An Update of the 2004 Special Report of the Task Force on Securities Law Opinions, ABA Business Law Section*

This updated report reflects developments in opinion practice since the 2004 Special Report, including the publication on October 14, 2011 of Staff Legal Bulletin No. 19 by the SEC Division of Corporation Finance.1

I. INTRODUCTION

Section 7(a) of the Securities Act of 1933 (the “Securities Act”) requires a registration statement to contain the information specified in schedule A to the Act.2 Paragraph 29 of schedule A requires the filing of “a copy of the opinion or opinions of counsel in respect to the legality of the issue.”3 The Securities and Exchange Commission (the “SEC”) has addressed that requirement in item 601 of Regulation S-K.4 Under paragraph (b)(5) of item 601, a registration statement must include as an exhibit “[a]n opinion of counsel as to the legality of the securities being registered, indicating whether they will, when sold, be legally issued, fully paid and non-assessable, and, if debt securities, whether they will be binding obligations of the registrant.”5 Counsel to the issuer—either inside counsel or outside counsel—gives the opinion. The opinion on legality appears as exhibit 5 to a registration statement and is thus often referred to as an “Exhibit 5 opinion.” This 2013 Update examines Exhibit 5 opinions.

---

* The Task Force included members of the Legal Opinions Committee and the Subcommittee on Securities Law Opinions of the Committee on Federal Regulation of Securities of the American Bar Association Business Law Section. This Updated Report is being issued by the Subcommittee on Securities Law Opinions. Keith F. Higgins served as reporter for the 2004 Report and Andrew J. Pitts served as reporter for this 2013 Update.


3. Id. § 77aa(29).


5. Id. § 229.601(b)(5).
II. PRELIMINARY MATTERS

A. ADDRESSEES, LIMITATIONS ON RELIANCE, AND TIMING OF FILING

The Securities Act and the SEC rules under it are silent with regard to whom an Exhibit 5 opinion should be addressed. In practice, the opinion typically is addressed to the issuer.

The SEC staff (the “Staff”) does not permit the inclusion in an Exhibit 5 opinion of any limitations on who may rely on the opinion and has stated that purchasers of securities in any offering to which an Exhibit 5 opinion relates are entitled to rely on that opinion without limitation. The Staff views any limitations on reliance (e.g., stating that the opinion is “only” or “solely” for the issuer or its board of directors) as being inconsistent with the purpose of paragraph 29 of schedule A to the Securities Act.

An Exhibit 5 opinion need not be included as an exhibit to a registration statement as initially filed but must be filed as an exhibit in order for the registration statement to be declared or become effective. Thus, the opinion often is filed with an amendment to the registration statement. As discussed further below, when counsel needs to include otherwise impermissible assumptions or qualifications to give an initial opinion before a registration statement becomes effective (e.g., in the case of a shelf registration statement), the Staff requires that an updated, unqualified opinion be filed not later than the closing date of each offering of securities pursuant to the registration statement.

B. ASSUMPTIONS

The fact that the opinion must be filed before the securities are actually sold—and in the case of shelf registrations, often long before—gives rise to issues about the appropriateness of assumptions that are included in the opinion. Certain situations (e.g., the filing of shelf registration statements and the registration of rights under shareholder rights plans) require counsel to include broad and otherwise unacceptable assumptions that the Staff has deemed permissible in these limited circumstances. These are discussed in further detail below. In general, however, the Staff likely will object to any assumptions that it considers "overly broad, that 'assume away' the relevant issue or that assume any of the

6. This is in contrast to third-party closing opinions, which often expressly limit reliance.
7. SLB 19, supra note 1, § II.B.3.d.
8. If there is a long delay between the initial filing of the registration statement and the effective date, the Staff previously required that an updated opinion be filed before declaring the registration statement effective. Recently, Staff members have indicated that the Staff no longer requires the filing of an updated opinion solely because of the passage of time. This position is based on the recognition that under section 11 of the Securities Act the opinion must be correct at the time the registration statement becomes effective regardless of the time it is filed or before the registration statement becomes effective, counsel would have to file an updated opinion even if an update is not requested by the Staff.
9. See infra Part IV.A.3. The Staff formerly asked counsel to remove language from the opinion stating that counsel had no duty to update the opinion, but Staff members recently indicated that the Staff had changed this practice and will no longer ask for that language to be removed.
material facts underlying the opinion or any readily ascertainable facts.”

