinions.

Opinions on zoning, land use and environmental matters are fundamentally different from the evaluations of other issues typically addressed in opinion letters in that they involve complex, technical matters that are not easily, or sometimes at all, susceptible to separation into factual and legal components. Opinions on such matters are not customary. Land use and environmental matters are normally considered to be the subject of the lender's due diligence, which frequently includes certificates from architects, engineers and other professionals and communications from relevant public agencies.

4.4 Lack of knowledge of particular factual matters.

An opinion giver normally should not be asked to state that it lacks knowledge of particular factual matters.[16] Matters such as the absence of prior security interests or the accuracy of the representations and warranties in an agreement or the information in a disclosure document (subject to § 4.5 below) do not require the exercise of professional judgment and are inappropriate subjects for a legal opinion even when the opinion is limited by a broadly worded disclaimer.

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[15] This *Guideline* is not intended to preclude a request for an opinion, otherwise appropriate, on a specific matter, for example, on whether specified activities of the client comply with the requirements of a specific statute.

[16] The principal exception is the "confirmation" often included in closing opinions regarding the opinion giver's knowledge of legal proceedings to which the client is a party. *See supra* § 3.4.

4.5 Negative assurances.

Opinion recipients sometimes seek negative assurance from the opinion giver regarding the adequacy of the disclosure in the prospectus or other disclosure documents furnished to investors in connection with a sale of securities. Such negative assurance is not an opinion in the traditional sense. Rather, the practice of providing negative assurance is unique to securities offerings and is intended to assist the opinion recipient in establishing a due diligence or similar defense. A request for negative assurance is appropriate only when it is requested for that purpose in connection with a registered securities offering or, depending on the nature of the disclosure document and the process by which it was prepared, an offering of securities exempt from registration.[17]

4.6 Fraudulent transfer.

An opinion on the enforceability of an agreement does not address the effect of fraudulent transfer laws on the other party's rights under the agreement.[18] Although a party to a transaction may be concerned about the effect of fraudulent transfer laws, an opinion giver could not render an opinion on those laws without relying heavily on assumed facts. Because opinions on the effect of fraudulent transfer laws are of limited value, they should not be requested absent a compelling justification.

4.6.a Substantive non-consolidation.

"Substantive nonconsolidation" opinions address whether the borrowing entity and its assets will be substantively consolidated with an affiliated entity if the affiliated entity becomes subject to a bankruptcy proceeding. In view of the considerable legal research and expense required for such opinions, they should not be requested unless justified by the size of the transaction or the needs of a regulatory agency or underwriter (as in the case of "conduit" or securitized loan transactions). Opinions on this subject, when given, generally rely upon a thoughtful structuring, and require careful analysis, of a special purpose "bankruptcy remote" borrowing entity. Because of the fact intensive nature of the evaluation, such opinions are usually given in the form of heavily qualified or "reasoned" or "explained" opinions. Such opinions should be rendered only by, or with the involvement of, competent bankruptcy counsel or other counsel with expertise regarding the relevant substantive issues.

4.7 Litigation evaluation.

The opinion giver ordinarily should not be asked to express an opinion on the expected outcome of pending or threatened litigation.[19]

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[17] A request for negative assurance will be appropriate, for example, in many Rule 144A and Regulation S offerings.

[18] The "bankruptcy exception" (which is implied even when not stated) excludes the effect of fraudulent transfer laws from the enforceability opinion. *See 1998 TriBar Report, supra* note 3, at 624.

[19] *See American Bar Association Statement of Policy Regarding Lawyers Responses to Auditors' Requests for Information*, 31 *Bus. Law*. 1709 (1976).

4.8 Matters of public policy.

Because public policy is a principal basis for invalidating contractual provisions, opinion givers should not qualify their opinions as a whole with a general exception for "matters of public policy."[20] When appropriate, however, an opinion giver may include an exception for matters of public policy with respect to a particular provision (such as a provision releasing the other party from liability without excluding liability for willful misconduct or fraud).

4.9 When law covered by opinion and law selected to govern agreement are different.

When a closing opinion does not cover the law of a jurisdiction whose law is selected as the governing law in an agreement, the opinion giver should explore with counsel for the opinion recipient how best to respond to a request for an opinion on the agreement's enforceability. Specifically, secured loan documents in multistate transactions frequently provide a choice of law for certain documents (e.g., a note or guaranty) different from the law of the jurisdiction of the opinion giver and from the law specified to govern other transactional documents (e.g., the mortgage, deed of trust and other security instruments). When an opinion of local counsel is not cost justified, an acceptable alternative may be an opinion of the opinion giver that is limited to the enforceability of the governing law clause under the law covered by the opinion. Another acceptable alternative (which might be combined with the first) may be an opinion that the entire agreement would be enforceable if the law covered by the opinion were to apply (notwithstanding the governing law clause).

