

# A Streamlined Form of Closing Opinion (2019 Update)

By Donald W. Glazer and Stanley Keller\*

In 2005, we published an article on the Boston Bar Association Streamlined Form of Closing Opinion.<sup>1</sup> As described in the article's introduction, the streamlined form was based on the Legal Opinion Principles<sup>2</sup> drafted by the Legal Opinions Committee of the American Bar Association's Business Law Section (the "ABA Legal Opinions Committee"). Now that the Statement of Opinion Practices (the "Statement") and its related Core Opinion Principles (the "Core Principles") have been published,<sup>3</sup> we are updating that article and the streamlined form to reflect the Statement and Core Principles and developments in legal opinion practice since 2005. As indicated in the Statement's explanatory note, the Statement, which has been approved by many bar associations and other lawyer groups, updates the Legal Opinion Principles in their entirety and selected provisions of the Guidelines for the Preparation of Closing Opinions, which also were drafted by the ABA Legal Opinions Committee.<sup>4</sup> The Core Principles are derived from the Statement and are designed to be incorporated by reference in or attached to a closing opinion by those who desire to do so. Among other changes, the updated Streamlined Form of Closing Opinion incorporates the Core Principles in place of the Legal Opinion Principles.

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At the closing of many business transactions, counsel for the company delivers to the party on the other side—the investor, lender, or acquirer—a letter, commonly referred to as a "closing opinion," in which counsel provides that other party a legal opinion on various matters it has asked counsel to address.

Although closing opinions have played a role in business transactions for more than a century, the development of a body of learning on the meaning

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1. Donald W. Glazer & Stanley Keller, *A Streamlined Form of Closing Opinion Based on the ABA Legal Opinion Principles*, 61 BUS. LAW. 389 (2005).

2. 53 BUS. LAW. 831 (1998).

3. 74 BUS. LAW. 801 (2019).

4. 57 BUS. LAW. 875 (2002).

of opinions and the work required to support them has been a relatively recent development. In 1973, a New York lawyer, James J. Fuld, published an article in *The Business Lawyer*<sup>5</sup> in which he raised and sought to answer questions that lawyers giving opinions had long puzzled over but that previously had not been reduced to writing. The Fuld article led to the creation of the TriBar Opinion Committee, a joint effort of three New York bar associations, and the issuance by that Committee in 1979 of a groundbreaking report on closing opinions.<sup>6</sup> The TriBar Opinion Committee's report struck a responsive chord with lawyers across the country and gained wide acceptance. In the ensuing years bar groups in many other states weighed in with their own reports.

In 1998, the TriBar Opinion Committee, which by then had added members from outside New York, published a comprehensive revision of its 1979 Report.<sup>7</sup> The TriBar 1998 Report provided a detailed analysis of customary practice as it related to many standard opinions.

The year 1998 also saw two other important developments in opinion practice. The first was the publication by the American Law Institute of its Restatement of the Law Governing Lawyers, which included a section that specifically addressed third-party closing opinions. The Restatement characterized customary practice as the basis for understanding closing opinions and referred to bar association reports such as those of the TriBar Opinion Committee as a source of guidance on customary practice.<sup>8</sup> The second was the publication by the Legal Opinions Committee of the American Bar Association's Business Law Section of a brief statement of Legal Opinion Principles, which also emphasized the applicability of customary practice.<sup>9</sup>

The TriBar 1998 Report, the ALI Restatement, and the Legal Opinion Principles treated customary practice as an important source of guidance on the meaning of standard opinion language and the work required to support standard opinions. That importance was recognized by the Business Litigation Session of the Massachusetts Superior Court in *Dean Foods*, a case in which the court referred frequently to the TriBar 1998 Report as articulating customary practice.<sup>10</sup>

The events of 1998 prompted the Boston Bar Association's Legal Opinion Committee to undertake the preparation of a streamlined form of closing opin-

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5. James J. Fuld, *Legal Opinions in Business Transactions—An Attempt to Bring Some Order Out of Some Chaos*, 28 *BUS. LAW.* 915 (1973).

