Report of the ABA Business Law Section
Task Force on Delivery of Document Review Reports to Third Parties*

In connection with the acquisition of a company (“Target”) or its assets, counsel for the purchaser (“Purchaser”) often is asked to review various matters relating to the Target and deliver to Purchaser a written report (a “Report”) (frequently referred to as a diligence report) describing the review it conducted and the results. The scope, focus, depth, and detail of the review conducted and of the resulting Report are determined in consultation between Purchaser and its counsel. Some matters reviewed by counsel are typically discussed informally with the client and alluded to only briefly or not covered at all in the Report. A Report prepared for one prospective purchaser examining a particular acquisition target may differ significantly from a Report prepared for another prospective purchaser examining the same target. The differences may result from, among other factors, the different budgets of the two prospective purchasers, their different perspectives and points of emphasis, and the relative levels of involvement in the diligence process by Purchaser’s internal counsel, management, and other advisors. In addition, Purchaser’s counsel often provides extensive written and oral legal analysis and advice to its client in connection with the proposed transaction that do not appear and are not referred to in the Report.

In recent years, there has been an increase in requests from lenders financing acquisitions and their counsel to be permitted to review the Report in connection with the lenders’ own diligence review. Similar requests may be made by parties that are investing in the transaction or forming a joint venture with Purchaser.2

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1. The Report may be voluminous, multidisciplinary, and multi-jurisdictional; for a given transaction, more than one Report may be prepared and more than one firm may prepare a Report. Due to the exigencies of time, in some transactions more than one draft of the Report may be shared with transaction participants prior to finalization.

2. Delivery of a Report to persons who are purchasing securities or acting as intermediaries in a distribution of securities, whether as placement agents or underwriters, may present additional issues under the securities laws, depending on the circumstances. As discussed below in this Task Force report under “Specific Techniques to Exclude Liability to Third Parties—3. Other Considerations,” this Task Force recommends that Reports generally not be provided to third parties in transactions involving a purchase or distribution of securities.
Frequently these requests are framed in terms of saving time and costs for Purchaser (which is often reimbursing the lender for its expenses) by allowing the lender, for example, to accelerate its own diligence effort. Purchaser’s counsel, often under pressure from both its client and the lender, is hard-pressed to deny the request, even though the Report was prepared for a different (albeit related) purpose and may have a different scope, focus, or level of detail than needed or desired by the lender. For example, the Report may not address matters that are material to the lender because of the scope agreed to with the client.

**European Practice**

In recent years, lawyers in Europe and some other non-U.S. jurisdictions have permitted third parties (lenders, investors, and joint venturers) not only to receive a copy of the Report, but to rely on it as well (“European Third Party Reliance Practice”). European Third Party Reliance Practice appears to have originated with UK lenders and their counsel, and it has followed them elsewhere in Europe, for example when a UK-based lender is the principal lender in a transaction. However, practice outside the UK varies substantially. As noted below, under European Third Party Reliance Practice permission to rely typically is subject to numerous qualifications and conditioned on the recipient’s agreement to limit counsel’s liability. As discussed below, the practice of permitting third parties to rely on such Reports typically has not been followed in the United States.

The following are examples of European Third Party Reliance Practice:

1. Purchaser’s counsel prepares a Report regarding Target and the prospective lender then requests permission to receive a copy of the Report and to rely on it in making its decision to finance the acquisition.

2. In the same situation, Purchaser has a co-bidder or joint venture partner, and the co-bidder or joint venture partner requests permission to receive a copy of the Report and to rely on it in making its decision to participate in the acquisition or to become a joint venture owner. As in the case of providing a Report to a prospective lender, this practice is intended to avoid the expense of having counsel for each of these parties conduct their own due diligence or prepare a Report.

3. A client, attempting to divest itself of a business, frequently in an auction, has its counsel prepare a written report that is intended to be used by prospective bidders for the business and the financial institutions providing credit to them. The purpose is to ensure that all prospective

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3. In asking the lawyer to share the Report with a third party, the client should understand that it is determining that it is willing to waive any privilege or confidentiality with respect to the information in the Report as provided to the third party. The scope of this waiver might be determined by a court to be a subject matter waiver that is broader than just the content of the Report itself.

4. This report does not address requests to review or rely on writings other than Reports, such as structure memoranda detailing contemplated transaction steps and corporate, tax, and other consequences of a transaction.
bidders have access to the same diligence information and to eliminate the need for each prospective bidder to bear the expense of conducting its own independent diligence. This practice is often referred to as “vendor diligence.” In this context, the seller’s counsel can find itself in a particularly difficult situation if after the closing Purchaser claims that the seller’s representations and warranties have been breached or, worse, that Purchaser was intentionally misled.

Law firms that allow their Reports to be relied on in Europe in situations like the ones described above, as a condition to such reliance, expressly limit the scope of the Reports and often insist on an express cap on liability (sometimes the amount of the fee for the transaction or a multiple of the fee, and in no event an amount that exceeds the law firm’s malpractice coverage).

