Laws Commonly Excluded from the Coverage of Third-Party Legal Opinions in U.S. Commercial Loan Transactions

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Often as a condition to the closing of loan transactions, borrowers are expected to have their counsel provide written opinions to the lenders addressing the enforceability and legality of the borrowers' obligations under the loan documents. In doing so, the opinion givers are not expected to address all laws that may be applicable. This article discusses the views of the authors as to what laws are commonly not expected to be addressed in such opinions delivered in the U.S. commercial loan context and reasons for their exclusion.

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The authors of this article have previously addressed the question of what constitutes common practice with respect to qualifications to enforceability opinions rendered in the context of U.S. commercial loan transactions. *See* Gail Merel et al., *Common Qualifications to a Remedies Opinion in U.S. Commercial Loan Transactions*, 70 Bus. Law. 121 (2014) [hereinafter *Common Qualifications Article*]. The work on that project was the starting point for the authors' continued analysis of common practice in the loan context, with a new focus on generally accepted exclusions from the laws covered by opinions of borrower's counsel. Like the *Common Qualifications Article*, this article has benefitted from discussions on the subject at meetings sponsored by The Working Group on Legal Opinions Foundation, but (also like the *Common Qualifications Article*) this article reflects only the views of its authors and has not been submitted for approval to the Foundation or to any bar association or other organization. Further, this article does not necessarily reflect the views of the law firms with which the authors are associated, nor does it modify the positions taken on subjects covered in this article in various bar association reports promulgated by committees on which any of the authors has served.

Introduction

In a U.S. commercial loan transaction, counsel to the borrower is often requested to provide a written opinion letter for the benefit of the lender addressing the enforceability against the borrower of some or all of the loan documents[1] and opining as well that the execution, delivery, and performance of the loan documents do not violate laws applicable to the borrower or require the borrower to obtain or make any governmental approvals or filings.[2] These opinions are commonly referred to as "third-party" opinions because the opinion giver renders them to a party or parties other than the opinion giver's own client.[3]

It is widely recognized that a third-party opinion of borrower's counsel, like other third-party opinions, will not address all laws that may conceivably be applicable.[4] Frequently, however, the scope of these opinions in the loan context and the extent to which they will be qualified are the subject of time-consuming discussions, and the resulting costs, borne by the client whose counsel is asked to render the opinions, increase substantially as these discussions proceed. Based upon the experience of the authors, this article aims to identify laws that opinion givers, as well as opinion recipients and their counsel, commonly do not expect to be covered by the legal opinions of borrowers' counsel in U.S. commercial loan transactions, except to the extent such laws are specifically and expressly addressed. In identifying these commonly excluded laws, the authors do not seek to establish what does or does not constitute what is referred to as *customary* legal opinion practice.[5] Instead, the authors hope, by exploring exclusions of law they believe are commonly recognized in practice, they can contribute to a convergence of understanding in the

1. The enforceability opinion is also generally referred to as a "remedies" opinion, and we use those terms interchangeably in this article.

2. We note that opinion givers express these opinions in various ways. For example, some opinion givers express the "no violation of law" and "no governmental approvals or filings" opinions as to "*laws*, rules and regulations"; others, suggesting perhaps a narrower scope, express these opinions as to "*statutes*, rules and regulations." As another example, some opinion givers express the no governmental approvals or filings opinion as to performance as well as to execution and delivery; others prefer rendering that opinion as to execution and delivery and either narrowing the scope of performance that is covered (for example, by excluding ordinary course of business approvals or filings or narrowing the scope of performance to consummation of the transaction or to payment obligations) or, in some instances, excluding coverage of performance from that opinion altogether.

Because the authors' aim is to identify laws commonly excluded from opinions of borrower's counsel and the possible reasons for those exclusions, regardless of how the opinions are articulated, the appropriate wording of any particular opinion is beyond the scope of this article.

3. *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 Bus. Law. 1277 (2008) [hereinafter *Customary Practice Statement*].

4. *See*, *e.g.*, TriBar Opinion Comm., *Third Party "Closing" Opinions: A Report of The TriBar Opinion Committee*, 53 Bus. Law. 591, 627–28 (1998) (§ 3.5.1) [hereinafter *TriBar 1998 Report*] ("[o]pinion preparers do not customarily seek (nor are they requested to seek) guidance from experts in every specialized field of law that might be implicated by the undertakings in an agreement"). On the exclusion of laws familiar only to specialists rather than transactional loan counsel generally, see *infra* note 39 and accompanying text.

5. For the meaning of the term "customary practice" in the context of third-party legal opinions, see *infra* note 16.

domestic loan context around what laws are usually excluded unless specifically and expressly addressed.[6]

Opinion givers in the commercial loan context take many approaches to excluding coverage of various laws from their opinions. Some opinion givers do not try to articulate all, most, or even any, of the laws excluded from their opinions, relying instead on a combination of the actual language of their opinions and other stated qualifications, as well as understandings under customary opinion practice as to excluded laws and other common understandings and experience of what lenders and their counsel expect will be covered by an opinion letter of borrower's counsel. In contrast, other opinion givers routinely include in their opinion letters lists (generally couched as non-exclusive) of some excluded laws, whether to provide examples of laws they believe fall within the more generally stated exclusions under customary practice[7] or simply to highlight at least some of their exclusions. In other cases, opinion givers rely on more succinct or general statements in their opinion letters, such as a statement limiting the laws covered by their opinions to only those laws (in the applicable jurisdiction) that lawyers in the jurisdiction, exercising customary professional diligence, would reasonably recognize as being applicable to the client or the transaction that is the subject of the documents being opined on.[8] Another example of a general formulation often used to limit laws covered by the opinions is a statement to the effect that coverage is expressly limited to only those laws normally applicable to general business entities (without taking into consideration the particular nature of the borrower's business or assets).[9]

Some opinion givers use a combination of general or succinct statements of exclusion, augmented by sample lists of excluded laws. Sometimes opinion givers expressly exclude certain laws from particular opinions, such as one or more of the enforceability, no violation of law, and no governmental approvals or filings opinions. Oftentimes opinion givers, instead, include their disclaimer of

6. While this article addresses laws commonly excluded from coverage in the context of U.S. commercial loan transactions, the authors believe the discussion in this article can assist both opinion givers and recipients in other types of transactions as well. Our focus, however, is on *domestic* commercial loan transactions, and it is beyond the scope of this article to consider common practice in the context of cross-border financings. For a discussion of excluded laws in the cross-border context, see ABA Comm. on Legal Ops., *Cross-Border Closing Opinions of U.S. Counsel*, 71 Bus. Law. 139, 202–03 (2015) [hereinafter *Cross-Border Report*].

7. See *infra* note 17, together with notes 25–26 and accompanying text in Part A for a discussion of ambiguity in the precise boundaries of laws generally excluded, as a matter of customary practice, from third-party opinions.

8. This type of disclaimer is implicit as a matter of customary practice and need not be expressly stated. *Statement of Opinion Practices*, 74 Bus. Law. 807, 810 (2019) (§ 6.2) [hereinafter *Statement of Opinion Practices*]. However, many opinion givers still choose to state this principle of customary practice (or some variation of it) expressly in their opinion letters. For some examples of variations the authors have seen used by, or have themselves used as, borrower's counsel, see paragraph (a) listed in Annex 1. For further discussion on the *Statement of Opinion Practices*, see *infra* note 16.

9. See *infra* note 84 and accompanying text on these types of disclaimers.

excluded laws among other qualifications that apply to the opinion letter as a whole.[10]

Whatever the approach taken in the opinion letter, the laws set out in Annex 1 and discussed in this article are laws the authors believe are commonly presumed to be excluded from an opinion of borrower's counsel unless affirmatively addressed *by specific reference in one or more particular opinions*. The laws set out in Annex 1 are also laws that the authors have seen included in expressly stated lists of excluded laws, without objection from opinion recipients and their counsel. Of course, the exclusion of any particular laws (or their inclusion with respect to one or more opinions) is also subject to any understandings worked out with the recipient and its counsel based on the facts and circumstances of the particular transaction. Neither the composite list set out in Annex 1, nor the other examples of disclaimers and limitations discussed in this article, are intended to be complete, as there are certainly other laws we do not address that, for one reason or another, would be appropriately excluded from an opinion of borrower's counsel. Moreover, because our laws and their judicial interpretation are never static, any list of excluded laws such as that set out in Annex 1 will need to be reconsidered and revised from time to time to take into account continuing changes in the law.[11]

As stated earlier, it is not our purpose to attempt to prescribe exactly what laws are or should be excluded as a matter of *customary practice*.[12] We undertake, instead, to identify laws that, as a practical matter and in our experience, are commonly not addressed in opinions rendered in the commercial loan context. We consider why that might be and note that in most loan transactions these exclusions are not controversial. The conclusions we reach reflect the experience of all eleven authors, each of whom has practiced in the commercial loan context for many years, acting as counsel for both lenders and borrowers. In this article, when we identify laws as "commonly" excluded from opinions of borrower's counsel, we refer to the authors' collective experience and understanding as to those matters opinion givers, as well as opinion recipients and their counsel, do not typically expect to be covered in an opinion of borrower's counsel except to the extent such laws are expressly addressed in the opinion letter. We also note where our experience finds support in state bar reports and other legal opinion literature.

The authors recognize that different approaches can be equally effective in accomplishing the intended scope of exclusion, and we do not advise that any particular approach—or the inclusion of any particular set of "magic words"—is

10. In the experience of the authors, the exclusions discussed in this article are increasingly applied to the entire opinion letter, without objection by opinion recipients or their counsel. *Cf*. Donald W. Glazer et al., Glazer and FitzGibbon on Legal Opinions: Drafting, Interpreting and Supporting Closing Opinions in Business Transactions § 15.2, at 570 (3d ed. 2008) [hereinafter Glazer & FitzGibbon] (analysis of which laws are covered by the no violation of law and no governmental approvals or filing opinions are the same).

11. See, for example, text accompanying *infra* notes 54–57 regarding a recent change in the opinion practice of some opinion givers in response to new CFIUS regulations.

12. *See supra* note 5 and accompanying text and *infra* note 16.

required. Nor do we recommend any one approach to identifying excluded laws (whether by category, list, or otherwise) as preferable to another. We do not, for example, take a position as to whether any one succinct or general statement of excluded laws is more appropriate or effective than another, or as to whether the types of long lists of excluded laws that many opinion givers include in their opinions—such as the composite list set out in Annex 1—or any other form of their expression—are either appropriate or required.[13] We also take no position as to whether, or when, it might be appropriate or inappropriate for opinion recipients to request that specific laws be addressed in one or more opinions.

We consider our collective experience with excluded laws in three parts, recognizing there may be some overlap in the categories set out in Parts A, B, and C below. In Part A, we address laws generally recognized in the literature as excluded as a matter of customary opinion practice, even when recognized as applicable. In Part B, a number of other laws are identified that, in the experience of the authors and for a variety of reasons, are rarely if ever covered, or even requested to be covered, by a legal opinion in the loan context. Finally, in Part C we address some types of laws that, in our experience, though commonly understood to be excluded from opinions of borrower's counsel, are nevertheless sometimes expressly covered when they are both applicable and significant to the transaction or the entity covered by the opinions.[14] We set out in Annex 3, for the convenience of the reader, the website locations for many of the opinion reports we cite.

In the end, each opinion requested and rendered will turn on the particular facts and circumstances presented, as well as the specific provisions of the documents covered by the opinion letter. We do conclude, however, that, because all of the laws identified in this article, if addressed at all by an opinion letter, are in the authors' experience rarely addressed unless their coverage is plainly "called out" by specific mention in the opinions actually rendered, recipients

13. The inclusion in opinions of lists of excluded laws is itself a matter of some controversy, although not one on which the authors take a position. *Compare*, *e.g.*, GLAZER & FITZGIBBON, *supra* note 10, § 13.2.2.7, at 546–47 ("In some parts of the country, lawyers routinely include in their opinions a list of laws that are expressly excluded from coverage, including laws, such as local laws, that clearly would not be covered anyway as a matter of customary practice. In other parts of the country, particularly the Northeast, they do not."), *and TriBar 1998* Report, *supra* note 4, § 3.5.3, at 630 ("[I]t would ordinarily be counterproductive for opinion givers to try to identify in opinion letters each area that is not covered."), *with* LEGAL OP. STDS. COMM., BUS. LAW SECTION, FLA. BAR & LEGAL OPS. COMM., REAL PROP., PROBATE & TR. LAW SECTION, FLA. BAR, REPORT ON THIRD-PARTY LEGAL OPINION CUSTOMARY PRACTICE IN FLORIDA 30–33 (2011) [hereinafter FLORIDA REPORT] (including list of excluded laws recommended to be sure opinion recipient understands their exclusion), *and Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions*, BULL. BUS. L. SEC. ST. B. TEX. (Tex. State Bar Bus. Law Section Legal Ops. Comm., Austin, Tex.), June–Sept. 1992, at 95 [hereinafter *Texas Report*] (if the *Accord*, *infra* note 32, is not incorporated, opinion givers should consider to what extent laws identified in § 19 of the *Accord* should be expressly excepted).