6. TriBar Opinion Comm., *Legal Opinions to Third Parties: An Easier Path*, 34 *BUS. LAW.* 1891 (1979).

7. TriBar Opinion Comm., *Third Party "Closing" Opinions*, 53 *BUS. LAW.* 591 (1998). The TriBar Opinion Committee has subsequently supplemented its 1998 Report with several additional reports. See, e.g., TriBar Opinion Comm., *Special Report of the TriBar Opinion Committee: The Remedies Opinion—Deciding When to Include Exceptions and Assumptions*, 59 *BUS. LAW.* 1483 (2004).

8. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 95 cmt. b, reporter's note to cmt. b (2000).

9. Comm. on Legal Ops. of the Section of Bus. Law of the Am. Bar Ass'n, *Legal Opinion Principles*, 53 *BUS. LAW.* 831 (1998). The ABA Committee subsequently published Revised Guidelines, updating and refining its 1991 Guidelines. Comm. on Legal Ops. of the Section of Bus. Law of the Am. Bar Ass'n, *Guidelines for the Preparation of Closing Opinions*, 57 *BUS. LAW.* 875 (2002).

10. *Dean Foods Co. v. Pappathanasi*, No. Civ. A. 01-2595 BLS, 2004 WL 3019442 (Mass. Super. Ct. Dec. 3, 2004).

ion. The project took many years, both because of the need to forge a consensus among lawyers in many firms on what closing opinions should and should not say and concerns about *Dean Foods* and other then recent judicial decisions relating to closing opinions. The years of effort ultimately produced the Boston Bar Association Streamlined Form of Closing Opinion, which was published in an article (by the authors of this article), first in the *Boston Bar Journal*<sup>11</sup> and then in *The Business Lawyer*.<sup>12</sup>

In 2008, the *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions* was published.<sup>13</sup> Approved by many bar associations and other lawyer groups, that Statement described the principal elements of customary practice as being the basis for legal opinion practice. Subsequently, an effort was undertaken to develop a statement of opinion practices that many bar associations and other lawyer groups could sign on to and, by doing so, establish a national consensus on key aspects of customary practice. That effort produced the Statement of Opinion Practices and related Core Opinion Principles published in 74 *The Business Lawyer* 801 (2019). The updated Streamlined Form of Closing Opinion refers to the Core Opinion Principles and also reflects developments in legal opinion practice since 2005.

The updated Streamlined Form of Closing Opinion is not intended to be prescriptive. Rather, in reflecting a broad consensus regarding acceptable opinion practice, it is intended to serve as a helpful starting point for lawyers drafting closing opinions and as a source of guidance for lawyers advising clients on what opinions to request and accept. The transaction addressed in the streamlined form is an unsecured bank loan. The form also includes in Attachment A opinions that are typically given on the issuance of stock. The notes to the form, while intended to provide helpful information, are not meant to be a substitute for the extensive literature on closing opinions that is currently available.

The updated Streamlined Form of Closing Opinion seeks to address opinion issues in a balanced way. Some noteworthy features are:

- The language used to incorporate definitions from the underlying agreement is more precise than the language incorporating definitions often used in closing opinions.
- The Form avoids use of the phrase “to our knowledge,” which has not always been read by courts as being as limiting as lawyers often expected. In addition, if “to our knowledge” or a like phrase is used, note 20 suggests a formulation that makes clear that the phrase is intended to serve as a limitation.
- The Form sharpens the description in the introductory paragraphs of the factual investigation the opinion preparers conducted, thus avoiding any suggestion that they did more than they actually did. The description also

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11. BOSTON B.J., Jan./Feb. 2006, at 14.

12. See *supra* note 1.

13. 63 BUS. LAW. 1277 (2008).

makes clear that the opinion preparers may have relied on certificates of public officials for legal matters.