U.S. CONCERNS WITH THE EUROPEAN PRACTICE

European Third Party Reliance Practice has not been followed in the United States. Among concerns in the United States about the European practice are the following:

I. Generally, U.S. lawyers assume that their liability to a client is limited to a claim for malpractice, that is, failing to do what a reasonable lawyer with appropriate background would do in similar circumstances. In the context of preparing a Report, a lawyer is providing advice to a client which usually has substantial independent knowledge about Target and the failure to note something that the client already knows would not be a basis for a malpractice claim. European Third Party Reliance Practice, on the other hand, might result in the Report being construed as a representation that all of the summaries are without flaw and “complete enough” for some unstated need of the recipient, and worse “insurance” that everything of significance to the recipient is covered.5

When Reports are provided to third parties, lawyers should not have any greater exposure to liability than they have to their clients, whether as a result of a misconstruction of counsel’s scope of work, the imposition of contract-like liability, the enlargement of the class of potential plaintiffs, or otherwise. Some lawyers are concerned that, wholly apart from whether the standard of liability is the same, a third party recipient of the Report will be more likely than the client to bring a claim against the firm that prepared the Report. The law firm and its client often will have a pre-existing, possibly long-standing, professional relationship—a

5. At least one situation has been reported where a European third party asked for a statement similar to the following:

that the Document Review Materials [i.e., the Report] are complete, accurate and not misleading in any way and may be relied upon by each of the Relying Parties as if they had been originally addressed to them.

The practice of European law firms is to refuse to provide this type of assurance, correctly noting that Reports are limited in scope under their clients’ engagement directions.
relationship that will typically be absent between the law firm and the third party recipient. In addition, defenses and/or mitigating circumstances resulting from the client’s knowledge, prior activities, or discussions with the law firm may not be applicable in the case of the third party. Furthermore, the opportunity to “work things out” with the client in terms of future services and billing arrangements will not be available.

Providing a Report to a third party should not transform the Report into a direct representation or an insurance policy as to the underlying facts. Nor should a lawyer have any obligation to disclose information to a third party in, or in connection with, the Report that the client did not ask the lawyer to include in the Report.

In this context, it should be noted that a Report consists for the most part of factual analyses undertaken and intended to assist the client with its own, ongoing due diligence review. The client often imposes limitations on the scope of review, including the level of staffing, in order to control expenses, and accepts and uses the Report with a full understanding of these constraints. The Report is customized and tailored to the needs of the client and does not typically receive the same level of senior attention from the law firm or adherence to an independent set of professional standards as a third party legal opinion. Neither the law firm preparing the Report nor the client would anticipate that the law firm would perform the same amount of work as it would when giving a third party legal opinion, nor should any other recipient of the Report.

The potential difference in counsel’s exposure to liability for a Report prepared for a client and a Report provided to a third party that intends to rely on the Report as a factual representation is crucial. If lawyers were asked to provide a summary to someone who would be relying solely on that summary for its information, with the recipient entitled to sue for millions, if not billions, of dollars if the summary were incorrect, they might, among other things:

- Conduct the review with a different level of thoroughness.
- Involve different lawyers.
- Charge a risk premium.
- Decline the representation.

When taking on potential liability to third parties, lawyers arguably should demand at least the same level of protection as other professionals, such as accountants for example, demand from their clients in connection with non-audit work and from third parties. A client of an accounting firm performing non-audit work and third parties who wish to rely on the accounting firm’s work typically are required to agree that they can never, under any circumstance, recover more from the firm than it has received in fees (and then only if the accounting firm is guilty of gross negligence, not just negligence). Also, the client and third parties are required to agree to indemnify the accountants for any liability that the accountants may have, including as a result of the accountants’ negligence.
II. More specifically, some of the risks to a law firm of adopting the European Third Party Reliance Practice in the United States, and reasons not to take these risks, include:

1. The possibility that, where confidential and privileged client information included in a Report prepared for a client is redacted from versions of the Report provided to a third party, the exclusion may increase the likelihood of claims by the third party that the lawyers withheld material information.\footnote{In any event, prior client consent to the release of the Report (which consent would apply to any privileged information it contains that is not redacted) is important. See supra note 3.}

2. Uncertainty regarding potential bases of liability and appropriate statutes of limitations, as well as a lack of a clear and accepted measure of damages.

3. An environment in the United States in which suits and threats of suits against law firms are increasing, in contrast to the situation in Europe where suits against law firms are uncommon.

4. The fact that liability caps for lawyers are not customary in the United States. In the United Kingdom, lawyers are permitted to limit their liability, even to clients, and UK law firms now are doing that routinely, including in their general engagement letters. This European practice mirrors the approach the accounting firms have adopted as described above. U.S. law firms normally are prohibited from limiting their liability to clients and generally have not imposed liability caps on third parties.