14. The laws listed in Annex 1 generally follow the order of discussion of those same laws in Parts A, B, and C below.

In this article, when we speak of laws covered "specifically" or "expressly," those terms are used interchangeably to refer to laws affirmatively addressed by specific reference so that their coverage is apparent on the face of the opinion letter.

and their counsel should generally understand, without more, that such laws are not covered by an opinion of borrower's counsel in a U.S. commercial loan transaction unless affirmatively addressed by specific reference in the opinion letter.[15]

A. Laws Excluded by Customary Practice Even When Recognized as Applicable

Some laws are understood as a matter of customary practice[16] to be excluded from the coverage of a third-party legal opinion, even when not expressly stated to be excluded and *even when recognized to be applicable* to the transaction, the entity, or the agreements covered by the opinion, *unless they are expressly addressed in the opinion letter*. This understanding applies generally to all types of transactions, not just loan transactions.

In the literature, including bar reports on the subject, laws understood to be excluded from third-party opinion letters by customary practice include, but are not limited to[17]:

- laws of jurisdictions not expressly stated to be covered in the opinion letter,[18]
- municipal and other local laws,[19]
- securities laws,[20]

15. Borrower's counsel often render opinions as to parties other than a borrower, such as a borrower's affiliates. Although, for simplicity, we refer throughout to opinions as to a borrower, our analysis should be understood to apply more broadly to these other third-party opinions as well.

16. Customary practice refers to the customary opinion practice of lawyers who regularly give and review third-party legal opinions for their clients. *Customary Practice Statement*, *supra* note 3, at 1277. Building on the *Customary Practice Statement*, the American Bar Association's Business Law Section and The Working Group on Legal Opinions Foundation jointly prepared the *Statement of Opinion Practices* "to identify key aspects of customary practice and other practices applicable to third-party opinions that are commonly understood and accepted throughout the United States." Stanley Keller & Steven O. Weise, *Obtaining National Consensus on Key Opinion Practices: An Introduction to the Statement of Opinion Practices*, 74 Bus. Law. 801 (2019). As restated in the *Statement of Opinion Practices*, third-party opinions "are understood in accordance with the customary practice of lawyers who regularly give those opinions and lawyers who regularly review them for opinion recipients." *Statement of Opinion Practices*, *supra* note 8, § 2, at 807. The *Statement of Opinion Practices* has since been approved by more than thirty-five bar and other opinion groups from around the country, and it also reflects the reported conclusions of many of these same groups.

Accordingly, the reader should note—due to wide acceptance of the *Statement of Opinion Practices* and to avoid redundancy—where we cite the *Statement of Opinion Practices* in direct support of a statement made in the text, we generally omit further supporting citations to other reports authored by the same groups approving the *Statement of Opinion Practices*.

17. It should be noted that no precise boundaries for any of these categories of laws excluded under customary practice are clearly stated in the published opinion literature. For example, as discussed in *infra* note 23 and notes 25–26 and accompanying text, "securities" and "antitrust" laws are two categories of laws universally recognized to be excluded, as a matter of customary practice, from third-party legal opinions (unless expressly addressed); yet considerable uncertainty remains as to precisely which laws fall within each of these two categories.

18. *Statement of Opinion Practices*, *supra* note 8, § 6.1, at 810. An example of a coverage limitation is set out in the first sentence of Annex 1.

19. *Id.* § 6.2, at 810.

20. *Id.*

- tax laws,[21]
- insolvency laws,[22]
- antitrust laws,[23] and

21. *Id.*

22. *Id.* Although the exclusion of insolvency laws is implicit under Section 4.2 of the *Statement of Opinion Practices*, many opinion givers choose to include an express exception; when they do, they almost invariably use a formulation broadly carving out laws addressing, not just bankruptcy or insolvency, but also such related concepts as fraudulent conveyances and voidable transfers. Sometimes, these exclusions are stated or listed, as for example in item (d)(i) of Annex 1, as laws excluded from the coverage of the opinion letter. Often, however, the opinion giver instead relies on what has come to be known as "the bankruptcy exception" which, when stated expressly, is typically coupled with the "equitable principles limitation," as in the following example:

> Our opinions are subject to the effects of (a) applicable bankruptcy, insolvency, fraudulent transfer and conveyance, preference, reorganization, receivership, moratorium, and other similar laws affecting the rights and remedies of creditors generally and (b) general principles of equity (whether considered in a proceeding at law or in equity), including but not limited to principles limiting the availability of specific performance and injunctive relief, and concepts of materiality, reasonableness, good faith, and fair dealing.

Opinion givers phrase this limitation in varying ways. The sample language set out above is an example taken from a prior article of the authors and is not intended as a recommended form. *See* Gail Merel et al., *Common Qualifications to a Remedies Opinion in U.S. Commercial Loan Transactions*, 70 Bus. Law. 121, 126–28 (2014). Under customary practice, the bankruptcy exception applies to opinions even if not expressly stated. *Statement of Opinion Practices*, *supra* note 8, § 4.2, at 808.

Clause (b) of the sample language set out in the preceding paragraph of this footnote addresses the equitable principles limitation, which excludes from the coverage of an opinion principles of equity pursuant to which a court might, in the interest of equity, decline to give effect to particular provisions of an agreement in light of facts that occur after the agreement is executed. *See TriBar 1998 Report*, *supra* note 4, § 3.3.4, at 625; Bus. Law Section, State Bar of Cal., Report on Third-Party Remedies Opinions app. 10, at 9 (2004 & 2007 Update) [hereinafter California 2007 Remedies Report Exceptions Appendix]; Florida Report, *supra* note 13, at 100; Legal Op. Comm., Bus. Law Section, N.C. Bar Ass'n, Third-Party Legal Opinions in Business Transactions § 10.1(b), at 56–57 (2d ed. 2004) [hereinafter North Carolina Report]; *Texas Report*, *supra* note 13, at 70–71. While equitable principles are not typically listed among excluded laws in an opinion letter, under customary practice their exclusion applies to opinions even if not expressly stated. *Statement of Opinion Practices*, *supra* note 8, § 4.2, at 808. When their exclusion *is* expressly stated, the limitation is usually coupled with the bankruptcy exception as in the sample formulation set out above.

23. Numerous bar reports recognize the implicit exclusion of antitrust laws unless expressly addressed. *See, e.g.*, *TriBar 1998 Report*, *supra* note 4, § 3.5.2, at 630, § 6.6, at 662; California 2007 Remedies Report Exceptions Appendix, *supra* note 22, at 14 (citing *TriBar 1998 Report*, *supra* note 4); Florida Report, *supra* note 13, at 30; Special Joint Comm., Section of Bus. Law & Section of Real Prop., Planning & Zoning, Md. State Bar Ass'n, 2007 Report on Lawyers' Opinions in Business Transactions 146 (rev. ed. 2009) [hereinafter Maryland Report]; Bus. Law Section, Pa. Bar Ass'n, Model Closing Opinion Letter (Annotated) (For Opinion Letter of Borrower's Counsel Relating Primarily to Unsecured Bank Credit Agreement) 86–87 (2007) [hereinafter Pennsylvania Model Closing Opinion]; *Texas Report*, *supra* note 13, at 76; Legal Ops. Comm., Bus. Law Section, Va. Bar Ass'n, Virginia Report on Third-Party Legal Opinions in Business Transactions 25, 45 (2018) [hereinafter Virginia Report]; Legal Ops. Comm., Bus. Law Section, Wash. State Bar Ass'n, Amended and Restated Report on Third-Party Legal Opinion Practice in the State of Washington A-32 n.104 (2018) [hereinafter Washington Report] (illustrative opinion letter). See also the following two recent reports issued by the real estate bar: ABA Section of Real Prop., Tr. & Estate Law, Comm. on Legal Ops. in Real Estate Transactions et al., *Real Estate Finance Opinion Report of 2012*, 47 Real Prop., Tr. & Est. L.J. 213, 270–71 (2012) (ch. 3, pt. IV, § 4.6) [hereinafter *Real Estate 2012 Report*] (illustrative opinion language); ABA Section of Real Prop., Tr. & Estate Law, Comm. on Legal Ops. in Real Estate Transactions et al., *Local Counsel Opinion Letters in Real Estate Finance Transactions: A Supplement to the Real Estate Finance*

- fiduciary duty requirements.[24]

Many opinion givers, relying on the fact that these exclusions are implicit as a matter of customary practice, do not exclude them expressly. Other opinion givers choose to state exclusions expressly within the four corners of the opinion letter. In either case, the exclusion of these laws is generally non-controversial in the loan context.

We note the existence of some disagreement in the literature about whether, under customary practice, Federal Reserve Board margin regulations[25] and the

Opinion Report of 2012, 51 REAL PROP., TR. & EST. L.J. 167, 260 (2016) (add. § 4.6(d)) [hereinafter *Real Estate Local Counsel Report*] (illustrative opinion letter).

Because the precise scope of antitrust laws excluded under customary practice has not been clearly articulated in bar reports and other opinion literature, some opinion givers choose to state expressly that, in addition to antitrust laws, their opinions exclude all laws relating generally to trade and unfair competition. Similarly, because there is no clear consensus on whether the exclusion for "antitrust laws" excludes coverage of the need to make filings under the Hart-Scott-Rodino Antitrust Improvements Act, many lawyers who intend to exclude coverage of Hart-Scott requirements do so expressly to avoid miscommunication. Of course, laws relating to antitrust, trade, and unfair competition, including Hart-Scott in particular, are unlikely to be relevant at all to most loan transactions, so an express exclusion should not be necessary and, in the authors' experience, is also generally acceptable to recipients when included.

24. Numerous bar reports recognize the implicit exclusion of fiduciary duty requirements. *E.g.*, *TriBar 1998 Report*, *supra* note 4, § 6.4, at 654 (no violation of fiduciary duties is an unstated assumption), § 6.6, at 662 n.166; CORP. COMM., BUS. LAW SECTION, STATE BAR OF CAL., REPORT ON LEGAL OPINIONS IN BUSINESS TRANSACTIONS (EXCLUDING THE REMEDIES OPINION) 46 (2005 & 2007 Update) [hereinafter CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT]; FLORIDA REPORT, *supra* note 13, at 30; LEGAL OPS. COMM., BUS. LAW SECTION, PA. BAR ASS'N, PENNSYLVANIA THIRD-PARTY LEGAL OPINION REPORT 27 (2007) [hereinafter PENNSYLVANIA REPORT] (due authorization, execution, and delivery opinion assumes compliance with fiduciary duty requirements and does not address that question unless it is specifically addressed); JOINT OP. COMM., SECTIONS OF REAL ESTATE LAW & BUS. LAW, TENN. BAR ASS'N, REPORT ON THIRD-PARTY CLOSING OPINIONS § 2.4(b)(2), at 12 (2011) [hereinafter TENNESSEE REPORT] ("Since the analysis of fiduciary duties involves complex factual issues and subjective judgments, conclusions about fulfillment of fiduciary duties would not normally be appropriate in a legal opinion."); *Texas Report*, *supra* note 13, at 76; VIRGINIA REPORT, *supra* note 23, at 25; WASHINGTON REPORT, *supra* note 23, at A-32 n.104 (illustrative opinion letter); *Real Estate 2012 Report*, *supra* note 23, at 245 (ch. 2, pt. III, § 3.8(a)) (the no violation of law opinion should not be read to address common law), 271 (ch. 3, pt. IV, § 4.6(f)) (illustrative opinion language); *see also* GLAZER & FITZGIBBON, *supra* note 10, § 13.2.2.7, at 545 (exclusion of statutes establishing fiduciary duties of directors and officers).

25. *Compare TriBar 1998 Report*, *supra* note 4, § 3.5.2(a)(iii), at 628–29 (as to whether compliance with the margin regulations is within the scope of a remedies opinion: "[C]ustom is not clear here. . . . Therefore, many lenders require a separate opinion addressing this question. . . . [T]he Committee believes that a separate opinion on the effect of these regulations is the better practice, if such an opinion is desired."), *with* CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 24, at 57 (no violation opinion generally understood not to cover compliance with margin regulations; if margin regulations are covered, "[t]his opinion is usually given as a separate opinion"), *and* FLORIDA REPORT, *supra* note 13, at 186 (opinion regarding margin regulations implicitly excluded under Florida customary practice), *and* MARYLAND REPORT, *supra* note 23, at 146 (opinion should not be interpreted to cover Federal Reserve margin regulations unless expressly addressed), *and Texas Report*, *supra* note 13, at 76 (margin regulations are not covered by an opinion unless expressly addressed, citing § 19 of the *Accord*, *infra* note 32). The 2015–2016 Cross-Border Report cites the *TriBar 1998 Report*, *supra* note 4, for the proposition that custom continues to remain unclear as to whether an opinion on a bank loan covers the margin regulations and that "better practice is for [the] recipient to request [a] separate opinion if it wants margin regulations to be covered." *Cross-Border Report*, *supra* note 6, at 201–02 n.185; *see also* GLAZER & FITZGIBBON, *supra* note 10, § 9.13.9, at 364 (margin regulations usually covered expressly in a separate opinion).