When loan documents specify the substantive law addressed by the opinion, a general enforceability opinion includes the enforceability of such choice of law. It is common for opinion givers to expressly exclude choice of law opinions; conversely, the better and customary practice where such opinions are sought is for such opinions to be expressly requested and separately stated. Choice of law opinions are often given as "reasoned" or "explained" opinions based upon factual assumptions bearing on the opinion conclusion and most often can be only a description of the approach likely to be taken by a court applying existing law in the opinion giver's jurisdiction.

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[20] *See supra* note 7.

APPENDIX B

LEGAL OPINION PRINCIPLES

By the Committee on Legal Opinions [of the Section of Business Law of the American Bar Association]

In the Committee's 1991 Third Party Legal Opinion Report the Committee undertook to monitor developments respecting the Report and the Legal Opinion Accord contained in the Report. It also undertook in due course to take such further action as might seem appropriate. These Legal Opinion Principles are a product of those undertakings. The Report and the Accord have made an important contribution to the learning on legal opinions. While the Accord has not gained the national acceptance the Committee had hoped, the Guidelines in the Report are frequently looked to for guidance regarding customary legal opinion practice. In Section 152 of the recently adopted Restatement (Third) of the Law Governing Lawyers, the American Law Institute affirmed the importance of customary practice in the preparation and interpretation of legal opinions. The Committee has prepared these Principles to provide further guidance regarding the application of customary practice to third-party "closing" opinions that do not adopt the Accord. The Committee hopes that these Principles will prove useful both to lawyers and their clients and to courts that from time to time are called upon to address legal opinion issues. The Committee intends to consider the possible extension of these Principles to issues they do not now address. The Committee would welcome the assistance of all who are interested in participating in that effort.

I. GENERAL

A. At the closing of many business transactions legal counsel for one party delivers legal opinion letter(s) to one or more other parties. Those opinion letters, often referred to as third party opinion letters, are the subject of these Legal Opinion Principles.

B. The matters usually addressed in opinion letters, the meaning of the language normally used, and the scope and nature of the work counsel is expected to perform are based (whether or not so stated) on the customary practice of lawyers who regularly give, and lawyers who regularly advise opinion recipients regarding, opinions of the kind involved. These Legal Opinion Principles are intended to provide a ready reference to selected aspects of customary practice.

C. An opinion giver may vary the customary meaning of an opinion or the scope and nature of the work customarily required to support it by including an express statement in the opinion letter or by reaching an express understanding with the opinion recipient or its counsel.

D. The opinions contained in an opinion letter are expressions of professional judgment regarding the legal matters addressed and not guarantees that a court will reach any particular result.

E. In accepting an opinion letter, an opinion recipient ordinarily need not take any action to verify the opinions it contains.

F. The lawyer or lawyers preparing an opinion letter and the opinion recipient and its legal counsel are each entitled to assume that the others are acting in good faith with respect to the opinion letter.

II. LAW

A. Opinion letters customarily specify the jurisdiction(s) whose law they are intended to cover and sometimes limit their coverage to specified statutes or regulations of the named jurisdiction(s). When that is done, an opinion letter should not be read to cover the substance or effect of the law of other Jurisdiction(s) or other statutes or regulations.

B. An opinion letter covers only law that a lawyer in the jurisdiction(s) whose law is being covered by the opinion letter exercising customary professional diligence would reasonably be expected to recognize as being applicable to the entity, transaction, or agreement to which the opinion letter relates.

C. An opinion letter should not be read to cover municipal or other local laws unless it does so expressly.

D. Even when they are generally recognized as being directly applicable, some laws (such as securities, tax, and insolvency laws) are understood as a matter of customary practice to be covered only when an opinion refers to them expressly.

III. FACTS

A. The lawyers who are responsible for preparing an opinion letter do not ordinarily have personal knowledge of all of the factual information needed to support the opinions it contains. Thus, those lawyers necessarily rely in large measure on factual information obtained from others, particularly company officials. Customary practice permits such reliance unless the factual information on which the lawyers preparing the opinion letter are relying appears irregular on its face or has been provided by an inappropriate source.