5. The anomaly that permitting third party reliance on Reports in M&A transactions would be an expansion of the risk of liability to third parties at a time when the trend with respect to third party legal opinions is to reduce substantially their use in most M&A contexts.\footnote{Unlike third-party closing opinions, which are specifically prepared for delivery to third-party non-clients in accordance with customary opinion practice, a Report is prepared for a client, and is typically crafted to be responsive only to specific requests and needs of the client as well as to the limitations the client imposes on the scope of the work.}

6. The anomaly that the law firm may expose itself to risk to a third party as though the law firm were a principal in the transaction, even when the law firm receives no direct benefit from the transaction and the client may have negotiated to eliminate or limit its post-closing liability. In this connection, it should be noted that the parties to a transaction regularly negotiate caps on liability, often limited to the consideration received in the transaction or less. A law firm should not have liability in excess of the amount it received if its exposure is to be proportionate to the benefit it received. The recipient of the law firm’s Report may argue, with the benefit of hindsight, that the law firm’s summaries were not complete enough, or did not raise issues with proper emphasis, and this
caused the recipient to enter into the transaction. The law firm becomes a potential deep pocket (and perhaps the only viable deep pocket) if the transaction goes sour. 8

7. The anomaly that a current trend among general counsel of companies is to insist that low cost personnel, for example legal assistants and contract attorneys (sometimes hired from temp agencies), perform document reviews. When that is done, the nature of the review may be different from what the law firm would have conducted under different circumstances, thereby increasing the law firm’s risk if reliance is permitted. This problem is exacerbated if the requirement to permit third party reliance is raised late in a transaction after the review has been completed.

8. The failure of normal fee arrangements to include any premium for the higher risk created by reliance (even where the requirement to permit third parties to rely is raised at the beginning of the engagement).

9. The probability that suits against law firms based on third party reliance on Reports would be so fact intensive that relief at an early stage of litigation is unlikely, making costs of litigation an added factor (together with potential reputational damage of litigation) that will pressure law firms to settle, even if blameless.

10. The exposure that results from reviews that are often conducted under demanding, time-sensitive circumstances. The availability of data is often imperfect. Where data rooms are used, in many situations documents continue to be added up until, and even after, the execution of definitive agreements. Often, indices of available documents are imperfect, never catching up with the constant addition of documents. It is also common for the seller to impose significant restrictions on access to documents and the opportunity to photocopy them.

**Description of U.S. Practice**

Recent discussions at bar association meetings and programs suggest that U.S. law firms are increasingly being asked to furnish to non-clients, often lenders, reports or memoranda prepared at the request of their clients. U.S. law firms appear to regularly seek to limit distribution of their Reports to third parties and, in addition, refuse to permit third party reliance on such Reports. However, some firms consent to delivery of copies of Reports to third parties who confirm in writing that they are not relying upon, and will not attempt to hold the law firm liable for, the Reports. This refusal to permit third party recipients to rely on Reports is

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8. Parties to a transaction regularly negotiate caps on liability, based in part on their respective stakes in the transaction. If a client is paid $100,000,000 and breaches a key term, it may agree to be liable for a substantial portion of the $100,000,000—after all, it has received $100,000,000. A law firm, however, receives no proceeds from the transaction.
intended to preclude reliance that would be a basis for liability and, therefore, to obviate the need for a dollar cap on the law firm’s liability.

Recognizing that claims by a non-client can pose a significant risk of liability, many U.S. law firms are stating expressly in their Reports that reliance by non-clients is prohibited. While such statements offer a firm some protection, to avoid any question regarding their effectiveness many firms seek written acknowledgments from non-clients to whom Reports are provided of the effect of these disclaimers and release of any liability associated with the Report being provided. While professional ethics rules normally prohibit lawyers from prospectively limiting their liability to clients, these prohibitions do not apply to non-clients. Therefore, this practice does not violate ethics rules. Law firms should be sensitive to the risks of providing a Report to a non-client.

**Specific Techniques to Exclude Liability to Third Parties**

To help avoid liability to third parties that may be furnished a Report, the lawyers preparing the Report should make clear (i) that reliance by a third party on the Report is not permitted, and (ii) the law firm that prepared the Report does not intend it to be for the benefit and guidance of a third party. This can be done in two principal ways:

1. **Limitations in the Report Itself.** The Report itself could make clear that it was prepared solely for the benefit of Purchaser in connection with the acquisition, that it may not be disclosed to or reviewed by any other party; that the scope of the review was determined in consultation with Purchaser, and that the Report is not a complete summary of all reviews conducted. Including such a disclaimer in the Report itself helps provide protection should the Report be furnished by the client

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9. Although limitations and disclaimers are likely to eliminate liability in most cases, they may not in all circumstances. For example, a law firm may face liability if it is found to have fraudulently misrepresented the results of its investigation or participated in its client’s fraud, and the loss was caused by the plaintiff’s justifiable reliance on the fraudulent misrepresentation. See Restatement (Second) of Torts § 525 (1979). In another example, in a claim against a law firm for violating Rule 10b-5 under section 10(b) of the Securities Exchange Act of 1934 regarding tax opinions that a law firm gave to its client, the U.S. Court of Appeals for the Third Circuit concluded that the law firm had not met its burden of showing that, as a matter of law, reliance by the plaintiffs, who were not clients, on the opinion letters was unreasonable, even though the opinions specifically provided that they were not to be relied upon by anyone other than the law firm’s client. Kline v. First W. Gov’t Sec., Inc., 24 F.3d 480, 488 (3d Cir. 1994). The dissenting opinion vigorously argued that the disclaimers and limitations required the court, as a matter of law, to find that the plaintiffs’ reliance was not reasonable and that summary judgment should therefore be entered in favor of the law firm. Id. at 492 (Greenberg, J., dissenting).