Nevertheless, the Staff does not question the inclusion of certain standard opinion assumptions (e.g., the genuineness of signatures and the legal capacity of the signatories of documents reviewed by counsel), many of which “are understood as a matter of customary practice to apply, whether or not stated.” Although counsel need not expressly enumerate each of these customary assumptions for them to apply, some may choose to do so. In general, assumptions should be limited to matters that cannot be known until after the registration statement is effective, such as the terms of a particular series of debt securities or approval by directors of the price of shares being sold in a common stock offering.

C. CONSENTS AND EXPERTISE

Rule 436 under the Securities Act requires that a written consent of counsel be filed as an exhibit to a registration statement, “[i]f any portion of the . . . opinion of . . . counsel is quoted or summarized as such in the registration statement or in a prospectus.” This requirement has led to speculation as to whether, by virtue of the reference in the prospectus to its having passed on the legality of the securities, counsel giving an Exhibit 5 opinion is an expert for purposes of section 7 of the Securities Act. The statute itself refers to:

any accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, [who] is named as having prepared or certified any part of the registration statement, or is named as having prepared or certified a report or valuation for use in connection with the registration statement.

The statute does not specifically refer to lawyers, an omission that may explain why Rule 436 refers to the consent of “an expert or counsel.” In any event, Rule 436 requires that a consent of counsel “be filed as an exhibit to the registration statement.”

That consent must be to the filing of the opinion as an exhibit to the registration statement and to both the discussion of the Exhibit 5 opinion and the reference to the counsel that gave it in the related prospectus. As a drafting matter, most lawyers include the consent in the opinion letter itself. Some also add a statement to the effect that the filing of the consent shall not be

10. SLB 19, supra note 1, § II.B.3.a. The Staff has specifically noted that counsel may not assume conclusions of law relevant to the opinion, e.g., that the issuer is “legally incorporated; has sufficient authorized shares; is not in bankruptcy; or has taken all corporate actions necessary to authorize the issuance of the securities.” Id.

11. Id. § II.B.3.a n.32 (citing, e.g., TriBar Opinion Comm., Third-Party “Closing” Opinions: A Report of the TriBar Opinion Committee, 53 BUS. LAW. 592, 615 (1998) (§ 2.3(a)) [hereinafter TriBar 1998 Report]). Many bar association reports describe opinion practice in particular states. By following the approach taken for third-party closing opinions, opinion givers should be able to rely on the substantial body of literature describing customary practice regarding those opinions.

12. See infra Part IV.B.


16. Id.

17. SLB 19, supra note 1, § IV.
deemed an admission that counsel is an expert within the meaning of section 7 of the Securities Act. The Staff does not object to this “no admission” language. The Staff does object, however, to language affirmatively denying that counsel is an expert within the meaning of the Securities Act.18 Whether or not counsel includes the “no admission” language should have no bearing on whether counsel is or is not an expert under section 7.

Exhibit 5 opinion practice, including compliance with Rule 436, has varied when the law of multiple jurisdictions is implicated. A typical example would be the issuance of debt securities by an entity formed in a jurisdiction other than New York pursuant to an indenture governed by New York law. Unless expressly qualified, an opinion that debt securities issued under an indenture are valid and binding (a matter of contract law under the law of the jurisdiction whose law governs the indenture) is customarily understood to encompass an opinion that the indenture has been duly authorized, executed, and delivered (a matter of corporate or other entity law of the jurisdiction where the issuer was formed). If the opinion giver is able to cover both the law of the issuer’s jurisdiction of formation and the law that governs the indenture, it can cover all requisite elements of the opinion in a single Exhibit 5 opinion. If not, the opinions of two counsel will be required to cover all relevant opinion matters. There are two approaches typically used when two opinions are required. These two approaches often are referred to as the reliance approach and the separate opinion approach.