- The corporate status opinion does not use the terms “duly incorporated” or “duly organized” for the reasons explained in note 9. The elimination of these terms has been widely accepted by opinion recipients.
- Paragraph 4 contains a more precise formulation of the no violation of law and no breach or default opinions than appeared in the original form.
- Note 15 provides an analysis of the Restatement approach for determining when the governing law provision in an agreement should be given effect. The Restatement approach has been adopted in many states.
- Note 16 addresses opinions on the enforceability of forum selection provisions. Although rarely given in domestic transactions, separate opinions on the enforceability of forum selection provisions are common in cross-border transactions.
- The Form proposes a formulation of the no-litigation “opinion” that is narrower than the one often used in the past (the “opinion” is really a factual confirmation and therefore is better referred to as a no-litigation confirmation). Use of the narrower formulation is an alternative to declining to cover litigation at all. The omission from closing opinions of any statement regarding litigation has gained increased acceptance.
- The Form includes a provision, often referred to as the “Wachovia provision,” that makes clear limitations on the right of assignees of notes to rely on a closing opinion.
- Attachment A addresses opinions on a corporation’s outstanding capital stock and rights to acquire stock. It also includes a form of opinion that the issuance of the stock does not require registration under the Securities Act of 1933.
- The Form leaves space for exceptions rather than identifying particular exceptions, including those that are commonly taken.

No form can accommodate every factual situation or eliminate the need for lawyers to exercise care when preparing closing opinions. Nevertheless, the law firms that treated the original Streamlined Form of Closing Opinion as a starting point in drafting their closing opinions have found that it improves the efficiency of the opinion process. We are hopeful that the updated Streamlined Form of Closing Opinion will continue to gain acceptance to the mutual benefit of both opinion givers and opinion recipients.

## Streamlined Form of Closing Opinion (2019 Update)

[For use when acting as Borrower's Counsel for an Unsecured Loan]

[Date]

To each Lender party to the  
Credit Agreement referred to below

We are furnishing this opinion letter<sup>1</sup> to you pursuant to Section \_\_\_\_\_ of the Credit Agreement dated as of \_\_\_\_\_ (the "Credit Agreement") among OpCo., Inc., a Massachusetts corporation (the "Company"), HoldCo., Inc., a Delaware corporation of which the Company is a wholly owned subsidiary ("Holdings"), and the Lenders party thereto.<sup>2</sup> Capitalized terms defined in the Credit Agreement and not otherwise defined in this opinion letter are used in this opinion letter as so defined.<sup>3</sup>

We have acted as counsel to Holdings, the Company and Delaware Sub, Inc., a Delaware corporation and wholly owned subsidiary of the Company ("Delaware Sub"), in connection with the preparation of the Credit Agreement, the Holdings Guaranty, the Subsidiary Guaranty and the Notes being delivered by the Company today under the Credit Agreement (which agreements and instruments are referred to collectively in this opinion letter as the "Credit Documents"). The Company and Delaware Sub are referred to collectively as the "Subsidiaries."

We have reviewed such documents and made such examination of law as we have deemed appropriate to give the opinions set forth below. We have relied, without independent verification, on certificates of public officials and, as to matters of fact material to our opinions, on representations made in the Credit Documents and certificates and other inquiries of officers of Holdings and the Subsidiaries [and others].<sup>4</sup>

The opinions set forth below are limited to the internal law of Massachusetts, the Delaware General Corporation Law and the federal law of the United States.<sup>5</sup>

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1. The opinion letter delivered to a third party in connection with the closing of a transaction also is often referred to as a "closing opinion."

2. This form is based on an entirely domestic U.S. transaction. For a discussion of opinions in cross-border transactions, see Legal Ops. Comm. of the Bus. Law Section of the Am. Bar Ass'n, *Cross-Border Opinions of U.S. Counsel*, 71 BUS. LAW. 139 (2015).

3. This form assumes that some of the terms used without definition are defined in the Credit Agreement. When incorporating definitions by reference, opinion preparers should consider the appropriateness of each definition.

4. The statements in this paragraph are understood as a matter of customary practice to apply without being stated. However, they are usually included for clarity.