There is authority that an express disclaimer of reliance in a business acquisition agreement between sophisticated parties can negate the element of reasonable or justifiable reliance required for a common law fraud or negligent misrepresentation claim or a fraud claim under the federal securities laws. See Harsco Corp. v. Segui, 91 F.3d 337, 343 (2d Cir. 1996); cf. AES Corp. v. Dow Chem. Co., 325 F.3d 174 (3d Cir. 2003).

10. Restatement (Third) of the Law Governing Lawyers § 51 cmt. e (2000) ("[a] lawyer may avoid liability to nonclients under [§ 51(2)] by making clear that an opinion or representation is directed only to a client and should not be relied on by others").
to a third party without the law firm’s knowledge or when a separate third party acknowledgment cannot be obtained. Such a disclaimer might read as follows:

The sole purpose of this Report is to assist Purchaser in evaluating the proposed acquisition. It has been prepared based on the directions of Purchaser, including directions as to the scope and content of review, and staffing levels and limitations, for the informational purposes of Purchaser only and upon the express understanding that it will be used only for that purpose. The contents of this Report and all attachments to this Report are confidential and may not be used by, filed with or provided, circulated, quoted or referred to or otherwise disclosed to any person or entity, in whole or in part, without Law Firm’s express prior written consent, which consent may be withheld at Law Firm’s discretion. Except as expressly agreed in writing by Law Firm, no person or entity other than Purchaser is entitled to rely upon this Report or any matter to which it refers.

The scope of the review was determined in consultation with Purchaser and based on that consultation does not deal with all potentially relevant matters or with all aspects of matters that are relevant. This Report is not a summary of all of the reviews conducted by Law Firm, nor a complete summary of the materials it references. Instead, this Report was designed to provide a summary overview of specific matters identified in discussions between Purchaser and Law Firm. In addition, certain matters have been discussed via telephone or e-mail with Purchaser and were not included in this Report. Accordingly, this Report does not purport to give a complete assessment of all matters to which it refers.

This Report is based solely on materials made available to Law Firm by [_____] in [the data room established at [______]], which Law Firm reviewed during the period from [_____] to [______], and [describe other sources]. Law Firm has assumed that the documents provided to it are true, complete, and correct copies of the original documents, and Law Firm has not made any independent investigation to confirm the accuracy or completeness of any information, whether written or oral, made available to it. Law Firm draws to your attention that documents (and other information) provided to it are governed, in many instances, by the laws of jurisdictions other than the State of [______] [to be used only if that is the case]. Accordingly, its review of such information and documents is based solely on the plain meaning of the language used in these documents, does not reflect any meaning or construction arising from any laws referred to in, or governing, such documents and other information, and may not have been reviewed by counsel qualified in the law of those jurisdictions. Nothing in this Report constitutes an opinion of Law Firm. Readers of this Report should not assume that Law Firm has conducted the investigation or analysis necessary to express an opinion as to any of the matters covered by this Report, even if a matter is of a type that frequently is the subject of legal opinions in other contexts.

Given the limited scope of Law Firm’s review, the readers of this Report should not assume (or rely upon any assumption), or infer or conclude, that the documents or other matters summarized in this Report are, individually or collectively, material to Target or the operations of Target, or that such documents or other matters comprise all the material information with respect to Target or the operations of Target or that a person investigating the proposed acquisition may want to be informed of and consider. This Report does not purport to provide a complete and accurate
summary of matters pertaining to Target. Law Firm does not assume responsibility for the completeness of the information contained in this Report. This Report should not be treated as a substitute for, and does not itself constitute, a warranty, indemnity, or other protection customary for a transaction of this nature. Law Firm makes no representation regarding the sufficiency of this Report or the scope or procedures it describes for any purpose. In addition, Law Firm has no responsibility to update this Report for events or circumstances occurring after the date of this Report.

This Report has been prepared as a general summary of certain aspects of the documents and other matters reviewed by Law Firm, and should not be treated as a substitute for specific legal advice concerning individual matters, situations, or concerns.

Many, if not most, law firms require a non-client recipient of a Report to expressly agree to the limitations by signing either the document or a separate document such as a non-reliance agreement.

2. The Non-reliance Agreement. If the law firm that prepared the Report permits a lender or other third party to review, but not rely upon, the Report, this Task Force recommends that the conditions and limitations under which the third party is permitted to review the Report be described and agreed upon in an agreement signed by the law firm and the third party. Such an agreement would be in addition to the disclaimers and qualifications in the Report itself of the kind that are discussed above, and often would cover the following subjects:

(a) Purpose for Which Report Prepared; Redaction. The Report was prepared for Purchaser in connection with a proposed acquisition of Target, subject to the specific directions and limitations of Purchaser. If appropriate, the agreement will note that the Report being provided to the third party has been modified from the version provided to the client, and omits some information contained in the version provided to the client.