Investment Company Act of 1940[26] are among the laws implicitly excluded from the coverage of an opinion letter even when they may be applicable. Some opinion givers are of the view that, because these requirements are "securities laws," the implicit exclusion of securities laws under customary practice by definition excludes each of these particular laws and regulations, so that no express exclusion is required to preclude the inference that they are covered by an opinion letter.[27] In the authors' experience, while borrowers' counsel often do opine as to these two matters (generally at the request of an opinion recipient who wants to make sure they are covered), the opinions are typically rendered expressly, as separate opinions.[28] When no request for express coverage is made, some opinion givers, to avoid misunderstanding (and even though they may believe that coverage of those matters is implicitly excluded as a matter of customary practice), nevertheless expressly exclude these matters from the coverage of their opinions, typically without objection from opinion recipients and their counsel.

A number of bar reports list laws, in addition to those listed in this Part A, that are also not covered by a third-party legal opinion unless they are expressly addressed.[29] The following two sections discuss many laws that, in the authors' experience, are *in practice* generally understood to be excluded from coverage of third-party opinions in the commercial loan context absent express coverage in the opinions actually rendered.

B. Laws Rarely, If Ever, Addressed in the Loan Context

The preceding section discussed certain laws that, as a matter of customary practice, are generally understood to be excluded from the coverage of a third-party legal opinion whatever the nature of the entity, transaction, or agreement—whether or not expressly stated to be excluded, and even if generally recognized to be *applicable*—unless they are expressly addressed in the opinion letter. While bar reports and other opinion literature are largely consistent in identifying the laws identified in Part A as excluded as a matter of customary

26. *Compare TriBar 1998 Report, supra* note 4, § 3.5.2(a)(i), at 628 ("the opinion preparers should consider the effect of the Investment Company Act of 1940 when preparing an opinion on the binding effect of any agreement on a registered investment company"), *and id.* at 628 n.81 ("The opinion preparers should also consider the application of the Act if they recognize that the Company's activities may make it an inadvertent investment company."), *with* California 2007 Business Transactions Report, *supra* note 24, at 59 (no violation opinion generally understood not to cover issues under the Investment Company Act of 1940), *and* Florida Report, *supra* note 13, at 186 (opinion regarding Investment Company Act "implicitly excluded from the scope of opinions of Florida counsel based on the exclusions of securities laws"), *and* Pennsylvania Model Closing Opinion, *supra* note 23, at 88 (Investment Company Act opinion "should not be implied if not expressly given, even though a violation of the Investment Company Act may void a loan or other contract").

27. On exclusion of the Investment Company Act as part of the broader exclusion of securities laws, see Florida Report, *supra* note 13, at 186.

28. See, for example, the sample language in item (d)(ii) of Annex 1 generally excluding coverage of margin stock regulations and the Investment Company Act except in particularly referenced opinions.

29. *See infra* note 30 and accompanying text.

practice, they do not provide much detail on what it is about these laws that justifies their exclusion. Further, the literature is generally clear that the laws enumerated in Part A do not comprise the universe of laws excluded from coverage *as a matter of customary practice*. In some cases, the existence of a larger universe of excluded laws is conveyed by expanding the list of excluded laws;[30] in other cases, for example, in the *Statement of Opinion Practices*, the concept is conveyed by stating that the laws excluded as a matter of customary practice "include" a short list of laws similar to that set out in Part A above (which avoids the obvious difficulties of developing consensus around an exhaustive list applicable to all areas of practice).[31] In other words, the literature suggests that additional laws are understood to be excluded from third-party legal opinions as a matter of customary practice, without providing consensus guidance on what those additional laws are or the reasons for their exclusion.

This Part B addresses a number of laws, beyond those identified in Part A, that in the experience of the authors are rarely, if ever, covered in third-party closing opinions in U.S. commercial loan transactions and that experienced finance lawyers generally do not expect to be routinely addressed by an opinion of borrower's counsel. We also posit possible reasons for why that is so, despite the prevailing ambiguity in the bar reports and other opinion literature noted above as to precisely which laws are excluded as a matter of customary practice. We note that the common practice in the loan context of not addressing the laws identified in this Part B is evidenced by the fact that when these laws are specifically identified as excluded from opinion letters of borrowers' counsel (for example, in lists of excluded laws such as that set out in Annex 1), opinion recipients and their counsel, in the authors' experience, almost never object to their exclusion. And if, in some transactions (because of the particular facts and circumstances), the recipient does object to one or more of these exclusions, in our experience recipient's counsel typically requests that particular issues arising under one or more of these laws be addressed expressly, rather than requesting that the law or laws in question be covered more generally. Indeed, based on the authors' experience, opinion recipients generally would not expect any of the laws considered in this Part B to be addressed by an opinion—even in cases

30. *E.g.*, California 2007 Business Transactions Report, *supra* note 24, at 56; Florida Report, *supra* note 13, at 30–31; Maryland Report, *supra* note 23, at 146, 186; Pennsylvania Model Closing Opinion, *supra* note 23, at 71–77; Tennessee Report, *supra* note 24, § 7.6(b)(3), at 59; Virginia Report, *supra* note 23, at 24–25; *Real Estate 2012 Report*, *supra* note 23, at 245 (ch. 2, pt. III, § 3.8(a)), 271–72 (ch. 3, pt. IV, § 4.6) (illustrative opinion language).

31. *Statement of Opinion Practices, supra* note 8, § 6.2, at 810 (stating "some laws" are not covered by a closing opinion, without providing an exclusive list). Many opinion reports expressly list only some excluded laws which they characterize as being "among," "included within," or "examples" of a broader category of excluded laws. *E.g.*, *TriBar 1998 Report*, *supra* note 4, § 6.6, at 662 (using term "among"); Pennsylvania Model Closing Opinion, *supra* note 23, at 76 (para. (k)) (using term "include"); Tennessee Report, *supra* note 24, § 7.6(b)(2), at 59 (using term "such as"); Washington Report, *supra* note 23, at A-32 n.104 (illustrative opinion letter) (using term "such as"). The Florida Report, *supra* note 13, at 31, lists laws relating to terrorism or money laundering among the laws excluded under Florida customary practice and then gives examples of the types of laws that exclusion "includes."

where they are not expressly identified in the opinion letter as excluded laws—unless their coverage is called out by being addressed expressly,[32] most likely in separate opinions that, in all likelihood, are quite limited in scope.[33]

Examples of these laws are:

- antifraud laws,
- laws addressing privacy matters,
- laws addressing immigration and naturalization,
- laws addressing occupational, safety and health, or other similar matters,
- laws addressing labor, pension, or other employee rights and benefits,
- laws addressing corrupt practices,
- laws addressing racketeering, criminal or civil forfeiture, or other criminal acts (including mail and wire fraud),
- laws addressing zoning, land use, subdivisions, building, or construction matters,[34]

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32. In a 1991 report (widely referred as the "Accord") issued by the Committee on Legal Opinions of the ABA Business Law Section, most of the laws discussed in this Part B (as well as in Parts A and C) were identified as appropriate exclusions from opinion coverage, *absent explicit treatment in the opinion letter*. Comm. on Legal Ops., ABA Bus. Law Section, *Third-Party Legal Opinion Report, Including the Legal Opinion Accord*, 47 Bus. Law. 167, 215 (1991) (§ 19) [hereinafter *Accord*]. See Annex 2 for the list of such excluded laws set out in § 19 of the *Accord*.

In addition, many of these laws are identified as exclusions, absent express treatment, in state and other bar reports. Some have cited approvingly to § 19 of the *Accord*, even though they did not adopt the *Accord*. *E.g.*, California 2007 Remedies Report Exceptions Appendix, *supra* note 22, at 15 ("The Subcommittee believes that California lawyers customarily do not expect that laws described in Section 19 of the Accord are addressed by a legal opinion, absent specific mention."); *Real Estate Local Counsel Report*, *supra* note 23, at 261 n.149 (add. § 4.6) (illustrative opinion letter) (implicit exclusions listed in this illustrative opinion letter (which are based on and similar to those listed in the *Real Estate 2012 Report*, *supra* note 23) "have precedent in the Accord"). The *Texas Report*, *supra* note 13, at 3, 95, both adopted the *Accord* and also recommended that, if the *Accord* is not incorporated, the opinion giver consider whether the opinion letter should expressly exclude the laws listed in § 19 of the *Accord*. It is noteworthy that, while the North Carolina Legal Opinions Committee rejected adoption of the *Accord*, it nevertheless recommends, like the *Texas Report*, that opinion givers consider whether their opinion letters should specifically exclude the listed exclusions set out in § 19 of the *Accord*. North Carolina Report, *supra* note 22, § 12.0 cmt. c, at 72; *see also* Florida Report, *supra* note 13, at 30–31 (setting out a list of laws, similar in scope to the *Accord* list, that under Florida customary practice are not covered unless expressly addressed).

33. *See Texas Report*, *supra* note 13, at 95 (to the extent an opinion addresses matters regarding the securities laws, federal and state antitrust laws, or laws applicable to regulated industries, a more narrowly crafted opinion should be included with respect to such matters). See also *infra* notes 45, 69, 73, 74, and 84 and accompanying text on the limited scope of opinions on certain matters when sometimes rendered.

34. *See* Maryland Report, *supra* note 23, at 186 (land use and subdivision laws implicitly excluded from loan opinion); Virginia Report, *supra* note 23, at 24–25 ("zoning or land use or any other matters relating to the development or use of real property" are implicitly excluded); Washington Report, *supra* note 23, at A-32–A-33 n.104 (illustrative opinion letter) (land use laws implicitly excluded); *see also* Glazer & FitzGibbon, *supra* note 10, § 15.2, at 568 (exclusion of zoning laws as well as other local law).

- the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, and laws applicable to swaps and other derivatives, commodity (and other) futures and indices, and other similar instruments,
- laws addressing foreign asset or trading controls, emergencies, national security, terrorism, or money laundering,
- laws addressing other aspects of foreign investment, including Section 721 of the Defense Production Act of 1950, as amended, and the related regulations overseen by the Committee on Foreign Investment in the United States ("CFIUS"), and
- possible judicial deference to acts of sovereign states (including judicial action giving effect to governmental actions or foreign laws affecting creditors' rights).

Perhaps a core reason for many, if not all, of these exclusions is that most of the agreements contained in the documents covered by opinions in the loan context—aside from the borrower's payment obligations, certain financial covenants, and covenants to provide advance notice or other information to the lenders, or to safeguard collateral and other property—consist of agreements on the part of the borrower to *comply* with (or, in negative covenants, agreements *not to violate*) applicable law. Because such covenants or other agreements to comply with the law, by their very terms, would not be expected to be unenforceable or illegal, the covenants in loan documents rarely give rise to legal opinion concerns.[35]

Many of these laws, of course, may have a bearing on the practical ability of a borrower to perform, insofar as their violation could result in fines and other penalties impairing the operations and even creditworthiness of the borrower. But such violations typically do not arise from (or impair the legality and enforceability as a legal matter of) the borrower's execution, delivery, and performance of the loan documents covered by the usual opinions of borrowers' counsel; and any opinions addressing these laws would likely also involve inherently factual determinations not appropriately requested of a third-party opinion giver.[36] For example, opinions involving factual determinations relating to a borrower's financial condition or creditworthiness are not expected to be addressed

35. While there may be circumstances in which antifraud laws, laws addressing foreign asset or trading controls, emergencies, national security, terrorism, or money laundering, or laws addressing deference to acts of sovereign states, including any judicial action giving effect to foreign governmental actions or foreign laws affecting creditors' rights, could bear on the matters addressed in a third-party opinion, those circumstances, in the experience of the authors, are sufficiently out of the ordinary that coverage of such laws is neither generally expected nor addressed. Although none of the authors has personal experience with a loan transaction where opinions as to any of these laws have been requested or rendered, we would expect any such coverage to be both specifically requested in a particular circumstance and (if agreed to by the opinion giver) called out by express coverage in the opinion letter.