5. Many non-Delaware lawyers are comfortable giving routine status, power, and authorization opinions on Delaware corporations because of their familiarity with Delaware corporation law. If a party to the transaction is not formed in Massachusetts or Delaware (or another state on whose law the opinion preparers are prepared to give those opinions), local counsel normally will be brought in to give the status, power, and authorization opinions with respect to that party. When local counsel gives those opinions, the practice today ordinarily is for lead counsel not to repeat them in its opinion letter but instead to assume expressly local counsel's legal conclusions to the extent necessary to support lead counsel's opinions.

[We note that the Credit Documents provide that they are to be governed by New York law. The opinion in paragraph 3 below is given as if each of the Credit Documents were governed by the internal law of Massachusetts.]<sup>6</sup>

Based upon the foregoing and subject to the additional qualifications set forth below, we are of the opinion that<sup>7</sup>:

1. Each of Holdings and Delaware Sub is validly existing as a corporation<sup>8</sup> and in good standing under Delaware law and has the corporate power to execute and deliver the Credit Documents to which it is a party and to perform its obligations thereunder.

2. The Company is validly existing as a corporation<sup>9</sup> and in good standing under Massachusetts law and has the corporate power to execute and deliver the Credit Documents to which it is a party and to perform its obligations thereunder.<sup>10</sup>

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An alternative approach, which is less common today, is for lead counsel to repeat local counsel's opinions and to state that in giving those opinions it is relying on the opinions of local counsel. If an opinion is based on an opinion of local counsel, it should be made subject to the same stated limitations, if any, to which local counsel's opinion is subject. By stating reliance on other counsel's opinions, the opinion giver is indicating that it is satisfied as to the competence of the other counsel and the coverage of its opinions. Language such as "you are justified in relying" or "the opinion is satisfactory in form and scope" does not add to the opinion giver's responsibility. By contrast, statements of concurrence or that "the opinion is satisfactory in form and substance" are understood to go further and to change the opinion giver's responsibilities. Those statements are not normally included in closing opinions.

6. The enforceability of an agreement is usually governed by the law chosen in that agreement (*see infra* note 15). When the law chosen is not the law of Massachusetts (or another state on whose law the opinion preparers are in a position to give an enforceability opinion), an opinion on the enforceability of the agreement "as if" Massachusetts law (or such other state's law) were the governing law might be given. In that case, the bracketed material should be included.

7. The opinions in this form are not intended to be exclusive. Depending on the circumstances, an opinion recipient may request additional opinions (e.g., that the Company is not an investment company; that the transaction complies with margin rules).

In addition, in some transactions, such as the sale by the Company of its stock, opinions on the Company's capitalization and the stock being sold typically would be included. Forms of opinions on the sale of convertible preferred stock are included in Attachment A.

8. This form is based on each of the entities being a corporation. Increasingly, non-corporate entities, such as limited liability companies, are being used for business transactions. For a discussion of opinions on these entities, see TriBar Opinion Comm., *Third-Party Closing Opinions: Limited Liability Companies*, 61 BUS. LAW. 679 (2006); *Supplemental TriBar LLC Opinion Report: Opinions on LLC Membership Interests*, 66 BUS. LAW. 1065 (2011); *see also* TriBar Opinion Comm., *Third-Party Closing Opinions: Limited Partnerships*, 73 BUS. LAW. 1107 (2018).

9. Opinion recipients sometimes request an opinion that the Company is "duly incorporated." This opinion can require the opinion preparers to conduct an inquiry into the past that, at least in the loan context, often is not cost justified. Ordinarily, an opinion that a Company has been "duly organized" should be avoided because of uncertainty as to what additional matters, if any, it covers.

10. Opinion recipients sometimes request that this opinion also cover the Company's corporate power to own its properties and conduct its business. If given, this broader opinion typically is based on a description of the Company's properties and business, usually in a disclosure document or an officer's certificate.

3. Each of Holdings, the Company and Delaware Sub has duly authorized, executed and delivered the Credit Documents to which it is a party, and such Credit Documents constitute its valid and binding obligations enforceable against it in accordance with their terms.