(b) Purpose for Which Report Is Provided to Third Party. A description of the purpose for which the Report is to be shared with the third party (e.g., for the third party’s convenience in facilitating organization of its independent diligence review).

(c) No Intention to Induce. The law firm’s agreement to provide the Report to the third party is not intended to induce the third party to make an investment in or loan to Purchaser, and the third party will only act based on its own analysis and diligence review and the advice of its own legal and other advisers.

(d) No Reliance or Liability. The third party may not rely on the Report for any purpose, and the law firm will have no liability to the third party with respect to the Report.

11. Law firms often will advise their clients to resist any effort of a third party recipient to require in client representations any characterization of the Report, particularly characterizations (such as a statement that the Report is “complete, accurate and not misleading in any way”) that would be inaccurate.
(e) Confidentiality. The third party will keep the existence of the Report, and all information in the Report, confidential, and will not provide the Report to any other party without the law firm's consent.

(f) Disclaimer; No Representations or Warranties. A disclaimer as to the scope of the law firm's review and the accuracy or completeness of the Report or the relevance of the Report for the third party's purposes. The letter agreement also may contain a disclaimer of any obligation to update the Report, and an acknowledgment by the third party that the law firm is not making any representation or warranty regarding the information in, or omitted from, the Report.¹²

(g) No Attorney-Client Relationship. A confirmation that delivery of the Report does not create an attorney-client relationship between the law firm and the third party.

(h) Choice of Law/Forum. A choice of law and selection of exclusive forum in a jurisdiction where the law firm believes that the agreement, and particularly the limitations on reliance and liability contained in the agreement, is likely to be upheld.

A compilation of some of the provisions found in sample non-reliance agreements is attached. The attached compilation may be varied as appropriate to suit particular situations.

3. Other Considerations. A document signed by the recipient of a Report that states that the recipient is not relying on the Report and that the recipient agrees to limit the preparer's liability, releases the preparer from liability, or holds the preparer harmless will be enforced under state law in most instances. As noted above, requesting non-reliance agreements from non-clients does not violate ethics rules. Even if a non-client recipient of the Report signs such an agreement, uncertainty may exist regarding the effect of the non-reliance agreement on others who receive the Report (for example, other lenders and co-venturers) without the knowledge or consent of the law firm and without signing the agreement. As a consequence, law firms that agree to provide Reports to non-client parties often include in the non-reliance agreement a confidentiality undertaking (such as the one described in clause (e) above) that the non-client will not provide the Report to any other person without the law firm's prior written consent, and possibly even an indemnity from the non-client to hold the law firm harmless from any losses and expenses to which it may be subject if the Report is provided to another party without the law firm's consent.

On occasion, U.S. law firms are asked to provide Reports that they have prepared to persons who are purchasing securities or acting as intermediaries in distributions of securities, whether as underwriters or placement agents. The

¹² Some law firms also attempt to obtain an explicit indemnification from the third party against any loss suffered because of a breach by the third party of its obligations under the letter agreement. The attached compilation does not include a suggested indemnification provision.
general practice of U.S. law firms is not to provide (or be associated with providing) Reports to parties that are not clients in transactions involving the offer or sale of securities.\textsuperscript{13} A law firm providing a Report in such a transaction would face the risk that, as a result of the applicability of the federal securities laws, a court may refuse to enforce non-reliance and waiver of liability provisions in a non-reliance agreement.\textsuperscript{14} Law firms should be sensitive to this issue when they are asked to provide a Report initially to prospective lenders in connection with the lenders’ credit decision but foresee that the loan will be replaced with or refinanced by a securities offering, including a securities offering in which the lenders or their affiliates may be acting as underwriters or placement agents. This Task Force recommends that in these circumstances the law firm not provide (or be associated with providing) a Report to anyone other than the law firm’s client.

4. \textit{Additional Communications}. On occasion, Purchaser’s counsel, whose Report has been provided to a third party at the request of its client, is asked by the third party to discuss the contents of the Report (e.g., to answer questions regarding the Report) and counsel’s review generally. Counsel should be aware that, even if the Report was provided with a well-drafted non-reliance agreement, such discussions could undermine the expected protections bargained for in the non-reliance agreement. Furthermore, if the Report furnished to the third party excludes information included in the original Report to the client (including substantive legal analysis and conclusions), such discussions could lead to disclosure of that information if counsel is not careful (for example, undermining the efficacy of the redaction of privileged communications from the Report provided to the third party). Oral discussions regarding the Report or the review generally between Purchaser’s counsel and a third party also could lead counsel to make affirmative statements that could be misconstrued as “representations” regarding the target company or the results of counsel’s review (e.g., “we do not think this litigation is an issue”; “nothing else came to our attention that we believe is material”). Clearly, counsel should take steps to ensure that any such discussions do not lead to these undesirable results.