36. *See Statement of Opinion Practices*, *supra* note 8, § 7.1, at 811 (opinions limited to "reasonably specific and determinable matters of law that involve the exercise of professional judgment").

in a third-party legal opinion.[37] Also, as a matter of customary practice in the loan context, borrower's counsel do not render broad opinions on the legality of the borrower's overall business and operations—either affirmatively (as for example by opining that the borrower's business is in material compliance with all applicable laws), or by providing negative assurance (whether as to the absence of material inaccuracies in the borrower's representations and warranties or as to the absence of any reason to believe there is any material illegality in the borrower's business and operations).[38] Instead, the borrower's compliance with these types of laws, like most matters relating to the creditworthiness of the borrower, are ordinarily addressed by lender diligence and borrower representations and warranties under the loan documents.

There are other reasons that likely account for exclusion of these laws as well. For example, while many of the laws discussed in this section—including those addressing occupational, safety and health, or other similar matters; labor, pension, or other employee rights and benefits; privacy matters; and immigration and naturalization—address compliance matters that affect many, if not most, commercial borrowers, such laws involve highly specialized areas of practice and are promulgated under distinct and often complicated statutory schemes, further supplemented by complex implementing and amplifying rules and regulations. In some cases, enforcement of such laws is also overseen by administrative bodies and specialized tribunals, not regular courts. Because of their specialized nature, these laws are generally not within the expertise of the typical transactional finance lawyer handling a loan transaction. And in the opinion of the authors, absent exceptional circumstances, opinion recipients' counsel would not request that specialized counsel be brought in to render opinions

37. *Statement of Opinion Practices*, *supra* note 8, § 7.2, at 811 ("Opinion givers should not be expected to give opinions on matters that are not within the expertise of lawyers (for example, financial statement analysis, economic forecasting, and valuation)."); *see also* TENNESSEE REPORT, *supra* note 24, § 7.2(a), at 53 (since enforceability under Tennessee law of a commitment fee depends on whether the fee is fair and reasonable based on factors including "the condition of the money market," "*the creditworthiness of the borrower*," and "the likelihood of the loan being made," no opinion on enforceability of such a fee or on its compliance with Tennessee usury law is generally given (emphasis added)).

38. *E.g.*, CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 24, at 15 (opinion as to client's not being "in material violation of any federal, state or local law, regulation or administrative ruling" no longer considered appropriate); MARYLAND REPORT, *supra* note 23, at 146 (a no violation of law opinion "does not address laws applicable generally to the Company or to the ongoing operation of the Company's business"); FLORIDA REPORT, *supra* note 13, at 114 (opinion as to compliance with applicable laws generally is too broad and an inappropriate opinion request); TENNESSEE REPORT, *supra* note 24, § 7.6(b)(1), at 59 (opinion as to compliance with all laws and regulations "inappropriate"); VIRGINIA REPORT, *supra* note 23, at 48 (recommending exclusion of broad opinions on governmental consents and approvals required for operation of the borrower's business); *see also* ABA Comm. on Legal Ops., *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875, 880 (2002) (§ 4.3); GLAZER & FITZGIBBON, *supra* note 10, § 13.3, at 552 (bar association reports unanimous that request for an opinion on the company's compliance with law generally, as opposed to the transaction's compliance with law, is inappropriate).

Negative assurance of factual matters, while appropriate in the context of some securities offerings, is also an inappropriate opinion request in the loan context. *See Statement of Opinion Practices*, *supra* note 8, § 5.6, at 810.

addressing such laws.[39] Further, because sophisticated recipients and their counsel typically draft the loan documents based upon forms that are familiar to them, these recipients and their counsel, at least in many instances, already know their rights under applicable law and the wording of the loan documents and are without need of third-party opinion advice on the laws discussed in this Part B. These factors, when combined with cost-benefit considerations and time constraints, also help to account for lenders' frequent willingness to accept these exclusions from the opinions of borrowers' counsel.

In addition, rendering a no violation of law or other opinion as to some of these matters—such as antifraud laws or laws addressing corrupt practices, racketeering, criminal or civil forfeiture, or other criminal acts (including mail and wire fraud)—would typically involve factual matters (including intent) that are understood as a matter of customary practice to be beyond the purview and responsibility of the opinion giver.[40] Coverage of a number of the laws discussed in this Part B may also be excluded, depending on the particular facts and circumstances, from opinions delivered in loan transactions under the principle that, also as a matter of customary practice, a third-party legal opinion covers only those laws that lawyers practicing in the covered jurisdiction, and exercising customary professional diligence, would reasonably recognize as being applicable to the entity or the transaction that is the subject of the opinion letter.[41]

39. *See* Maryland Report, *supra* note 23, at 146 (ERISA and other pension and employee benefit laws typically beyond the scope of a loan opinion); *id.* at 186 (health and safety, labor and employment, employee benefits implicitly excluded from loan opinion); Pennsylvania Model Closing Opinion, *supra* note 23, at 76 (pension and employee benefit laws, OSHA, labor laws implicitly excluded unless specifically addressed); *Texas Report, supra* note 13, at 43 (cost benefit analysis applies to factual and legal investigations into certain areas of the law such as health and safety laws and employee benefit laws); Virginia Report, *supra* note 23, at 24–25 (pension and employee benefit laws are among those "certain *specialized* laws" implicitly excluded from a standard business transaction opinion (emphasis added)); Washington Report, *supra* note 23, at A-32 (para. (vii)) (illustrative opinion letter) (implicit exclusion of privacy, pension, labor, employee benefits laws). *See generally* 1 Arthur Norman Field & Jeffrey M. Smith, Legal Opinions in Business Transactions 330–31 (4th ed. 2019) [hereinafter Field & Smith] (proposing an understanding as to the exclusion of specialized practice areas of law from opinion letters delivered by non-specialized transaction counsel, including counsel in loan transaction); *see also id.* at 328 (Note on "Law" as Typically Covered in Opinion Letters) ("The Restatement Third, The Law Governing Lawyers articulates a standard of care for attorneys as a duty to 'exercise the competence and diligence normally exercised' by . . . other transactional attorneys, not by attorneys in general. . . . Laws that a transactional attorney would not reasonably be expected to recognize as applicable (such as certain areas of legal specialization) are excluded (without any statement in the opinion letter). There is one exception to this rule. Specifically, if the opinion preparer has knowledge of law that a transactional attorney would not reasonably be expected to recognize as applicable, that knowledge must be considered in giving the opinion.").

40. *TriBar 1998 Re*port, *supra* note 4, § 2.2, at 610 ("Opinion preparation is not ordinarily an occasion to question factual information provided by apparently reliable sources nor is the opinion letter a vehicle to ferret out fraud."); Pennsylvania Model Closing Opinion, *supra* note 23, at 76 (criminal laws of general application and RICO implicitly excluded unless specifically addressed); Virginia Report, *supra* note 23, at 24–25 (implicit exclusion of racketeering or criminal or civil forfeiture from a standard business transaction opinion); Washington Report, *supra* note 23, at A-32 (illustrative opinion letter) (implicit exclusion of criminal and civil forfeiture laws).

41. *Statement of Opinion Practices*, *supra* note 8, § 6.2, at 810.

It is of course possible, that as part of its diligence process and where an area of law has a particular bearing on the business of the borrower, a lender may seek legal advice beyond the scope of what a third-party closing opinion in the loan context typically addresses. For example, a borrower's past history of violating labor or employee benefit laws might lead a lender to seek legal advice on current remediation and compliance, and the opinion of a specialist in that area of law may be required. Or, to look ahead to Part C, a borrower's particular exposure to environmental liability or a lender's reliance on special types of collateral may prompt a request for a legal opinion on one or more of those matters beyond the scope of the typical third-party loan closing opinion. In such cases, however, the parties to the transaction will typically have detailed discussions, well before closing, concerning both the nature of the opinions requested and the extent to which it is feasible for borrower's counsel to render them. And in many, if not most, cases such opinions will require the involvement of specialized counsel and in the authors' experience will, in all events, be addressed expressly either in specific opinion paragraphs or an altogether separate opinion letter. It is noteworthy that none of the authors recalls seeing a loan transaction where an opinion has been requested and rendered on any of the laws discussed in this Part B, with the exception of zoning, which in the authors' experience is occasionally covered expressly by borrower's counsel when no zoning analysis report or title insurance endorsement is available. But, even then, such opinions are typically rendered very narrowly, and are quite specific as to their scope and limitations.

The reasons outlined above largely account for why exclusions of the laws identified in this Part B are broadly accepted. Other factors or considerations may also come into play as they do in the case of the specific laws discussed below.

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") is, in the authors' experience, another example of a highly specialized body of law that is rarely, if ever, addressed, or expected to be addressed, by loan closing opinions of borrower's counsel.[42] When first enacted, Dodd-Frank was often expressly excluded from coverage in third-party legal opinions in the loan context. The thought at that time was that Dodd-Frank was a new and complex statute that would take some time to digest, but that, once that happened, the exclusion might no longer be necessary or, perhaps, appropriate. Yet even now, years after its enactment, Dodd-Frank continues to be among those laws opinion recipients commonly do not expect to be covered in a commercial loan closing opinion, and coverage of Dodd-Frank also continues to be expressly excluded on a regular basis by many of those opinion givers who expressly list excluded laws in their opinion letters. The primary reason for that continued exclusion may be that Dodd-Frank is a portmanteau statute cutting across a range of statutory schemes, including securities laws, commodities laws, bank regulatory laws, and insolvency laws—some of which, as discussed in

42. *See* Virginia Report, *supra* note 23, at 88–89 (sample form opinion for commercial loan transaction) (express exclusion of Dodd-Frank).

Part A, are generally understood to be excluded from coverage as a matter of customary practice. Dodd-Frank also cuts across transactional contexts, including securitizations and swaps and derivatives, that are not necessarily relevant to a loan transaction.[43] As a result, broad coverage of Dodd-Frank in the loan context could have the effect of suggesting coverage of areas of the law that are routinely excluded based on other established principles or practices.[44] Furthermore, many provisions of Dodd-Frank are not self-executing, but require the adoption of implementing regulations. That regulatory process has been drawn out; and in some cases, the implementing regulations still have not been issued. Where they have been adopted, the regulations are complex and impose interpretive difficulties.[45]

In light of the above, Dodd-Frank, much like securities laws more generally, continues to be commonly understood to be excluded from coverage of legal opinions in the loan context. If recipients need an opinion on an aspect of Dodd-Frank and believe it is more appropriate for borrower's, rather than lender's, counsel to render the opinion, the opinion should be specifically requested, and, if rendered, any Dodd-Frank opinion would likely be addressed expressly and based on specially drafted assumptions and qualifications not ordinarily included in, or required for, a typical loan closing opinion.

Swaps and Other Derivatives. Laws relating to swaps and other derivatives and other similar instruments ("Swaps") are also commonly not expected to be covered in third-party loan closing opinions. While credit agreements frequently contemplate the borrower's entering into interest rate or other Swap arrangements to hedge against loss, and those arrangements are often referenced throughout the loan documentation (typically in one or more of the borrower's representations, warranties, or covenants), in the authors' experience, they are rarely addressed by an opinion of borrower's counsel. One of the main reasons for this treatment is that most Swaps are documented through the use of complex, standardized forms promulgated by the International Swaps and Derivatives Association ("ISDA") and other similar trade groups, and these forms have already been vetted for legal compliance by ISDA and these other groups. In addition, some of the laws relating to Swaps derive from Dodd-Frank, and the rationales discussed in the preceding paragraphs for the exclusion of opinions on that statute may apply. Another reason for the absence of opinions on these laws

43. For further discussion of laws relating to swaps and derivatives, see *infra* notes 46–49 and accompanying text.

44. See *supra* notes 20 & 22 and accompanying text and *infra* notes 46–49 and accompanying text on exclusions of securities and insolvency laws under customary practice and common practice as to swaps, commodities, and other derivatives.

45. Transactions where issues under Dodd-Frank and the relevant implementing regulations have come to be addressed in third-party legal opinions are, in the authors' experience, outside the loan context. The most notable examples are what are referred to as "Volcker Rule" opinions and risk retention memoranda in the securitization context. In those cases, the analysis has proved to be complex and coverage of the relevant issues has been called out by express coverage in separate opinion paragraphs or even in separate reasoned opinion letters or memoranda.

may be that Swaps are typically entered into separately, with each relevant lender or other counterparty, in separate (albeit related) transactions.