4. The execution and delivery by each of Holdings, the Company and Delaware Sub of the Credit Documents to which it is a party do not and the performance by it of its obligations thereunder will not (i) result in a violation by it of any federal or Massachusetts statute or any rule or regulation under such a statute, (ii) result in a violation by it of any court order, judgment or decree [listed in Schedule \_\_\_\_\_ to the Credit Agreement] [applicable to it and known to us],<sup>11</sup> (iii) result in a breach of, or constitute a default under, or result in the creation of a Lien or a right of acceleration under,<sup>12</sup> any agreement or instrument [listed in Schedule \_\_\_\_\_ to the Credit Agreement][to which it is a party and known to us]<sup>13</sup> or (iv) violate its charter or by-laws.

5. No consent, approval, license or exemption by, order or authorization of, or filing, recording or registration with any federal or Massachusetts governmental authority is required to be obtained or made by Holdings, the Company or Delaware Sub in connection with its execution and delivery of, or the performance by it of its obligations under, the Credit Documents to which it is a party [other than those that have been obtained or made].<sup>14</sup>

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11. The bracketed material provides alternative approaches. The first alternative, which is more commonly used, contemplates that a list of court orders, judgments, and decrees is available. This form refers to a schedule to the Credit Agreement. A list prepared for purposes of the opinion also could be used. If none of the entities covered are subject to any court order, judgment, or decree, this part of the opinion should be omitted. The second alternative is less commonly used; if it is used, see *infra* note 20 regarding a definition of “knowledge.”

12. Depending on the circumstances, this clause could be expanded to cover other adverse consequences, such as changes in terms or creation of put rights or rights of termination.

13. The bracketed material provides alternative approaches. The first alternative, which is more commonly used, specifies the documents covered by the opinion by referring to a list or schedule. This form refers to a schedule to the Credit Agreement. A list prepared for purposes of the opinion also could be used (this approach is particularly helpful when the opinion preparers cannot be sure that the schedule will not be changed after they have reviewed it). In the case of public companies, the reference could be to the exhibits in an SEC filing. The second alternative is less commonly used; if it is used, see *infra* note 20 regarding a definition of “knowledge.”

14. For most borrowers an unsecured loan will not require that they obtain any governmental approvals or make any filings.

[6. The choice of New York law as the governing law in the Credit Documents will be given effect under Massachusetts law.]<sup>15, 16</sup>  
 [ \_\_\_<sup>17</sup> [Except as disclosed in Schedule \_\_\_\_\_ to the Credit Agreement,] we are not representing Holdings or either of the Subsidiaries in any pending

15. This opinion is sometimes requested when the Credit Documents choose as their governing law the law of a state on which the opinion giver is not giving an enforceability opinion. When given, this opinion provides comfort to the opinion recipient that the chosen law will be applied if it brings an action against the Company in the Company's own state (assumed to be Massachusetts in this form). This opinion is not necessary when the opinion letter covers the law chosen as the governing law in the Credit Documents and an opinion is being given on the enforceability of the Credit Documents under that law because the opinion on the enforceability of the Credit Documents covers the governing law provision.

Often, this opinion is not given alone but is accompanied by an opinion on the enforceability of the Credit Documents as if the law covered generally by the opinion letter (Massachusetts in this form) governed those documents. Sometimes, the two opinions are combined by adding the following at the end of the choice-of-law opinion: "but if the internal law of Massachusetts were nevertheless held to be applicable, the Credit Documents to which each of Holdings, the Company and Delaware Sub is a party would constitute its valid and binding obligations enforceable against it in accordance with their terms under Massachusetts law."