Once counsel’s Report has been provided to a third party, the most obvious way to avoid these “pitfalls” is to avoid supplemental discussions with the third party, pointing out that the Report speaks for itself (subject to limitations and caveats included in the non-reliance agreement and the Report itself) and directing the third party (or its counsel) to the sources of information (e.g., the data room). However, the realities of the situation may make this approach impractical. If counsel engages in supplemental discussions regarding its Report with a third party, then, at

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\item In a securities offering, issuer’s counsel typically delivers to underwriters or comparable parties a carefully limited legal opinion covering specified matters and, depending on the circumstances, a negative assurance letter. \textit{See Report of the Subcommittee on Securities Law Opinions, Committee on Federal Regulation of Securities, ABA Section of Business Law, Negative Assurance in Securities Offerings (2008 Revision)}, 64 \textit{Bus. Law.} 395, 396 (2009). Established practice in securities offerings does not include delivery of diligence or comparable reports prepared by counsel.
\item Counsel should consider whether the nature of the interests involved in a particular transaction would cause them to be considered “securities.”
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a minimum, counsel should consider stating clearly (preferably in writing) that (i) the discussions are expressly subject to the limitations and caveats included in the non-reliance agreement and the Report itself, and (ii) counsel will not offer any substantive analysis or conclusions regarding the information in the Report (nor discuss any substantive conclusions or analysis shared with its client that are not included in the Report). In addition, counsel also may consider reminding the third party that the law firm is counsel to its client, and not the third party, and that the third party should recognize that counsel is acting as an advocate on behalf of its client and in the client’s interests, and should consider any discussions or statements by counsel in that light.

The foregoing discussion highlights the tension faced by a law firm when it is asked whether its Report can be provided to a third party non-client. Counsel is expected to protect, advance, and advocate the interests and objectives of its client, and the interests and objectives of the third party will sometimes not be in harmony with those of counsel’s client. Counsel should not be expected to assume a role or responsibility of joint representation by reason of providing a Report or discussing its review when that could compromise its primary obligation as advocate for its client. Discussions with a third party or its counsel regarding counsel’s review could very well become a key component of negotiation (for example, the client may not view a particular matter as “material,” but a lender to the client may have the opposite view). Thus, the third party should in no way view counsel who prepared the Report as representing its interests, and should view the furnishing of a Report (and any related discussions) as merely facilitating its and its own advisers’ independent review and analysis.

**SUMMARY AND CONCLUSION**

Under U.S. practice, law firms that prepare a Report for a client do not permit reliance on the Report by third parties, such as lenders to the client and investors in the transaction. U.S. law firms generally furnish, or consent to delivery of, a Report to a lender or other third party for review (but not reliance) only when they include a disclaimer in the Report itself limiting the Report’s distribution and negating reliance by third parties, and obtain a non-reliance agreement from the third party that makes clear that (i) the third party is not permitted to rely, or justified in relying, on the Report, (ii) the Report was not prepared or intended for the benefit of the third party, and (iii) the law firm has no liability or other responsibility to the third party to whom the Report has been provided. Although the disclaimer and agreement may not provide protection from liability in all situations

15. In this regard, the non-reliance agreement could include an express statement to the effect that “should any of [the Firm]’s partners or employees provide you or any of your representatives with any explanations or further information in relation to the Report, you acknowledge that they are given subject to the same terms as those specified in this agreement in relation to the Report.” However, counsel may not want to imply that it is willing to enter into discussions regarding the Report. The attached compilation includes a provision to this effect.
or under all theories of liability, they should be helpful in defending an action by a third party by demonstrating the circumstances under which the Report was furnished and in establishing that the third party’s reliance on the Report was not reasonable or justifiable.

**REPORT EXHIBIT—NON-RELIANCE LETTER AGREEMENT**
**(COMPILATION OF CERTAIN REPRESENTATIVE PROVISIONS)**

Re: [Reference to Transaction] Preliminary Legal Diligence Report

Dear [                ]:

[                ] (the “Lender” or “you”) has requested that [Law Firm Name] (“our Firm” or “we”) provide you with a copy of a Preliminary Legal Diligence Report (together with any supporting schedules or related materials, the “Report”) that we prepared for our client, [Client Name] (“Client”), in connection with its consideration of a possible transaction (the “Transaction”) involving [Name of Company/Target] (the “Company”). The Report is subject to many limitations, restrictions, and caveats, some of which are set forth in the Report and otherwise, and does not provide any form of assurance regarding the information it discloses or contains. We are delivering a copy of the Report to you on the basis of the limitations, restrictions, and caveats set forth in the Report and in this letter agreement. References herein to you, our Firm (or we), or Client, as the case may be, include in each case reference to each such person’s respective affiliates, general or limited partners, members, directors, officers, managers, employees, advisors, and counsel. By signing and returning an executed copy of this letter agreement, you agree to, and acknowledge that you understand, each of the following limitations:

1. The Report is being provided to you as a courtesy and for your convenience only to facilitate your independent diligence review and not to induce you to provide financing to, or enter into any other transaction with, Client, the Company, or anyone else. You agree that you will not use the Report for any purpose other than facilitating your independent diligence review as described herein. You and your advisors will be undertaking such reviews, investigations, and other diligence as you believe is prudent, and do not intend to, and agree and acknowledge that you are not entitled to, rely, and (without limiting the provisions of paragraph 2 below) neither you nor any of your affiliates who may be “Lender’s affiliates” (as used in the second sentence of paragraph 6 of this letter) will make any claim of reliance, on the Report in connection with your or their decision to provide financing to Client or for any other purpose. Notwithstanding anything to the contrary contained herein, in no event shall the Report be used by you or any other person in connection with your review of the Company in connection with any transaction involving the offer, sale, or issuance by the Company or any affiliate of the Company of any equity or debt security (and you agree and acknowledge that “Lender’s affiliates” as used in the
second sentence of paragraph 6 of this letter excludes such of your affiliates as may be participating in any such securities transaction).