While some counterparties may request separate legal opinions on certain matters regarding the Swap documentation, such opinions—when rendered at all, and like the specialized opinions given on other Dodd-Frank matters[46]—are generally rendered in separate, specialized opinions outside of the opinion letter delivered by borrower's counsel at the closing of a loan. Where the loan documentation references Swaps, some opinion givers choose to highlight that they are not addressing Swap issues by including an express carve-out of laws relating to Swaps or by expressly stating that their opinions do not cover the Swap documentation.[47] Furthermore, in transactions where there are affiliate guaranties or grants of collateral, or other joint and several arrangements, supporting the Swap obligations of the borrower, some opinion givers will take an express exclusion, in lieu of or in addition to a broad carve-out of all laws relating to Swaps, as to the treatment of those affiliate instruments under the U.S. Commodity Exchange Act. Such a qualification might be stated in many ways; one example is as follows:

> We express no opinion as to any grant of collateral or guaranty provided by, or any joint and several liability imposed upon, any party that is not an "eligible contract participant" within the meaning of section 1a(18) of the U.S. Commodity Exchange Act (the "CEA") insofar as such collateral grant, guaranty or joint and several liability covers an agreement, contract or transaction that constitutes a "swap" within the meaning of section 1a(47) of the CEA.[48]

Commodity and other futures and indices, and other similar instruments, are also, in the authors' experience, rarely, if ever, the subject of a third-party legal opinion in the loan context.[49]

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46. *See supra* note 45.

47. *See, e.g.*, Virginia Report, *supra* note 23, at 88–89 (sample form opinion for commercial loan transaction) (express exclusion of "commodities or commodities laws, including any document or provision constituting a 'swap'").

48. The U.S. Commodity Futures Trading Commission and the U.S. Securities & Exchange Commission have taken the position that it is unlawful for affiliates of a borrower to enter into guaranties of Swap obligations or to become jointly and severally liable for Swap obligations unless such affiliates are "eligible contract participants" ("ECPs"), as such term is defined in the Commodity Exchange Act (the "CEA"), 7 U.S.C. § 1a(18) (2018) (defining "eligible contract participant"). *See* CFTC No-Action and Interpretation Letter No. 12-17, Staff Interpretations and No-Action Relief Regarding ECP Status: Swap Guarantee Arrangements; Jointly and Severally Liable Counterparties; Amounts Invested on a Discretionary Basis; and "Anticipatory ECPs" (Oct. 12, 2012). Although this No-Action and Interpretation Letter does not specifically address the issue of whether an affiliate of a borrower must be an ECP in order to *secure* Swap obligations, commentators have interpreted it to require, at least in most circumstances, that this be the case. To avoid this problem with non-ECP subsidiaries or other affiliates, some credit agreements contain provisions automatically excluding non-ECP affiliates from guaranteeing, securing, or becoming jointly and severally liable for, Swap obligations. *See* Loan Syndications & Trading Ass'n, Market Advisory, Swap Regulations' Implications for Loan Documentation (Feb. 15, 2013).

Opinion givers that choose to include the kind of qualification set out in the text do so to make clear they are not addressing issues raised by any of the borrower's affiliates not being ECPs.

49. *See Accord*, *supra* note 32, § 19, at 215 (legal issues not addressed unless explicitly addressed include "laws and regulations relating to commodity (and other) futures and indices and other similar instruments"); California 2007 Remedies Report Exceptions Appendix, *supra* note 22, at 14–15

Foreign Asset or Trading Controls, Money Laundering, Etc. Laws addressing foreign asset or trading controls, emergencies, national security, terrorism, or money laundering and other laws involving Presidential powers[50] may also be relevant to a borrower's business and creditworthiness. Yet these laws are commonly not expected to be addressed by an opinion of borrower's counsel, most likely because—as with many of the laws addressed in this article—they primarily govern the general business and operations of the borrower and are not specifically related to the legality or enforceability of the loan transaction itself.[51] While such laws could be relevant to a borrower's use of proceeds, loan documents generally contain representations and warranties from the borrower relating to the borrower's use of loan proceeds. Unless the opinion preparers know these representations and warranties are incorrect or know of facts they recognize make reliance on the representations and warranties under the circumstances otherwise unwarranted, an opinion giver is entitled to rely upon these representations and warranties.[52] Furthermore, any analysis regarding compliance with these laws would almost certainly be both highly factual in nature and time-consuming, requiring a review of business practices and relationships of a type, and at a level of diligence, not reasonably expected for the rendering of an outside counsel's third-party loan closing opinion letter.[53] While a borrower's compliance with these laws is important, these matters are principally a function of a financial institution's own compliance requirements to "know its customers," and lenders typically rely on a combination of their own due diligence

(concurring with the *Accord, supra* note 32, on the exclusion); *Texas Report, supra* note 13, at 76 (concurring with the *Accord, supra* note 32, on the exclusion); Virginia Report, *supra* note 23, at 25 (laws relating to commodities implicitly excluded from standard business transaction opinion).

50. *E.g.*, Trading with the Enemy Act, 50 U.S.C. §§ 4301–4341 (2018); International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1708 (2018).

51. *See* 1 Field & Smith, *supra* note 39, § 6.3.1[A][2], at 229–32 (national security and international trade laws should be recognized as "specialized, excluded areas"); *id.* at 231 ("Third-party, customary opinion practice excludes the effects of national security law."); *id.* § 6.3.2[C][2], at 242 (national security law "understood to be excluded from opinion letters (without any express statement to that effect)").

52. *Statement of Opinion Practices, supra* note 8, § 5.2, at 809. Of course, if the stated purpose of the use of proceeds is illegal on its face, the opinion giver would need to address that issue.

53. Even with careful diligence, it is often impossible to know with sufficient certitude for legal opinion purposes whether a borrower's transaction with a particular foreign person is or is not barred by foreign asset, emergency, or national security prohibitions. For example, some of these prohibitions are list-based, with the lists set out in English using the Latin alphabet, while many of the names on these lists originate in Chinese, Arabic, Cyrillic, or other languages that use a different alphabet. Adding to the difficulty is the prevalence of certain surnames in certain countries (e.g., "Lee" in China and "Kim" in Korea). As a consequence, matching of foreign names with those on the list is often a very imprecise process, yet administrative authorities regard less than 100 percent matches as matches nonetheless. Difficulties of diligence are compounded by the fact that some prohibitions apply not only to listed individuals or entities, but also to their 50 percent or more owned subsidiaries (whether or not identified on any list) about whom there may be limited public information. In some transactions, where a party is really concerned about these issues, private investigators have even been engaged to assist. *See also* Florida Report, *supra* note 13, at 31 (implicit exclusion of laws relating to terrorism or money laundering); Virginia Report, *supra* note 23, at 24–25 (terrorism and money laundering laws among those specialized laws implicitly excluded from a standard business transaction opinion).

and the borrower's representations and warranties—and not on opinions of borrower's counsel—to confirm a borrower's compliance with these laws.

Foreign Investment. Laws of general applicability relating to foreign investment *into* the United States (including laws restricting such investments, or imposing filing or review requirements, such as filings with the Committee on Foreign Investment in the United States ("CFIUS") under the Exon-Florio Amendment), like the laws described in the preceding paragraph, have been commonly considered to be excluded in the loan context whether or not the exclusion is expressly stated.[54] One reason may be that these laws are rarely relevant to a *domestic* commercial loan transaction. Further, the relevance of these laws turns in substantial part on the identity of the parties (including the opinion recipient) and whether they are foreign or foreign controlled, and relevant information about ownership may not be readily available to the opinion giver.[55] As a result, with the exception of foreign ownership limitations incorporated in particular industry-focused regulatory regimes,[56] these laws should not, in the authors' experience, be considered as addressed in an opinion unless the opinion addresses them expressly. That said, perhaps because of recent amendments making CFIUS filings mandatory in some cases, a number of firms expressly exclude CFIUS (and other foreign investment limitations).[57]

Judicial Deference to Acts of Sovereign States. American court decisions on comity[58] and laws involving Presidential powers[59] allow for possible deference to acts of foreign states. Many, but not all, opinion preparers take a specific exception for such court decisions and laws, particularly if an obligor is, or is

54. *Cross-Border Report*, *supra* note 6, at 203 & n.190 (identifying foreign investment related laws commonly considered as excluded). It has long been generally understood that, as a matter of customary practice, the Exon-Florio Amendment to the Defense Production Act of 1950 (most commonly referred to as the laws and regulations governing "CFIUS" review) is among the laws excluded from the coverage of a third-party opinion letter. *E.g.*, *TriBar 1998 Report*, *supra* note 4, § 3.5.2(c), at 630; *id.* § 6.6, at 662; California 2007 Remedies Report Exceptions Appendix, *supra* note 22, at 14 (citing *TriBar 1998 Report*, *supra* note 4); Florida Report, *supra* note 13, at 31; Pennsylvania Model Closing Opinion, *supra* note 23, at 76 (Exon-Florio Amendment is deemed not to be covered by a legal opinion unless it is specifically addressed); *Texas Report*, *supra* note 13, at 76.

55. *Cross-Border Report*, *supra* note 6, at 204 & n.191 (noting difficulty opinion giver may have in ascertaining relevant facts).

56. Any number of substantive regulatory regimes applicable to particular industries, such as telecommunications, airlines, and insurance, contain foreign ownership limitations. Bar reports treat opinions on these types of regulated industry laws differently than the generic foreign trade and investment laws addressed in this and the immediately preceding section. Whether an opinion addresses ownership limitations that are part of such a regulatory regime should be approached in the same manner as opinions on other regulatory regimes applicable to a party because of the nature of its particular business. For a discussion of opinions on regulated industry laws, see *infra* notes 75–87 and accompanying text.

57. James F. Fotenos, *Business Law Section 2018 Fall Meeting: Report on Meeting of the Legal Opinions Committee*, In Our Opinion (ABA Comm. on Legal Ops.), Winter 2018/2019, at 5 (discussion of changes to CFIUS made by the Foreign Investment Modernization Act; observation that express exception may become more common); *see also* Timothy G. Hoxie, *Final CFIUS Regulations and Opinion Practice*, In Our Opinion (ABA Comm. on Legal Ops.), Fall 2020, at 11.

58. *E.g.*, Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516 (2d Cir. 1985).

59. *E.g.*, Trading with the Enemy Act, 50 U.S.C. §§ 4301–4341 (2018); International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1708 (2018).

controlled by, a non-U.S. person or entity.[60] However, it has been suggested that, as a matter of customary practice, an enforceability opinion is understood not to cover the possibility that a state or federal court in the United States might excuse an obligor from performing its obligations under an agreement in deference to a foreign act or decree.[61] And a number of opinion reports also recognize this exclusion more generally from the laws covered by third-party opinion letters (unless expressly addressed).[62] Consequently, many opinion preparers believe the exclusion of possible judicial deference to acts of sovereign states (often referred to as concepts of comity) is sufficiently understood such that no such exception need be expressly stated.[63]

C. Examples of Commonly Excluded Laws That Are Sometimes Expressly Covered When Both Applicable and Significant to the Transaction or the Entity

For all of the reasons articulated above—and, likely, others as well—the authors believe the laws discussed in Part B are widely understood—absent specific coverage of them in the opinions being rendered—to be excluded from third-party legal opinions in the commercial loan context, whether or not they are specifically identified in the opinion letter as excluded laws. In this Part C, we discuss additional laws commonly not addressed by opinions of borrower's counsel, but which, in the experience of the authors, are more likely than those discussed in Part B to be viewed, in certain loan transactions, as sufficiently significant to the entity or the transaction to warrant the time and expense required for the opinion giver to undertake the necessary additional diligence, research, analysis, or other effort, or to consult with counsel having the specialized expertise, required to address them in an opinion letter.

As with the other commonly excluded laws already discussed, when an issue under one of the laws considered in this Part C is sufficiently significant to the transaction to warrant an opinion request, the recipient or its counsel should

60. *TriBar 1998 Report, supra* note 4, § 3.2, at 622 n.71 ("When foreign obligors are involved, some lawyers add an exception for possible judicial deference by state or federal courts to acts of foreign sovereign states."); *see also* 1 Field & Smith, *supra* note 39, § 6.3.2[C][1], at 240 (recognizing the wording of an opinion qualification to exclude "judicial action giving effect to governmental actions or foreign laws affecting creditors' rights").

61. Glazer & FitzGibbon, *supra* note 10, § 9.13.2, at 359; *see also infra* note 63.

62. *E.g.*, *Accord*, *supra* note 32, § 19(q)(ii); California 2007 Remedies Report Exceptions Appendix, *supra* note 22, at 15 (affirming laws excluded by § 19 of the *Accord, supra* note 32); Florida Report, *supra* note 13, at 31 (implicit exclusion of possible judicial deference to acts of sovereign states); *Texas Report, supra* note 13, at 77 (affirming laws excluded by § 19 of the *Accord, supra* note 32); *Real Estate 2012 Report*, *supra* note 23, at 245 (ch. 2, pt. III, § 3.8(a)); *id.* at 272 (ch. 3, pt. IV, § 4.6(q)(ii)) (illustrative opinion language) (implicit exclusion of possible judicial deference to acts of sovereign states).