Rule 436(f) under the Securities Act specifies that, if an opinion filed as an exhibit expressly relies on an opinion of another counsel, the consent of that other counsel need not be provided and that other counsel need not be named in the registration statement.19 Under this approach, the opinion of primary counsel covers all required matters (e.g., due authorization, execution, and delivery of the indenture as well as enforceability of the debt securities issued pursuant to the indenture), expressly relying on the opinion of other counsel for matters governed by the law of the jurisdiction where the issuer was formed. Despite the relief from filing a consent, the Staff has taken the position that a signed copy of the opinion on which primary counsel expressly relied must nevertheless be included as an exhibit to the registration statement.20

The Staff also has accepted a separate opinion approach when the law of multiple jurisdictions is involved. Under this approach, which is more consistent with typical third-party closing opinion practice, the opinion of one counsel covers all matters governed by the law of the jurisdiction where the issuer was

20. SLB 19, supra note 1, § II.B.1.e. The Staff further notes that in such a situation, while primary counsel’s opinion cannot then “assume” the matters for which it is relying on the other counsel’s opinion, it may nevertheless “note that [primary counsel’s] opinion as to these matters is subject to the same qualifications, assumptions and limitations as are set forth” in the other counsel’s opinion. Id. § II.B.1.e. n.21.
formed (e.g., due authorization, execution, and delivery) and, assuming those matters, the opinion of another counsel covers enforceability. Under this approach, both opinions must be filed as exhibits to the registration statement and both counsel must file consents pursuant to Rule 436.21

III. PARTICULAR CLASSES OF SECURITIES

A. EQUITY SECURITIES

1. Substantive Requirements

Item 601 of Regulation S-K requires that the opinion state that the securities, when sold, will be:

- legally issued,
- fully paid, and
- nonassessable.22

The phrase “legally issued,” although taken directly from the language of the Securities Act, is not the language lawyers customarily use when giving a third-party closing opinion on equity securities. Because the Staff does not insist on the “legally issued” language, many opinion givers use “validly issued” instead.23 Thus, in Exhibit 5 opinions, many lawyers use, and the Staff has accepted,24 a formulation of an Exhibit 5 opinion with respect to equity securities to the effect that the securities have been “duly authorized and, [when sold in accordance with the provisions of the applicable purchase agreement], will be validly issued, fully paid and nonassessable.”25 This is the language normally used in third-party closing opinions, and its meaning (as well as the meaning of “fully paid and nonassessable”) is the subject of numerous bar association reports.26

21. Id. § II.B.1.e.
22. 17 C.F.R. § 229.601(b)(5) (2013). The Staff outlines its understanding of the meanings of each of “legally (or validly) issued,” “fully paid,” and “non-assessable” in detail in SLB 19, supra note 1, § II.B.1.a.
23. In the case of a corporation, shares must be duly authorized to be validly issued, and the opinion as to due authorization is subsumed in the “validly issued” opinion. The Staff also has provided guidance on the meaning of these concepts and the form of the Exhibit 5 opinion when the issuer is not a corporation but rather a limited liability company, limited partnership, or statutory trust. See SLB 19, supra note 1, § II.B.1.b. With respect to limited liability companies, the Staff has indicated that it will accept the form of opinion set forth in TriBar Opinion Comm., Supplemental TriBar LLC Opinion Report: Opinions on LLC Membership Interests, 66 Bus. Law. 1065, 1072 n.43 (2011).
24. SLB 19, supra note 1, § II.B.1.a.
26. See, e.g., TriBar 1998 Report, supra note 11, at 648–52 (discussing third-party closing opinions). The Staff has noted that “[i]f counsel does not opine that the securities will be legally issued, the Division [of Corporation Finance] will not accelerate the effectiveness of the registration statement. On the other hand, if counsel opines that the securities are not fully paid or are assessable, the effectiveness of the registration statement may be accelerated so long as the disclosures about partial payment or assessability are adequate.” SLB 19, supra note 1, § II.B.1.a.
Because the Exhibit 5 opinion is delivered before the securities are sold, opinion givers often cast the opinion in the future tense, stating that the securities will be validly issued, fully paid, and nonassessable upon their sale in accordance with the applicable purchase agreement or governing document. Opinion givers also sometimes condition the opinion on further action by the board or a board committee. Opinion givers should be careful about the breadth of any such assumptions. Although an opinion giver may appropriately assume that a pricing committee—if permitted by the law of the jurisdiction where the issuer was formed and its constituent documents—will take the action necessary to set the sale price within a range established by the board, the Staff likely will object to an assumption that all action required to be taken prior to the issuance and sale of the securities has been taken. In general, as discussed above, assumptions should be limited to matters that as a practical matter cannot be known until after effectiveness of the registration statement.