2. Neither we nor Client make any representation or warranty as to the accuracy, completeness, or sufficiency of the Report, and nothing contained in the Report shall be deemed a representation or warranty as to the information therein, omitted therefrom or otherwise. Neither our Firm nor Client shall have any liability (whether under statute, in contract, in equity, in tort, or otherwise) to you, or to any member of any syndicate or group for which you act as agent (or in a similar capacity) or to any other person to whom the existence of the Report is disclosed (to the extent permitted pursuant to the provisions of paragraph 6 below), with respect to, or resulting from, the Report (or anything contained therein or omitted therefrom), the furnishing of the Report to you[, or any discussions relating to the Report];\(^{16}\) and neither you nor they shall have any rights or claims (or basis for a claim), nor shall you or they assert any claims, against our Firm or Client by virtue of the Report (or anything contained therein or omitted therefrom), of the Report having been furnished to you[, or of any discussions relating to the Report].\(^{17}\) Further, neither our Firm nor Client has any obligation to you or any other person to update the Report or further investigate or update any matter that may or may not be included therein, including to consider any changes in law, facts, or other developments of which we may become aware, or to inform you (or any other person) if any of the statements or conclusions contained in the Report should subsequently be modified or determined to be incorrect. You have advised us you do not intend, by execution and delivery of this letter agreement, to limit (i) the effect of any representation or warranty regarding a specific matter or matters you may receive from Client (or another applicable contracting party) in connection with any definitive financing document that may be entered into, and delivered, by you and Client in respect of the Transaction (a “Definitive Transaction Document”), or (ii) any liability of Client under any operative provision of a Definitive Transaction Document, including, in each case, if the particular subject matter or matters overlap with particular subject matter or matters addressed by the Report, so long as such representation or warranty, or matter giving rise to the potential liability, does not apply to the accuracy and completeness of, any omissions from, or the receipt of (or participation in) the Report. No provision of this letter agreement shall limit the effect of any written legal opinion that we may expressly render to the Lender in connection with the Transaction.\(^{18}\)

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16. Counsel may not want to imply that it is willing to enter into discussions regarding the Report.
17. See supra note 16.
18. References to the “Client” in this paragraph 2 are intended to help protect the client from potential liability for misstatements or omissions in the Report under a representation in any agreement that provides the recipient of the Report broad assurance as to disclosures (so-called “10b-5 representations”) without excluding the Report. Some clients refuse to permit delivery of a Report to a lender unless the representation excludes the Report from its coverage or the lender expressly disclaims the client’s liability to it for the Report.
3. The scope of the Report is limited as described therein and as described in this letter agreement, and you acknowledge that you accept such limitations.

4. You acknowledge that our furnishing the Report (i) does not create any attorney-client relationship whatsoever between you and our Firm with respect to your consideration of the subject matter of the Transaction or otherwise, and (ii) is not to be viewed as providing you with legal or other advice or opinions with respect thereto. You understand and acknowledge that our Firm represents only Client in connection with the Transaction and does not represent you, and, as such, the role of our Firm in connection with the Transaction is to represent, advocate, and negotiate the interests and positions of Client, which interests and positions by their nature may be divergent from, or adverse to, yours. [Accordingly, in the event that any of our partners or employees have any discussions with you or provide any further information (whether written or oral) regarding the Report or our diligence review, (i) you understand and acknowledge that we are doing so as advocates of Client and its interests and not yours, and should be viewed as such, and (ii) you agree and acknowledge that, in each case, they are subject to the same terms and limitations as those specified in this letter agreement in relation to the Report; provided that we have no obligation whatsoever (and nothing in this letter agreement shall be deemed to require us) to have any such discussions or to provide further information.] 19

5. The Report was prepared for Client based on its instructions to us, and the scope of our investigation was determined in consultation with Client and was limited solely to matters that Client requested us to review. Consequently, the scope of the Report reflects the nature of Client’s participation, objectives, priorities, and interests in the Transaction; and you and any other party to the Transaction may have different objectives and priorities, different legal rights, different tolerances for risk, different expectations as to return, and different views as to materiality than Client. Therefore, you should not expect that the Report will cover all issues which may be relevant or important to you or, with respect to the issues actually covered, have a level of depth or accuracy appropriate for you. In addition, certain matters have not been reviewed by us, but by other advisors to, or employees of, Client, and, therefore, are not included within the scope of the Report, and there are certain matters we have discussed with Client that are not included in, or that are beyond the scope of, the Report.