63. 1 Field & Smith, *supra* note 39, § 6.3.2 [C][1], at 241 (implicit exclusion is also based on the view that recognition of a foreign law or decree is "similar to new legislation that need not be anticipated by an opinion giver"); *see also TriBar 1998 Report, supra* note 4, § 3.2, at 622 n.71 ("Whether 'comity' is viewed as an integral part of United States law or deference to the law of others, it is of general application and broadly understood. Concepts such as comity that are so broadly comprehended do not ordinarily require a specific exception.").

make a specific request for the opinion,[64] typically early enough in the process of structuring and documenting the transaction to allow sufficient time for the negotiation of the opinion scope and for completion of the necessary factual and legal diligence. Rendering these types of opinions typically requires the engagement or involvement of counsel with the requisite expertise to render the opinion, and adequate lead time is needed for that counsel to conduct any special factual due diligence and prepare any related certifications. The requested opinion is also often the subject of considerable discussion and negotiation between specialized counsel and counsel for the recipient (with the negotiations sometimes extending to the wording of representations, warranties, and covenants in the loan documents, as well).

Finally, when these laws *are* addressed—as was the case with all of the other laws discussed in Parts A and B above—they would, in our experience, be expected to be addressed expressly, separate and apart from the general enforceability, no violation of law, and no governmental approvals or filings opinions—typically in a separate opinion paragraph, or in a separate opinion letter. Because coverage of these laws is also often quite narrow and specific in scope, the authors believe recipients and their counsel should not assume these laws are covered unless their coverage is called out by their being expressly and specifically addressed.

Environmental Laws. Environmental laws, while relating to the ongoing business and operations of the borrower and its affiliates, are rarely implicated in assessing the legality or enforceability of the loan documents addressed by the usual opinions of borrower's counsel. And, as we have already discussed,[65] as a matter of customary practice borrower's counsel is not expected to opine on the legality of the borrower's overall business and operations, whether under environmental laws or otherwise. Environmental laws, however, are often important to the business of the borrower, and lenders and their counsel sometimes need aspects of environmental regulations addressed in some manner where they relate to significant aspects of the borrower's operations or the collateral package or the use of significant loan proceeds. If a borrower violates state or federal environmental laws or regulations, the borrower may be subject to significant penalties and clean-up obligations, so credit agreements typically include representations and warranties and affirmative and negative covenants relating to the borrower's compliance with environmental laws and regulations.[66] Particularly where real estate collateral is central to the transaction, lenders sometimes also require, as a condition to closing, that licensed third-party engineers and

64. *TriBar 1998 Report*, *supra* note 4, § 3.5.3, at 630 (when it is unclear whether particular laws are covered by an opinion, the opinion recipient should request express opinions on the matters it wishes to have covered).

65. *See supra* note 38 and accompanying text.

66. *See* Michael Bellucci & Jerome McCluskey, The LSTA's Complete Credit Agreement Guide § 6.3.8 (2d ed. 2017). Federal Superfund legislation may impose liability on prior owners or lessors of property, as well as clean-up responsibilities with respect to hazardous materials deposited at a Superfund site. *Id.* In some circumstances, a lender may become responsible for clean-up costs if the lender participates in the financial management of a borrower's facilities. *Id.* § 9.7.4, at 453–54.

other experts perform environmental surveys and assessments of the borrower's properties.[67] In some states, an "environmental endorsement" for title policies is available to insure against certain risks relating to environmental laws and regulations, and the lender may take advantage of that availability to require those endorsements to its title insurance policy.[68] But lenders rarely request—or expect—legal opinions from borrower's counsel on environmental laws except in transactions, such as project financings, where environmental matters are particularly important to the credit decision and fundamental to the success of the project and, even then, only as to specific matters.[69]

In the authors' experience, when environmental laws *are* covered by opinions, they are addressed expressly, typically in response to requests of recipients for opinions regarding particular permits or other specific governmental authorizations relating to the borrower. Such an opinion would not address a borrower's general compliance with all—or even only all *material*—environmental laws and regulations.

The Hague Securities Convention. The Hague Securities Convention[70] is another example of a body of law that is not commonly addressed in a legal opinion due to its apparent complexity and its requirement for analysis, but, when requested, is often covered expressly by borrower's counsel where the Convention is applicable and significant to the transaction.[71] The Hague Securities Convention applies to interests and rights in respect of securities held in a securities account with a securities intermediary—interests and rights that are called "security entitlements" under Article 8 of the Uniform Commercial Code ("U.C.C.")—and is a choice-of-law treaty applicable in all states as a matter of federal law. The Convention specifies the law governing, among other matters, the enforceability, perfection, and priority of a security interest in security entitlements.[72] To determine the governing law, an opinion giver needs to analyze, or make an assumption with respect to, the governing law provisions of the applicable account or

67. *Id.* § 5.1.11.3, at 197–99; FLORIDA REPORT, *supra* note 13, at 162.

68. FLORIDA REPORT, *supra* note 13, at 162.

69. Numerous opinion reports highlight the implicit exclusion of environmental laws and their express treatment when actually addressed in an opinion letter. *E.g.*, CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT, *supra* note 24, at 32; FLORIDA REPORT, *supra* note 13, at 31; PENNSYLVANIA MODEL CLOSING OPINION, *supra* note 23, at 76 (environmental law excluded unless specifically addressed); VIRGINIA REPORT, *supra* note 23, at 24–25 (environmental laws implicitly excluded); WASHINGTON REPORT, *supra* note 23, at A-32–A-33 n.104 (illustrative opinion letter) (environmental laws implicitly excluded); *compare Accord*, *supra* note 32, § 19 (excluding environmental laws unless expressly addressed); *see also Texas Report*, *supra* note 13, at 43 (cost benefit analysis applies to opinions covering environmental regulations and certain other areas of law).

70. Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, July 5, 2006, 17 U.S.T. 401, 46 I.L.M. 649 (entered into force Apr. 1, 2017) [hereinafter the *Convention*].

71. For a discussion of how to render opinions under the *Convention*, *supra* note 70, as well as the practice of some opinion givers to expressly exclude coverage of mandatory choice-of-law rules, including the *Convention*, *supra* note 70, from their opinion letters, see generally Carl S. Bjerre et al., *Security Interest Opinions Under the Hague Securities Convention*, IN OUR OPINION (ABA Comm. on Legal Ops.), Spring 2017, at 11.

72. *Convention*, *supra* note 70, art. 2(1).

custody agreement between the debtor and the securities intermediary, as well as the location of a physical office of the securities intermediary in the United States, all as contemplated by the Convention. Such an analysis or assumption would not seem difficult, but sometimes the underlying account agreement is not readily available for analysis, and often the value of the collateral attributable to the borrower's securities accounts does not warrant the time and expense required to render such an opinion, even in those transactions where the recipient is willing to accept broadly stated assumptions or qualifications. In the authors' experience, many law firms do not address these issues unless specifically requested to do so by the recipient and expressly disclaim in their legal opinions any opinion as to the applicability or effect of the choice-of-law rules of the Convention relating to matters governed by Article 2(1) of the Convention. If addressed, such opinions are called out by virtue of the opinion language itself and likely also by the express assumptions and qualifications set out in the opinion letter relating to the Convention.

Laws Relating to Security Interests in Specialized Forms of Collateral. Laws, other than the U.C.C.,[73] relating to security interests in numerous specialized forms of collateral are also commonly excluded from coverage in legal opinions—although, when applicable and significant to a transaction (usually because they are significant to the collateral for the loans), they are almost always covered by counsel expert in the specific laws in question. Examples of these specialized forms of collateral include: (a) patents, trademarks, trade secrets, and registered copyrights, (b) vessels documented under the law of the United States, (c) aircraft and certain related aircraft parts and equipment, and (d) railcars, locomotives, and rolling stock. Opinions on laws (outside of the U.C.C.[74]) relating to patents, trademarks, trade secrets, copyrights, or other intellectual property, for example, are usually requested and rendered only in transactions involving borrowers, such as film or music production companies, where the ownership or pledge of particular copyrights or other intellectual property is fundamental to the borrower's collateral package.

Some opinion givers expressly exclude these laws from their opinions to put lenders and their counsel on notice when they are not being addressed. However, when rendered, opinions covering these laws are usually called out by being stated expressly and in a manner separate and apart from the usual

73. In secured loan transactions it is common for borrowers' counsel to render opinions on the U.C.C., and various exclusions of law and other qualifications related to those opinions are commonly included and accepted; it is however beyond the scope of this article to address how opinions are rendered under the U.C.C.

74. We note that perfection of a security interest in certain of these specialized forms of collateral is accomplished by the filing of a financing statement under the U.C.C. As to perfection of security interests in patents under the U.C.C., see, for example, *In re Cybernetic Services Inc.*, 252 F.3d 1039 (9th Cir. 2001); and as to perfection of security interests in trademarks under the U.C.C., see, for example, *Trimarchi v. Together Development Corp.*, 255 B.R. 606 (D. Mass. 2000). In an aircraft secured financing, it is usual to perfect not only under the Cape Town Convention but also by filing under the U.C.C. *See* Convention on International Interests in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S 285, implemented in the United States by the Cape Town Treaty Implementation Act of 2004, 49 U.S.C. §§ 44101–44113 (2018).

opinions rendered by borrower's counsel—in part, because these opinions typically relate instead to specific aspects of the borrower's (or another party's) grants of collateral, and in part because they also typically make specific reference by name to the statutes or recordation systems applicable to the particular collateral. For these reasons, the authors believe recipients and their counsel should not assume these laws are covered in the opinion letter unless they are specifically addressed.

Regulated Industries. Another category of laws that are commonly excluded from legal opinions in the commercial loan context but are sometimes covered when applicable and significant to the entity or the transaction to which the opinion relates—and when borrower's counsel has the expertise to do so—consists of those laws applicable to regulated industries, such as laws regulating public utilities, telecommunications, banking, or insurance industries. Loan opinions covering these laws usually come up in one of two contexts.

First, these laws are often addressed by borrower's counsel when the opinion giver, the recipient, or its counsel, or more likely all three, recognize that a particular regulatory issue is directly implicated in the typical opinions of borrower's counsel[75] addressing the loan transaction itself—for example, where the borrower's ability to borrow money or pledge assets as collateral for the loan, or to otherwise consummate the principal terms of the loan transaction, is impermissible under a particular regulatory regime absent appropriate regulatory approval. These types of regulatory opinions are frequently requested and rendered on loans to utilities, banks, or insurance companies organized under laws limiting their authority to incur debt.[76]

There is some agreement among state bar and other opinion reports that an opinion of borrower's counsel is understood to cover regulatory laws applicable to the borrower to the extent that these laws impose restrictions directly implicated in the opinions being rendered, unless coverage of such laws is expressly

75. For a discussion of typical opinions that could be directly implicated, see *supra* notes 1–2 and accompanying text.

76. As an example of such a law, regulations promulgated by the Maryland Public Service Commission provide that a Maryland public utility must, in certain circumstances, file an application with the Public Service Commission in order to issue notes or other evidences of indebtedness. Md. Code Regs. 20.07.04.02 (2020); *see also* Cal. Pub. Util. Code § 818 (West 2004) (California public utility may not issue certain types of notes or other evidences of indebtedness unless the California Public Utilities Commission authorizes the issuance). As another example, under regulations promulgated by the Office of the Comptroller of the Currency, U.S. national banks must, under certain circumstances, obtain the prior approval of the OCC to issue subordinated debt. 12 C.F.R. § 5.47(f) (2020). Insurance companies are also subject to similar requirements; for example, Texas law provides that if an insurer assumes a subordinated liability, the agreement relating thereto must be submitted to the Texas Insurance Commissioner for approval. Tex. Ins. Code Ann. § 427.053 (West 2009).