2. Opinions on Delaware Corporations by Counsel Not Admitted to Practice in Delaware

The Staff has indicated that it will accept an opinion in respect of the law of a jurisdiction in which the opinion giver is not admitted to practice so long as the opinion giver does not attempt to qualify the opinion by “carving out” the very laws of the jurisdiction in question. Counsel not admitted to practice in Delaware, for example, often give Exhibit 5 opinions on stock issued by Delaware corporations. Usually, such counsel includes in its opinion a so-called coverage limitation specifying that the opinion’s coverage of Delaware law is limited to the Delaware General Corporation Law.

In the late 1990s, a question arose over the scope of the law covered by opinions on stock issued by Delaware corporations where coverage of the opinion was limited to the Delaware General Corporation Law. In the registration statement review process, the Staff frequently commented that this limitation unacceptably limited the scope of the opinion because, on its face, it focused only on the Delaware corporation statute and not on the Delaware Constitution and judicial interpretations. That controversy was resolved when the Staff accepted the view that the reference to the “Delaware General Corporation Law” was an opinion drafting convention, and that the practicing bar understood that phrase to cover the Delaware General Corporation Law, the applicable pro-

---

27. For example, this practice is usually followed when, in reliance on Rule 430A, the registration statement is declared effective before pricing occurs. See generally 17 C.F.R. § 230.430A(a) (2013) (indicating that a registration statement that omits the public offering price may be declared effective); see also SLB 19, supra note 1, § II.B.3.a.

28. Unless, as discussed below, the opinion is being given in the context of a shelf registration of securities for future sale and a subsequent unqualified opinion will be filed in connection with each specific offering. See supra Part II.B; see also infra Part IV.A.

29. SLB 19, supra note 1, § II.B.3.b. In general, the Staff does not require that counsel be admitted to practice in the jurisdiction whose law is covered by the opinion, but it will object if an opinion states that counsel is not qualified to opine on the law of the covered jurisdiction.

30. Id.
visions of the Delaware Constitution, and reported judicial decisions interpreting these laws. The Staff’s position was further clarified in Staff Legal Bulletin No. 19, in which the Staff confirmed that it shares the view that the phrase Delaware General Corporation Law includes reported judicial decisions interpreting that law. The Staff now routinely accepts a coverage limitation that states that the opinion is limited to the Delaware General Corporation Law. However, the Staff has reiterated that it “does not accept an opinion that explicitly excludes consideration of . . . reported judicial decisions. This position applies to the corporation and other entity statutes of all jurisdictions.”

B. DEBT SECURITIES

1. Binding Obligations

For debt securities, item 601 of Regulation S-K requires the filing of an opinion that the securities will be “binding obligations of the registrant.” This opinion, often referred to in the context of general opinion practice as the “remedies” or “enforceability” opinion, is stated in various ways. Perhaps the most common formulation is that the debt securities constitute valid and binding obligations of the issuer, enforceable against the issuer in accordance with their terms “except as may be limited by bankruptcy, insolvency or other similar laws affecting the rights and remedies of creditors generally and general principles of equity.” Minor differences in wording do not change the meaning of the opinion.