An opinion giver's ability to give a choice-of-law opinion will depend on the law it covers and the factual context. Massachusetts follows the Restatement approach of applying the law chosen to govern the agreement if (i) the state whose law is chosen has a reasonable relationship to the transaction or the parties, (ii) applying that state's law would not violate a fundamental policy of a state whose law would apply in the absence of an effective governing law provision, and (iii) that other state has a materially greater interest in the issue. To give the choice-of-law opinion included in this form, the opinion preparers must be satisfied that New York has a reasonable relationship to the transaction or the parties (e.g., the lenders are located in New York) and that the Credit Documents, as interpreted under Massachusetts law, do not violate a fundamental policy of Massachusetts (assuming for this purpose that Massachusetts law would apply in the absence of an effective governing law provision and that Massachusetts has a materially greater interest in the issue). Some opinion preparers choose to state expressly in their opinion letters that the opinion in paragraph 6 "is based on the assumption that Massachusetts law would apply in the absence of a governing law clause in the Credit Documents and that Massachusetts would have a materially greater interest than any other state in any issue relating to the enforceability of the Credit Documents." Other lawyers believe that this assumption does not need to be stated expressly on the grounds that it is well understood that they are only addressing Massachusetts law and not the law or policies of any other state and are not in a position to determine whether another state has a materially greater interest in an issue than Massachusetts. Choice-of-law opinions are discussed at length in TriBar Opinion Comm., *Supplemental Report: Opinions on Chosen-Law Provisions Under the Restatement of Conflicts of Law*, 68 BUS. LAW. 1161 (2013).

16. In cross-border transactions, when the Credit Documents include a provision naming the courts of a jurisdiction other than those of the state whose law is covered generally by the opinion letter (Massachusetts in this form) as a (or the) forum in which disputes under those documents are to be resolved, opinion recipients sometimes request an opinion on the enforceability of that provision. See Legal Ops. Comm. of the Bus. Law Section of the Am. Bar Ass'n, *Cross-Border Opinions of U.S. Counsel*, 71 BUS. LAW. 139, 167-85 (2015).

17. Some opinion preparers do not number this paragraph so as to emphasize that, unlike the paragraphs that precede it, it is not an opinion but rather a factual confirmation.

In view of the expansion of law firm size and geographic diversity, the limited nature of many client relationships and other factors, many firms question whether a no-litigation confirmation is justified today. This paragraph is included in brackets to make clear that firms using this form may properly choose not to include it.

If included, this paragraph, by focusing on matters that the firm is handling for the Company and that bear directly on the transaction, covers what a firm might realistically be asked to address. Sometimes, opinion recipients also may ask counsel to cover material litigation that could adversely affect the Company. Even firms that are willing to address litigation affecting the transaction may well decline such a request. If, however, a firm decides to expand the confirmation to cover litigation



litigation<sup>18</sup> in which it is a named defendant[, or in any litigation that is overtly threatened in writing against it by a potential claimant,<sup>19</sup>] that challenges the validity or enforceability of, or seeks to enjoin the performance of, the Credit Documents.<sup>20</sup>]

Our opinions above are subject to bankruptcy, insolvency, fraudulent transfer, reorganization, moratorium and other similar laws of general application affecting the rights and remedies of creditors and to general principles of equity.<sup>21</sup>

We express no opinion as to . . . .<sup>22</sup>

[This opinion letter shall be interpreted in accordance with the Core Opinion Principles as published in 74 *The Business Lawyer* 801, 815 (2019).]<sup>23</sup>

This opinion letter is being furnished only to you for your use solely in connection with the transaction described above and may not be relied on without our prior written consent for any other purpose or by anyone else other than an assignee of the Notes permitted by the Credit Agreement [provided that their right to rely is subject to the condition and understanding that (i) any such reliance must be actual and reasonable under the circumstances existing at the time such person becomes a permitted assignee, including any circumstances

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adversely affecting the Company, the opinion preparers should carefully consider the internal review procedures they will follow and the wording of the confirmation.

18. Opinion preparers sometimes are asked to refer to “action, suit or proceeding” instead of simply “litigation.”

19. When this phrase is used, it is understood to mean that a potential claimant has manifested in writing to the Company its intention to assert a claim against the Company that could reasonably be expected to result in litigation.