Because regulatory approval used to be required under the former Public Utility Holding Company Act of 1935 ("PUHCA") for the enforceability of many types of public utility financings, opinions used to be routinely requested and rendered as to whether a borrower was subject to regulation as a "holding company" or a "subsidiary company" or an "affiliate" of either, within the meaning of PUHCA. However, since PUHCA was repealed in 2005, these opinions are no longer appropriately requested. Act of Aug. 26, 1935, ch. 687, 49 Stat. 803, *repealed by* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1263, 119 Stat. 594, 974.

excluded from the opinion letter.[77] This presumption of coverage distinguishes regulated industry from most of the laws we have already discussed. However, in the authors' experience, in those instances where, absent disclaimer, this presumption of coverage applies, typically very early in the process one or both of lenders' and borrowers' counsel have recognized and discussed the need for regulatory compliance to ensure the legality of the transaction, and opinions of borrowers' counsel (or special regulatory counsel) covering these laws will have been specifically requested.[78] Further, we note that, since these opinions—like opinions on the other laws we have discussed—typically contain language that makes clear the scope of the opinions being rendered, such as through express references to the regulatory regime being covered or through qualifications or assumptions that narrow the scope of the opinion,[79] the result in practice is generally no different from opinions on the other excluded laws we have discussed. Because both coverage of such laws and the scope of coverage are evident in the wording of the opinions, the opinion recipient should have little trouble ascertaining what matters are or are not addressed.[80]

77. *E.g.*, *TriBar 1998 Report*, *supra* note 4, § 3.5.2, at 628; BUS. LAW SECTION, STATE BAR OF CAL., REPORT ON THIRD-PARTY REMEDIES OPINIONS app. 4, at 11–12 (2004 & 2007 Update) (Threshold Subcommittee Report) [hereinafter CALIFORNIA 2007 REMEDIES REPORT THRESHOLD APPENDIX] (citing § 3.5.2(a)(i) of the *TriBar 1998 Report*, *supra* note 4); FLORIDA REPORT, *supra* note 13, at 30; NORTH CAROLINA REPORT, *supra* note 22, § 12.0 cmt. c, at 72; *see also* PENNSYLVANIA MODEL CLOSING OPINION, *supra* note 23, at 72 (remedies opinion covers regulatory approvals relating to the borrower if the failure to obtain such approvals would cause the contract to be void or would impair its enforceability); *id.* at 85 ("no violation of laws" opinion also addresses regulatory matters if entering into the transaction or the performance of the borrower's obligations thereunder will expose the borrower to a fine, penalty, or other sanction for violating a regulatory prohibition); VIRGINIA REPORT, *supra* note 23, at 45 (analysis of regulated industry laws "may require consultation with an attorney specializing in that regulated industry or stating an express exception"); *Real Estate 2012 Report, supra* note 23, at 245 (ch. 2, pt. III, § 3.8(a)) ("For a regulated borrower or the guarantor entity, the opinion giver should consider whether any governmental approvals or filings are needed to borrow money, enter into the transaction, or make the transaction documents enforceable against a borrower or the guarantor.").

78. Another example of the distinction between regulated industry laws and other commonly excluded laws discussed above can be found in laws regulating foreign investment. While some laws generally applicable to foreign investment (like CFIUS) are generally understood to be excluded, that same presumption may not extend to foreign investment limitations that are part of some of the regulatory regimes discussed in this section. *See supra* note 56.

79. *See, e.g.*, MARYLAND REPORT, *supra* note 23, at 148 (basing these opinions on certificates or express assumptions recommended for such opinions); *Texas Report*, *supra* note 13, at 95 (blanket opinion as to the laws applicable to regulated industries is inappropriate; rather, such opinions should be narrowly crafted).

80. It should be noted that, in some transactions, regulatory regimes would be directly and significantly implicated in the opinions typically rendered, but for the fact that the applicable regulatory matters are addressed, instead, by drafting the documents or otherwise structuring the transaction to avoid violations of law. For example, in the authors' experience, issues relating to the pledge of government receivables by healthcare companies are often addressed by the parties' structuring the transaction so that Medicare and Medicaid payments are deposited directly into the borrowers' pledged bank accounts, with the lenders relying on the deposit accounts as collateral. *See* Leslie J. Levinson, *Healthcare Financing Anti-assignment Limitations*, LEXIS PRAC. ADVISOR J. (Aug. 23, 2019), https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/posts/healthcare-financing-anti-assignment-limitations. In these instances, typically no opinions on compliance are expected and opinion givers also often expressly exclude coverage of the relevant regulatory laws from their opinion letters.

As to the second context, regulated industry compliance requirements are sometimes of such importance to the operations of the borrower that—even though the requirements are not directly implicated by the matters addressed in a standard closing opinion and even though the failure to comply with the requirements does not impair the legality or enforceability of the loan transaction itself—the recipient nevertheless wants additional comfort as to the borrower's compliance with specific regulatory requirements underpinning the borrower's financial ability to repay the loan. This second rationale for covering regulatory requirements is thus similar to that discussed above for opinions on governmental authorizations under environmental laws. As an example, opinions addressing telecommunications laws are sometimes both requested and rendered in loan transactions involving borrowers that own and operate television or radio stations subject to licensing regimes.[81] In these instances, lenders want assurance that basic licenses for the operation of the borrowers' businesses have been obtained. While these opinions go beyond the typical opinions of borrower's counsel that address the loan transaction itself, opinion givers sometimes agree to render them when specifically requested to do so, though opinion recipients are well-advised to make specific requests early in the transaction when they expect an opinion letter to cover them. Further, because such opinions are typically both requested and rendered by express reference to the particular regulatory requirements being addressed and because the opinions are not otherwise implicitly addressed in the standard closing opinions, their coverage is typically called out by express language in the opinion letter.

Likely as a consequence of the position taken in some opinion reports on the coverage of regulated industry laws, coupled with the technical expertise required to render these opinions and the potentially broad scope of laws applicable to regulated industries that a recipient might wish to have covered,[82] many firms choose, in their initial approach to the preparation of their opinion letters, to exclude regulatory laws expressly and in their entirety from their third-party closing opinions,[83] with the expectation that, if the recipient views compliance

81. For a general discussion of these opinions, see John C. Quale & Brian D. Weimer, *Legal Opinions in Corporate Transactions Affected by FCC Regulation: An Economic Approach*, 51 FED. COMMC'NS L.J. 773 (1999).

82. Laws regulating borrowers that are public utilities, banks, insurance companies, governmental authorities, pharmaceutical companies, and telecommunications companies regulated by the FCC fall into this category. *See, e.g.*, CALIFORNIA 2007 REMEDIES REPORT THRESHOLD APPENDIX, *supra* note 77, at 11–12 (citing § 3.5.2(a)(i) of the *TriBar 1998 Report*, *supra* note 4); FLORIDA REPORT, *supra* note 13, at 30. For examples of some such laws relating to public utilities, banks, and insurance companies, see *supra* note 76; *see also TriBar 1998 Report*, *supra* note 4, § 3.5.2(a)(i), at 628 (pointing to an even broader category of regulated industry laws covered outside of the loan context: where purchase of shares of a telephone corporation requires prior New York Public Service Commission approval, a remedies opinion on a purchase agreement's enforceability against the purchaser is understood as a matter of customary practice to cover the effect of the Public Service Law); *id.* § 6.6, at 661 (no violation of law opinion could not be given if pharmaceutical company is selling assets that include controlled substances to the extent that the sale could expose the seller and the buyer to serious sanctions if the sale does not satisfy government requirements governing the sale of narcotics).

83. Broad exclusions of regulatory laws in their entirety serve, among other things, to disclaim coverage of those regulatory laws that under the opinion literature are implicitly addressed, absent a

with a particular regulatory regime as material to the transaction, the recipient will specifically request that the implicated laws be addressed, at least to some extent. To convey such a broad exclusion, many opinion givers use a generally stated exclusion of regulatory regimes such as the following:

> The laws covered by this opinion letter do not include any law, rule or regulation that is applicable to the relevant parties, the transaction documents or the transactions related thereto solely because such law, rule or regulation is part of a regulatory regime applicable to any party to any of the transaction documents or any of its affiliates due to the specific assets or business of such party or such affiliate.[84]

Others choose to express their exclusion of regulated industry laws by listing in their opinion letter specific regulatory laws that are not covered. Some opinion givers use a combination of both approaches, as illustrated in the sample exclusions set out in Annex 1.[85] Note that even where opinion letters do cover particular regulatory regimes, opinion givers often also, in some manner, expressly exclude coverage of the broad array of other regulatory regimes not being addressed.

In the opinion of the authors, because the scope of the coverage of regulatory compliance issues is typically clear on the face of an opinion letter, generally stated exclusions of regulatory regimes of the types set out in the preceding paragraph and related footnote (however phrased) should be broadly construed by opinion recipients to exclude—in addition to the laws identified earlier in this

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disclaimer, when those laws are directly implicated in any of the opinions being rendered. As to the presumption of coverage, absent disclaimer, of directly implicated regulatory laws under state bar and other opinion reports, see *supra* note 77 and accompanying text. As to the broad scope of generally stated exclusions of regulatory regimes, see also the text accompanying *infra* note 86.

84. This example is a type of exclusion that in the authors' experience is frequently used. A slightly more detailed example of the same type of exclusion is set out in item (b) of Annex 1. Other examples of generally stated exclusions of regulatory regimes sometimes seen in loan opinions are statements such as the following:

> We express no opinion as to the laws of any jurisdiction other than those laws of the State of _____ and the federal laws of the United States that in our experience are generally applicable to transactions of this type without regard to the particular nature of the business conducted by any of the borrower and its affiliates.
>
> or
>
> We express no opinion as to the laws of any jurisdiction other than the laws of the State of ____ and the federal laws of the United States that in our experience are normally applicable to general business entities.

These more generally stated regulatory exclusions are worded in many different ways by opinion givers, some more broadly than others, and the examples provided in this footnote and in the text are intended as samples only and not as recommendations of how this type of exclusion should be phrased.

85. For an example of this approach, see paragraph (b) as well as the other items listed in Annex 1. Some opinion givers prefer, at least in some transactions, to list expressly in their statements of excluded laws any regulatory regimes they recognize may be applicable to the borrowers in those transactions. Many opinion givers, however, do not believe it is necessary to do so where they have excluded regulatory regimes generally from their opinion letter, thereby putting the recipient on notice that it needs to make a specific request if it wants coverage of any particular regulatory regime in the opinion letter.

section—all of the many other regulatory laws that are not being specifically addressed by the opinion givers, such as those regulating energy companies (whether or not they are public utilities), as well as those regulating businesses in any of the transportation, alcohol, tobacco, firearm, gaming, food and drug, and health industries.[86]

Because of the highly technical nature of opinions on these laws, in many situations in which these laws are not directly implicated in the enforceability or legality of loan transactions, lenders are willing to accept these very broad exclusions from the opinion letter, even where these laws are quite important to the credit, relying instead on the borrower's representations and warranties and their own due diligence as to some or all of these regulated industry matters. Their willingness to do so can sometimes be attributed to cost-benefit considerations or time constraints, because opinions covering these matters generally require special factual diligence and additional time and expense to carry out the necessary inquiry, as well as the inclusion of specially prepared assumptions, qualifications, and certifications not commonly found in a typical third-party closing opinion.[87] Another factor may be that counsel rendering the opinion is often not the borrower's primary regulatory counsel, because many borrowers retain counsel to handle one or a series of isolated loan transactions, while seeking regulatory advice elsewhere (generally from other specialized outside counsel, or from in-house counsel and other employees or consultants experienced in the relevant regulatory compliance).

To summarize, in the authors' experience, opinion givers often exclude these types of regulated industry laws in some manner when not covering them, and opinion recipients generally ask for coverage of particular regulated industry laws when the impact of those laws on the borrower or the loan transaction is important to them. Further, in those transactions where regulated industry laws are covered by the opinion giver, the extent to which those regulatory issues are addressed is generally clear to the recipient from the express wording of the opinions and any related qualifications and assumptions.

Conclusion

In the experience of the authors, at least in the context of U.S. commercial loan transactions, opinion givers typically do not cover in their legal opinions the types of laws discussed in this article except to the extent requested to do so by the opinion recipient or its counsel. Opinion recipients also commonly do not object to their express exclusion, and their counsel typically expect to make specific requests of the opinion giver if an opinion as to any of these

86. As previously discussed, specialized counsel do sometimes opine on businesses in the transportation industry to the extent they opine on security interests in vessels, aircraft, and railroad equipment. *See* text accompanying *supra* notes 73–74.

87. *See, e.g.*, California 2007 Remedies Report Threshold Appendix, *supra* note 77, at 4–5 (cost benefit analysis applies to opinions regarding the satisfaction of regulatory requirements). As to reliance on certificates and the need to narrowly craft opinions addressing regulatory requirements, see *supra* note 79 and accompanying text.

laws is desired. Experienced opinion recipients and their counsel also understand that, when any of these laws are covered in closing opinions, they are commonly covered both narrowly and expressly, and in a manner separate and apart from the other opinions being rendered.

Many opinion givers prefer to make some or many of their exclusions of law express in order to avoid misunderstandings. Others believe it is generally unnecessary to do so. The authors believe, based on their combined years of experience, that there is wide acceptance *in practice* among opinion givers and recipient counsel, at least in the context of U.S. commercial loan transactions, that the laws discussed in this article are not covered by a third-party opinion letter unless they are specifically and expressly addressed.