B. As a matter of customary practice the lawyers preparing an opinion letter are not expected to conduct a factual inquiry of the other lawyers in their firm or a review of the firm's files, except to the extent the lawyers preparing the opinion letter have identified a particular lawyer or file as being reasonably likely to have or contain information not otherwise known to them that they need to support an opinion.

C. An opinion should not be based on a factual representation that is tantamount to the legal conclusion being expressed. An opinion ordinarily may be based, however, on legal conclusions contained in a certificate of a government official.

D. Opinions customarily are based in part on factual assumptions. Some factual assumptions need to be stated expressly. Others ordinarily do not. Examples of factual assumptions that ordinarily do not need to be stated expressly are assumptions of general application that apply regardless of the type of transaction or the nature of the parties. These include assumptions that copies of documents are identical to the originals, signatures are

genuine and the parties other than the opinion giver's client have the power to enter into the transaction.

IV. DATE

An opinion letter speaks as of its date. An opinion giver has no obligation to update an opinion letter for subsequent events or legal developments.

APPENDIX C

Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions

At the closing of many business transactions, the lawyers for one party deliver to the other party a legal opinion letter covering matters the recipient has asked those lawyers to address. These opinion letters, also commonly known as closing or third-party legal opinions, are prepared and understood in accordance with the customary practice of lawyers who regularly give and review them.

Customary practice permits an opinion giver and an opinion recipient (principally through its counsel) to have common understandings about an opinion without the opinion stating them. The use of customary practice does this in two principal ways:

1. It identifies the work (factual and legal) lawyers are expected to perform to give particular opinions. In so doing, it reflects a realistic assessment of the nature and scope of the opinion and the difficulty and extent of the work required to support the opinion.

2. It provides guidance on how certain words and phrases commonly used in opinions should be understood. Customary practice may expand or limit the plain meaning of those words and phrases.

Customary practice provides content to abbreviated opinion language. When it does so, customary practice permits the omission of lengthy lists of procedures, definitions, exceptions, limitations, and assumptions. This significantly reduces the number of words needed to communicate complex thoughts. As a matter of customary practice, the explicit inclusion in an opinion of some but not all of these matters does not exclude others customarily understood to apply. Departures from customary practice are not implied and should not be inferred unless the departure is clear in the opinion letter.

The role of customary practice in third-party legal opinion practice is well established. The American Law Institute's *Restatement (Third) of the Law Governing Lawyers*[1] states:

In giving "closing" opinions, lawyers typically use custom and practice to provide abbreviated opinions that facilitate the closing. Such opinions may not recite certain assumptions, limitations, and standards of diligence because they are understood between counsel.

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[1] The references to the *Restatement* in this statement are to Sections 52 and 95 of the *Restatement*. The references also include the following Comments, Illustrations, and Notes to those sections: Section 52, Comment *b*, Comment *e*, Illustration 2; and Section 95, Reporter's *Note* to Comment *b*, Reporter's *Note* to Comment *c*. The *Restatement* sometimes refers to "custom and practice." We understand that phrase to have the same meaning as "customary practice."

The Restatement also refers to customary practice as an element in determining the "meaning of the opinion letter."

The Restatement identifies customary practice as a source of the criteria for determining whether the opinion giver has satisfied its obligations of competence and diligence. Under the Restatement the "professional community whose practices and standards are relevant" in making that determination is that of "lawyers undertaking similar matters." That professional community may vary based on, among other things, the subject of the opinion and the relevant jurisdiction.

Customary practice evolves to reflect changes in law and practice. The Restatement treats bar association reports as valuable sources of guidance on current customary practice.

Some closing opinions refer to the application of customary practice. Others do not. Either way, customary practice applies.

* * * * *

This Statement is jointly issued by bar association groups in the following jurisdictions:

[The approval by each group is subject to that group's approval of the final version of the statement; in addition the specific expression of the name of each group is subject to review by that group.]

- **Multi-jurisdictional**:
  - Section of Business Law of the American Bar Association
  - TriBar Opinion Committee (see New York below)
- **Boston**: Business Law Section of the Boston Bar Association
- **California**: Business Law Section of the California State Bar
- **District of Columbia**: Corporate Law Committee of The Bar Association of the District of Columbia
- **Hawaii**: Real Property and Financial Services Section of the Hawaii State Bar Association
- **Maryland**: Business Law Section of the Maryland State Bar Association
- **Michigan**: State Bar of Michigan Business Law Section
- **New York**: TriBar Opinion Committee (including members of the (i) Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers' Association; (ii) Corporation Law Committee, The Association of the Bar of the City of New York, (iii) Special Committee on Legal Opinions of the Business Law Section, New York State Bar Association, and (iv) members of other state and local bar associations)
- **North Carolina**: North Carolina Business Law Section
- **Ohio**: Corporation Law Committee of the Ohio State Bar Association