20. Although this form obviates the need for the phrase “to our knowledge” or a variant of it, an opinion sometimes will include that phrase. When it does, “knowledge” ordinarily should be defined in the opinion letter to avoid any misunderstanding as to its meaning. (See also bracketed material in the text at *supra* notes 11 and 13 in paragraph 4.) An example of a definition that is derived from the Core Opinion Principles (and that presumably would apply if no definition were included) is:

When used in this opinion letter, the phrase “to our knowledge” or an equivalent phrase limits the statements it qualifies to the actual knowledge of the lawyers in this firm responsible for preparing this opinion letter after such inquiry as they deemed appropriate.

Some opinion preparers include in the definition in place of “this opinion letter” the phrase “the particular opinion or confirmation containing that reference.” Also, some opinion preparers refer to “conscious awareness” instead of “actual knowledge.”

In preparing a no-litigation confirmation, the opinion preparers normally would conduct an inquiry of those lawyers in their firm whom the opinion preparers recognize as being reasonably likely to have information not otherwise known to them that they need to prepare the confirmation. As a matter of customary practice, the confirmation is understood not to cover information known to any other lawyers in the firm. Depending on the circumstances and the wording of the confirmation, the opinion preparers also might make inquiry of appropriate officials of the Company. In preparing a no litigation confirmation, the opinion preparers are not required as a matter of customary diligence to check court or other public records. Although not necessary, some opinion preparers choose to make this clear, for example, by stating expressly that they did not examine court or other public records.

21. Although usually stated in the opinion letter, these exceptions are understood to apply whether or not stated.

22. Include any additional exceptions to the opinions that may be necessary.

23. Many firms choose to include this paragraph to emphasize the application of the Core Opinion Principles. The *Statement of Opinion Practices*, 74 *BUS. LAW.* 801, 807 (2019), from which the Core Opinion Principles are derived, states in section 2: “Customary practice applies to a closing opinion whether or not the closing opinion refers to it or to this Statement.” The *Statement of Opinion Practices* has been approved by many bar associations and other lawyer groups.

relating to changes in law, facts or other developments known to or reasonably knowable by such person at such time, (ii) our consent to such reliance shall not constitute a reissuance of the opinions expressed herein or otherwise extend any statute of limitations period applicable hereto on the date hereof, and (iii) in no event shall any permitted assignee have any greater rights with respect hereto than the original addressees of this opinion letter on the date hereof or its assignor. [Furthermore, all rights hereunder may be asserted only in a single proceeding by and through [the Administrative Agent or the Required Lenders].<sup>24</sup>]]<sup>25</sup>

Very truly yours,  
[Law Firm]

### Attachment A

[a] The authorized capital stock of the Company consists of (i) \_\_\_\_\_ shares of Common Stock, \$\_\_\_\_\_ par value, of which \_\_\_\_\_ shares are issued and outstanding, and (ii) \_\_\_\_\_ shares of Preferred Stock, \$\_\_\_\_\_ par value, of which \_\_\_\_\_ shares have been designated Series A Preferred Stock, \_\_\_\_\_ shares of which are issued and outstanding, and \_\_\_\_\_ shares have been designated Series B Preferred Stock, none of which are issued and outstanding.<sup>26</sup> [All such issued and outstanding shares have been duly authorized and validly issued and are fully paid and nonassessable.]<sup>27</sup>

[b] The Series B Shares [*shares of Series B Preferred Stock to be issued pursuant to the Purchase Agreement*] have been duly authorized and, when issued, delivered

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24. This sentence addresses concerns by opinion givers over the possibility of a multiplicity of lawsuits in diverse jurisdictions. It is consistent with the requirement in many credit agreements that actions brought against borrowers on behalf of the lenders be brought only by an agent for the lenders or the lenders as a group.

25. Opinion preparers should consider whether anyone besides the addressees should be permitted to rely on the opinion letter. When third parties, such as assignees, are permitted to rely, sometimes language such as that in brackets is added to make clear the rights of such parties and the limitations on those rights. This provision is based upon the so-called "Wachovia provision," which, except for the final bracketed sentence, has been generally accepted by opinion recipients.