Annex 1

Compilation of Categories of Commonly Excluded Laws in U.S. Commercial Loan Transactions[88]

We express no opinion as to the laws of any jurisdiction other than the laws of the State(s) of _____ and the federal laws of the United States. Further we express no opinion as to any of the following:

(a) any law, rule or regulation that lawyers in the State of ______ exercising customary professional diligence would not reasonably be expected to recognize as being applicable [to the Borrower or the transactions contemplated by the Opinion Documents] [to transactions of the type contemplated by the Opinion Documents] [or to documents of the type constituting Opinion Documents];[89]

(b) any law, rule or regulation that is part of a regulatory regime applicable to any party to any of the Opinion Documents or any of its affiliates due to the specific assets owned, leased or operated by, or the business of, or the goods or services sold by, such party or such affiliate;[90]

(c) local law;

(d) state or federal laws, rules or regulations relating to:

(i) bankruptcy or insolvency, including fraudulent conveyances and voidable transfers;[91]

(ii) securities laws, including, without limitation, the '33 Act, the '34 Act, the Investment Advisors Act, [except as expressly covered in our opinion in paragraph ___][92] the Investment Company Act, [except as

88. Opinion givers phrase each of these exclusions in various ways, and nothing in this list is intended as a recommendation of any particular formulation of any particular exclusion. Many opinion givers only include some of these exclusions in some form. Others do not believe an express statement of some or all of these exclusions is required. See Part A above for a discussion of the exclusions listed in items (c) and (d)(i) through (v) of this Annex; Part B above for a discussion of items (a) and (d)(vi) through (xvii); and Part C above for a discussion of items (b) and (d)(xviii) through (xxvi).

89. The first of the bracketed phrases in this paragraph (a) is based upon the *Statement of Opinion Practices*, *supra* note 8, § 6.2, at 810. Opinion givers, however, when expressly stating this exclusion, so do in a variety of ways, and the alternative brackets in this paragraph (a) provide other examples of language often used by opinion givers.

90. This paragraph (b) is but one example of a category of excluded laws often included in opinion letters and, if included, opinion givers phrase this exclusion in a variety of ways. For other examples see *supra* note 84 and accompanying text.

91. See *supra* note 22 for a discussion of the bankruptcy exception that is often accompanied by an equitable principles limitation.

92. Borrowers' counsel often do opine as to whether the borrower or other loan party is required to register as an investment company under the Investment Company Act. *See supra* note 26 and accompanying text.

expressly covered in our opinion in paragraph ___][93] the regulations of the Federal Reserve regulating margin stock, and state blue sky laws;

(iii) tax;

(iv) antitrust trade or unfair competition, including Hart-Scott-Rodino;

(v) fiduciary duties;

(vi) antifraud;

(vii) privacy matters;

(viii) immigration and naturalization;

(ix) occupational, safety and health or other similar matters;

(x) labor, pension or other employee rights and benefits;

(xi) corrupt practices;

(xii) racketeering, criminal or civil forfeiture or other criminal acts, including mail and wire fraud;

(xiii) zoning, land use, subdivisions, building or construction matters;

(xiv) the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 [and any other specified laws which the opinion giver chooses to list[94]];

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93. Borrowers' counsel often do opine as to whether the use of loan proceeds violates margin stock regulations. *See supra* note 25 and accompanying text.

94. On January 1, 2015, the European Union's Bank Recovery and Resolution Directive (the "EU BRRD") became effective. Council Directive 2014/59, 2014 O.J. (L 173) (EU). The EU BRRD and its implementing legislation adopted by member states of the European Economic Area (the "EEA") confer broad powers on the relevant bank regulators to, among other things, write down, reform the terms of, cancel, or convert into equity the liabilities of certain EEA financial institutions. Richard R. Howe, *Implications of the European Bail-In Legislation for Opinions on Credit Facilities in the United States*, In Our Opinion (ABA Comm. on Legal Ops.), Spring 2016, at 11 [hereinafter *Implications of EU Bail-In Legislation*]. Because Article 55 of the EU BRRD ("Article 55") and its implementing legislation requires that contracts of EEA financial institutions (other than those governed by the law of an EEA member country) include agreements of the loan parties to be bound by the European bank regulators' exercise of powers under the EU BRRD, these types of contractual provisions are now frequently included in U.S. credit agreements to permit foreign bank syndicate members to comply. These types of contractual provisions are frequently referred to as "bail-in provisions."

On January 31, 2020, the United Kingdom (the "UK") ceased to be a member state of the European Union. Effective as of January 31, 2020, the Loan Syndications and Trading Syndication Association ("LSTA") published new contractual bail-in provisions that are designed to meet the expected requirements of the UK's post-Brexit contractual recognition of bail-in regime (the "UK Bail-In Legislation"), in addition to those imposed by the EU. These new loan provisions include in the definition of "Bail-In Legislation," to which the parties to the loan agreement consent, both the expected UK Bail-In Legislation and Article 55 and its implementing legislation. Loan Syndications & Trading Ass'n, Bail-In Rules (EU and UK) Form of Contractual Recognition Provision LSTA Variant (2020), https://www.lsta.org/content/lsta-form-of-contractual-recognition-provision-2/.

While the typical coverage limitation used by opinion givers in the loan context, limiting the coverage of the opinion letter to laws of specified U.S. jurisdictions, is understood, without more, to exclude all foreign laws (thereby excluding both Article 55 and its implementing legislation and

(xv) swaps and other derivatives, and commodity and other futures and indices and other similar instruments;

(xvi) foreign asset or trading controls, emergencies, national security, terrorism or money laundering and laws addressing other aspects of foreign investment (including Section 721 of the Defense Production Act of 1950, as amended, and the FIRRMA regulations overseen by CFIUS);

(xvii) possible judicial deference to acts of sovereign states (including judicial action giving effect to governmental actions or foreign laws affecting creditors' rights);

(xviii) pollution or protection of the environment;

(xix) the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary;

(xx) patents, copyrights, trademarks, trade secrets or other intellectual property;

(xxi) aviation, shipping and other types of transportation;

(xxii) utilities and other matters relating to the transmission of energy, power or gas;

(xxiii) communication, telecommunication or similar matters;

(xxiv) food or drug matters, including, without limitation, the regulation of narcotics;

(xxv) healthcare; or

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the UK Bail-In Legislation, without need for specific mention), some opinion givers nevertheless choose to include these foreign bail-in regimes in their list of excluded laws. Further, because the inclusion of these contractual provisions can present enforceability issues under the U.S. *domestic* laws chosen to govern the credit documents, some opinion givers choose to include in their opinion letters a separate qualification to the effect that no opinion is expressed as to any provision of the loan documents relating to Article 55 and its implementing legislation or the UK Bail-In Legislation. Such an exclusion might be phrased as follows:

> We express no opinion with respect to the enforceability, or the effect on the obligations of any party under the Transaction Documents, of the [Bail-In Clause] in Section ____ of the [Loan Agreement] or any [Bail-In Action] as defined in the Loan Agreement).

See also Implications of EU Bail-In Legislation, *supra*, at 13–22 (discussing other forms of opinion qualifications).

(xxvi) the regulation of banks, insurance companies and other financial institutions;[95] and

(e) any judicial or administrative decisions, orders, rulings, directives, policies or other interpretations addressing any of the foregoing.

95. For a discussion of opinions where the borrower is a regulated bank, insurance company, or other financial institution, see *supra* notes 75–87 and accompanying text. Even where the borrower is not a regulated financial institution, some opinion givers include this type of exclusion to highlight that their opinions address only compliance with law on the part of, or the enforceability of agreement(s) against, the borrower, and do not address other laws that could be applicable to the transaction solely by virtue of their applicability to the lenders; many opinion givers, however, do not believe such an exclusion is necessary for this purpose because the wording of the opinions themselves limits the laws being covered to those applicable only to the borrower.

Annex 2[96]

Section 19 of the Accord[97]

It is a basic principle of this Accord that the Opinion will deal in a direct way with any specific legal issue to be addressed. In this connection, an Opinion does not address any of the following legal issues unless the Opinion Giver has explicitly addressed the specific legal issue in the Opinion Letter:

(a) Federal securities laws and regulations administered by the Securities and Exchange Commission (other than the Public Utility Holding Company Act of 1935), state "Blue Sky" laws and regulations, and laws and regulations relating to commodity (and other) futures and indices and other similar instruments;

(b) Federal Reserve Board margin regulations;

(c) pension and employee benefit laws and regulations (*e.g.*, ERISA);

(d) Federal and state antitrust and unfair competition laws and regulations;

(e) Federal and state laws and regulations concerning filing and notice requirements (*e.g.*, Hart-Scott-Rodino and Exon-Florio), other than requirements applicable to charter-related documents such as a certificate of merger;

(f) compliance with fiduciary duty requirements;

(g) Local Law;

(h) the characterization of a Transaction as one involving the creation of a lien on real property or a security interest in personal property, the characterization of a contract as one in a form sufficient to create a lien or a security interest, and the creation, attachment, perfection, priority or enforcement of a lien on real property or a security interest in personal property;

(i) fraudulent transfer and fraudulent conveyance laws;

(j) Federal and state environmental laws and regulations;

(k) Federal and state land use and subdivision laws and regulations;

(l) Federal and state tax laws and regulations;

96. *Accord*, *supra* note 32, § 19, at 215–16.

97. In the experience of the authors, although the *Accord* is generally not incorporated by reference or otherwise referred to in legal opinions rendered in the loan context, it remains a useful reference regarding opinion practice and is also likely one important source of the common practice on excluded laws (absent express coverage) we have discussed. *See supra* note 32.

(m) Federal patent, copyright and trademark, state trademark, and other Federal and state intellectual property laws and regulations;

(n) Federal and state racketeering laws and regulations (*e.g.*, RICO);

(o) Federal and state health and safety laws and regulations (*e.g.*, OSHA);

(p) Federal and state labor laws and regulations;

(q) Federal and state laws, regulations and policies concerning (i) national and local emergency, (ii) possible judicial deference to acts of sovereign states, and (iii) criminal and civil forfeiture laws; and

(r) other Federal and state statutes of general application to the extent they provide for criminal prosecution (*e.g.*, mail fraud and wire fraud statutes).

Annex 3

Website Addresses for Opinion Reports Referenced in This Article

California 2007 Remedies Report Exceptions Appendix	*Legal Opinion Resource Center*, Am. B. Ass'n, https://www.americanbar.org/content/dam/aba/administrative/business_law/opinions/tribar/materials/20120820000005.pdf [Appendix 10]
California 2007 Remedies Report Threshold Appendix	*Legal Opinion Resource Center*, Am. B. Ass'n, https://www.americanbar.org/content/dam/aba/administrative/business_law/opinions/tribar/materials/20120820000005.pdf [Appendix 4]
California 2007 Business Transactions Report	*Legal Opinion Resource Center*, Am. B. Ass'n, https://www.americanbar.org/content/dam/aba/administrative/business_law/opinions/tribar/materials/20120820000000.pdf
Florida Report	*Legal Opinion Resource Center*, Am. B. Ass'n, https://www.americanbar.org/content/dam/aba/administrative/business_law/opinions/tribar/materials/20111203_florida_third_customary_practice.pdf
Maryland Report	http://www.msba.org/uploadedFiles/MSBA/Member_Groups/Sections/Business_Law/2009RevisedVersionofMarylandOpinionReport2007.pdf
North Carolina Report	https://www.ncbar.org/wp-content/uploads/2020/12/Report-of-the-Legal-Opinion-Committee-of-the-BL-Section-of-the-NCBA.pdf
Pennsylvania Model Closing Opinion	*Legal Opinion Resource Center*, Am. B. Ass'n, https://www.americanbar.org/content/dam/aba/administrative/business_law/opinions/tribar/materials/20080612000001.pdf
Pennsylvania Report	*Legal Opinion Resource Center*, Am. B. Ass'n, https://www.americanbar.org/content/dam/aba/administrative/business_law/opinions/tribar/materials/20080612000000.pdf
Real Estate 2012 Report	*Legal Opinion Resource Center*, Am. B. Ass'n, https://www.americanbar.org/content/dam/aba/administrative/business_law/opinions/tribar/materials/ref_opinion_20120711.pdf
Real Estate Local Counsel Report	*Legal Opinion Resource Center*, Am. B. Ass'n, https://www.americanbar.org/content/dam/aba/administrative/business_law/opinions/tribar/materials/ref_opinion_2017.pdf
Tennessee Report	*Legal Opinion Resource Center*, Am. B. Ass'n, https://www.americanbar.org/content/dam/aba/administrative/business_law/opinions/tribar/materials/20110701_tennessee_third_party_closing_opinions.pdf
Texas Report	*Legal Opinion Resource Center*, Am. B. Ass'n, https://www.americanbar.org/content/dam/aba/administrative/business_law/opinions/tribar/materials/1992_tx_opinion_report.pdf

TriBar 1998 Report	*Legal Opinion Resource Center*, Am. B. Ass'n, https://www.americanbar.org/content/dam/aba/administrative/business_law/opinions/tribar/materials/20050303000003.pdf
Virginia Report	*Legal Opinion Resource Center*, Am. B. Ass'n, https://www.americanbar.org/content/dam/aba/administrative/business_law/opinions/tribar/materials/virginia_opinions.pdf
Washington Report	https://www.wsba.org/sections/join-a-section/business-law/third-party-legal-opinions