6. You agree that you will treat the Report, and all information therein, as confidential, and you will not deliver, quote, or disclose the Report or any contents thereof or information therein, or disclose the existence of or your receipt of the Report, to any other person or party without the prior written consent of our Firm or as expressly permitted by this letter agreement. Lender may furnish the Report only to Lender’s affiliates (including directors, officers, managers, and

19. See supra note 16.
employees of the Lender or its affiliates) and to its advisors and counsel, in each case who need to know for the purposes of Lender’s consideration of participating in the Transaction. In furtherance (and without expansion) of such limitations, you agree that you will cause any and all persons that are provided access to the Report to adhere strictly to the terms of this letter as if it were addressed to and acknowledged by them, and you will inform them of the terms of this letter and that their access to the Report is strictly conditional on their acceptance of the non-reliance basis and other restrictions, agreements, and acknowledgments described in this letter, which acceptance will be evidenced by their asking to receive the Report. You may also disclose the existence (but not the contents) of the Report in connection with the initial syndication of the contemplated financing, subject to customary confidentiality provisions, provided that you may disclose the substance of the Report or any information therein only to a member of the syndicate who, prior to such disclosure, has executed and delivered, in connection with the Transaction, a non-reliance letter or agreement with us substantially identical to this letter agreement. The obligations of confidentiality set forth in this paragraph shall not apply to any such information (or portion thereof) that (i) is, or becomes, publicly available through no act, omission, or fault of you or any person or party to whom you have provided the Report, (ii) was already in your, your affiliates’ or your advisors’ possession prior to the date hereof (and not obtained from, or on behalf or request of, our Firm or Client), or (iii) has been legally obtained by you from sources other than our Firm or Client (or sources acting on our Firm’s or Client’s behalf or request), and in each case, not in violation of any known confidentiality agreements (provided that the exceptions in this sentence apply to the information covered in the Report only and do not apply to the delivery, quotation, or disclosure of the Report itself or any portion thereof, and disclosure or discussion of any such information shall be made without attribution or reference to the Report or our Firm). It is understood that the confidentiality provisions hereof shall not be construed to prevent you from disclosing factual information, independently verified, regarding the Client or the Transaction that may be included in the Report in connection with the arrangement and syndication to lenders or purchasers of debt and securities financing, in each case subject to customary confidentiality provisions, so long as such disclosure does not refer to our Firm, or the Report, or any other materials prepared by[, or discussions with,]20 our Firm in each case as a source of such information.

7. Notwithstanding the first sentence of paragraph 6 (but without otherwise limiting obligations therein), in the event that you are required in a judicial, administrative, or governmental proceeding to which you are subject, or requested by a regulatory authority or agency with legal jurisdiction over you, to disclose the Report (or any portion thereof), you will promptly notify our Firm (to the extent legally permissible) in advance of such disclosure so that our Firm may

20. See supra note 16.
seek a protective order or other appropriate remedy and/or waive compliance with this letter. You will cooperate with and assist our Firm in obtaining such protective order or other remedy, provided that reasonable expenses incurred by you in connection with such cooperation will be reimbursed by our Firm. If such protective order or other remedy is not obtained and disclosure of the Report (or portion thereof) is required by judicial or administrative order, or requested by applicable regulatory authority or agency, you will furnish only that portion of the Report which is legally required to be disclosed (or in the case of the request by a regulatory authority or agency, the portion of the Report so requested), based upon advice from your legal counsel, and you will attempt to obtain reliable assurance that confidential treatment will be accorded to the information furnished. 21

8. This letter agreement is governed by and interpreted in accordance with the laws of [ ], without regard to its principles of conflicts of law. All actions and proceedings directly or indirectly arising out of, under, or relating to this letter agreement or the Report shall be heard and determined exclusively in [ ] or, if that court does not have subject matter jurisdiction, in any state court located in [ ], and you and we hereby consent to the jurisdiction of such courts. To the extent legally permissible, you and we hereby waive any right to trial by jury in any action or proceeding directly or indirectly arising out of, under, or relating to this letter agreement or the Report. 22

Very truly yours,

[                        ]

ACKNOWLEDGED AND AGREED
AS OF THE DATE FIRST ABOVE WRITTEN:

[NAME OF LENDER/REQUESTING PARTY]

By:__________________________

Name:

Title:

21. If the lender is a bank with regulatory obligations that would be inconsistent with this undertaking, language similar to the following is sometimes included:

In the event that you are required by the regulatory authority or agency with primary legal jurisdiction over you to disclose the Report or any portion thereof, you will promptly notify our Firm (to the extent legally permissible) about such disclosure, to the extent practicable under the circumstance in advance of or concurrently with such disclosure. You will provide such regulatory authority or agency with a copy of this letter agreement as part of any such requested disclosure and request that such regulatory authority or agency maintain the confidentiality of the Report.

22. The waiver of jury trial may require particular language or prominence under applicable state law. In cases where the law of the relevant state may regard a prior waiver of jury trial unenforceable, this sentence may be omitted.