26. The appropriateness of an opinion on the number of outstanding shares will depend on the circumstances. For example, in the case of a public company, the opinion usually adds little to a certificate from the transfer agent and is rarely given. In the case of a private company, the opinion preparers may be able to base the opinion on Company records. Even if they are willing to cover the number of outstanding shares, some law firms will do so only if they also are giving an opinion on the valid issuance of those shares (*see infra* note 27) to avoid any misunderstanding over the meaning of an opinion on the number of outstanding shares.

27. Because an opinion on the valid issuance of all the outstanding shares will require a review of each issuance of shares, in many situations it will not be cost justified. *See* TriBar Opinion Comm., *Third-Party "Closing" Opinions: A Report of The TriBar Opinion Committee*, 53 BUS. LAW. 591, 651-52 (1998).

Opinion recipients sometimes ask for an opinion whether, to the opinion giver's knowledge, the Company has any outstanding options, warrants, or other rights to acquire stock other than as disclosed in the transaction documents. Many law firms decline to give this opinion because it constitutes negative assurance on a factual matter they rarely are in a position to confirm. If, however, a firm is willing to give the opinion, the opinion letter should describe what the opinion preparers have done to support it.

and paid for in accordance with the Purchase Agreement, will be validly issued, fully paid and nonassessable. The Conversion Shares [*shares of Common Stock issuable upon conversion of the Series B Preferred Stock*] have been duly authorized and, [assuming sufficient authorized shares of Common Stock are available for issuance at the time of conversion of the Series B shares,]<sup>28</sup> upon conversion of the Series B Shares and issuance in accordance with the Company's articles of organization, will be validly issued, fully paid and nonassessable. [The issuance and sale of the Series B Shares and the issuance of the Conversion Shares upon conversion of the Series B Shares are not subject to any preemptive rights under Chapter 156D of the Massachusetts General Laws or the Company's articles of organization or bylaws.]<sup>29</sup>

[c] Assuming the accuracy of the representations and warranties of the [*Purchasers*] in the Purchase Agreement and their compliance with the covenants in the Purchase Agreement, registration of the Series B Shares or the Conversion Shares under the Securities Act of 1933 is not required in connection with the offer, sale and delivery of the Series B Shares to the [*Purchasers*] in accordance with the Purchase Agreement, or the offer, sale and delivery of the Conversion Shares issuable upon conversion of the Series B Shares [(assuming no commission or other remuneration is paid or given directly for soliciting such conversion)].<sup>30</sup>

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28. This opinion is understood as a matter of customary practice to mean that sufficient authorized shares are available for issuance upon conversion on the date of the opinion letter and not that sufficient authorized shares will be available on a future conversion date. Nevertheless, some law firms include the bracketed assumption regarding the availability of sufficient authorized shares in the future.

29. Even though a valid issuance opinion could not be given on shares issued in violation of preemptive rights granted by Chapter 156D or a Company's articles of organization or bylaws, opinion recipients sometimes request an opinion that expressly addresses the absence of those rights. Such an opinion is understood as a matter of customary practice not to cover contractual rights unless it does so expressly.

30. Some firms include the bracketed assumption in view of the condition for availability of the exemption under section 3(a)(9) of the Securities Act of 1933; other firms consider the assumption to be so well understood as to be unnecessary. When shares are issuable upon exercise of warrants, an opinion on the availability of an exemption from registration upon such issuance raises difficult issues because the exemption under section 3(a)(9) is not available (other than possibly if shares were only issuable on a net exercise basis) and the availability of another exemption, such as the exemption for transactions not involving a public offering, will depend on the facts at the time of exercise. Therefore, some firms decline to give a no-registration opinion with respect to the issuance of shares upon exercise of warrants. Alternatively, some firms give that opinion based on the express assumption that the warrants were exercised by the purchasers to whom the opinion is being given at the time the warrants were issued. See Subcomm. on Sec. Law Ops. of the Fed. Reg. of Sec. Comm. of the Bus. Law Section of the Am. Bar Ass'n, *No Registration Opinions (2015 Update)*, 71 BUS. LAW. 129 (2015).