- **Pennsylvania**: Business Law Section of the Pennsylvania Bar Association
- **Philadelphia**: Business Law Section of the Philadelphia Bar Association
- **South Carolina**: Corporate, Banking and Securities Law Section of the South Carolina Bar
- **Texas**: Business Law Section of the State Bar of Texas
- **Washington**: Business Law Section of the Washington State Bar Association
- **Wisconsin**: Business Law Section of the State Bar of Wisconsin

APPENDIX D

SPECIMEN OPINION DUE DILIGENCE CHECKLIST
(Real Estate Secured Transaction)

I. Executed Copies of the Following Loan Documents:

(*insert relevant transactional documents*)

II. Organizational Documents:

A. For a corporation:

1. Order a good standing certificate and certified copies of the corporation's articles of incorporation and all other documents listed in the certificate.

2. Confirm that an organizational meeting of the board of directors was held.

3. Review all filed corporate documents for (a) a time limit on the corporation's existence, and (b) articles of dissolution, merger, or transfer.

4. At the time of closing, be sure to have a status/good standing certificate not more than thirty (30) days old. Obtain evidence form the corporation's officers that the corporation has paid personal property taxes and any State taxes owed.

5. Obtain a certificate from the shareholder/directors/officers (as applicable) that no steps have been taken to dissolve the corporation.

B. For a general partnership:

1. Determine the existence and terms of the partnership, preferably by obtaining (a) a copy of a written partnership agreement and (b) a certificate signed by all partners confirming the formation and continued existence of the partnership as a general partnership.

2. Make a reasonable factual inquiry and/or obtain a certificate of all partners to confirm that no event of dissolution has occurred under the terms of the partnership agreement or State law. This certificate should confirm that neither the partnership nor any partner is involved in a bankruptcy proceeding and that no judicial proceeding is pending for the dissolution of the partnership.

3. Determine whether a statement of partnership authority has been filed with the Secretary of State, and if so obtain a copy.

C. For a limited partnership:

1. Order a good standing certificate and a certified copy of the limited partnership certificate (with all amendments or other filings) from the Secretary of State. Check to see if the filed certificate of limited partnership conforms to the limited partnership agreement, if the agreement and certificate are separate documents.

2. Make a reasonable factual inquiry (perhaps obtain a certificate of one of the general partners similar to the one described above for general partnerships) to determine whether any circumstances exist that would trigger a dissolution (a) under the certificate of agreement of limited partnership or (b) under State law.

3. Confirm that the filings with the Secretary of State include a designation and address of a resident agent.

D. For a limited liability company:

1. Obtain a good standing certificate and a certified copy of the articles of organization (with all amendments or other filings) from the Secretary of State.

2. Review the operating agreement. If there is no written operating agreement, obtain a certificate to that effect from the members as well as a statement outlining the provisions of the oral operating agreement.

3. Make a reasonable factual inquiry (perhaps obtain a certificate of the manager similar to the one described above for general partnerships) to determine whether any circumstances exist that would trigger a dissolution (a) under the operating agreement or (b) under State law.

III. Authorization and Status Documents:

Review the charter and bylaws of a corporation, the partnership agreement for any partnership, the certificate for a limited partnership, and the articles of organization and the operating agreement for a limited liability company.

A. Obtain certified copies of the documents that are in effect during the relevant periods.

B. Draft certificates covering what action is necessary under the constituent documents for the entity to authorize the execution, delivery, and performance of the loan documents.

C. Verify that the type of transaction is within the scope of the purpose of the entity.

D. Verify whether any special approvals or authorizations are required.

E. Verify that the action required under the documents to authorize the execution delivery, and performance of the loan documents, has been taken and has not been rescinded or revoked.

F. Obtain a certificate from an officer, partner, or member of the client that states the substance of the current entity documents that are not of record.

G. Review of all contracts binding the entity (or obtain a certificate from an authorized representative of the entity).

H. Obtain litigation certificate listing court and administrative actions, orders, writs, judgments, and decrees that name the entity and are specifically directed to it or its property.

I. Obtain an incumbency certificate including sample signatures.

IV. Usury:

A. Consider all rates of interest, including default rates.

B. Consider effect of loan charges, late fees, prepayment penalties or premiums, etc.

C. Consider availability of exemptions.

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