Exhibit 5 opinions on debt securities typically refer to the debt instruments themselves rather than the indenture under which they are issued. An enforceability opinion on the debt securities covers those portions of the indenture that relate to the terms of the securities, including any terms in the indenture that further define terms in the securities, such as the terms for conversion.

31. Id. § II.B.3.c. In 2000, the Staff had revised its procedures to require counsel to confirm to the Staff in writing that reference to the “Delaware General Corporation Law” included not only the statutory provisions, but also all applicable provisions of the Delaware Constitution and reported judicial decisions interpreting that law. With the publication of Staff Legal Bulletin No. 19, however, that requirement was eliminated. In addition, in 2004, the specific provision of the Delaware Constitution addressing the due issuance of stock of Delaware corporations was repealed.

32. Similarly, opinions on Delaware limited liability companies and limited partnerships that are limited to the Delaware Limited Liability Company Act or the Delaware Revised Uniform Limited Partnership Act are now routinely accepted by the Staff.

33. SLB 19, supra note 1, § II.B.3.c.

34. 17 C.F.R. § 229.601(b)(5) (2013). When debt securities are guaranteed, counsel must also give an opinion that each guarantee will be the binding obligation of the applicable guarantor. SLB 19, supra note 1, § II.B.1.e.

35. TriBar 1998 Report, supra note 11, at 622–23 (noting the bankruptcy exception and equitable principles limitation to an “enforceability” opinion). The bankruptcy exception and equitable principles limitation are standard exceptions that are understood to apply even when not stated expressly. Id. at 623. These exceptions do not require prospectus disclosure, and the Staff does not object to their being stated expressly. SLB 19, supra note 1, § II.B.1.e.


37. Furthermore, the Staff has noted that “counsel need not expressly state in the opinion that the agreement or instrument pursuant to which the debt security or guarantee is issued, such as
2. Governing Law

Unlike the law governing the validity of equity securities (which is the entity law of the jurisdiction where the issuer was formed), the law governing the enforceability of debt securities is generally the law chosen in the instrument under which the securities are issued. Often New York law is chosen to govern the obligations of the issuer in a registered debt offering. In the context of third-party closing opinions, when counsel for the issuer is not in a position to give an opinion on New York contract law, underwriters may be willing to accept an opinion on the enforceability of the debt as if the law of counsel’s home jurisdiction applied. However, that practice is not acceptable to the Staff in the context of an Exhibit 5 opinion. The Securities Act requires an opinion on the legality of the issue, and the Staff takes the position that anything short of an opinion on the law that actually governs the enforceability of the debt securities will not suffice.

3. Non-Standard Exceptions

Sometimes counsel includes exceptions, in addition to the standard bankruptcy exception and equitable principles limitation, to identify issues that affect the enforceability of particular provisions of the securities being registered. When including additional exceptions, counsel should consider whether they relate to issues requiring disclosure in the prospectus. In addition, counsel should be prepared for possible Staff comments. If the exceptions simply make explicit what is understood as a matter of customary practice to be implicit or otherwise are not material, additional exceptions should not require prospectus disclosure.

C. Options, Warrants, and Rights

Rights to acquire securities, either equity or debt, are contractual rights. In that respect they are more like debt securities than equity securities. In the case of warrants, for example, an opinion that a warrant is validly issued, fully paid, and nonassessable would be inapt because these concepts relate to stock—not contractual obligations.

an indenture, is enforceable in accordance with its terms, although the opinion may include such language.” SLB 19, supra note 1, § II.B.1.e.

38. TriBar 1998 Report, supra note 11, at 635 n.98.

39. SLB 19, supra note 1, at § II.B.1.e. n.19.

40. See id. The Staff permits counsel to exclude federal law (including the federal securities laws) and state securities laws from the coverage of the opinion. Id. § II.B.3.c. See also supra Part II.C. Because the opinion need only cover the legality of the issue under state law, such exclusions are not required whether or not the Exhibit 5 opinion contains a statement that the opinion is limited to applicable state corporation law (e.g., the Delaware General Corporation Law).

41. Counsel should keep in mind that “boilerplate” exceptions that do not relate to the securities being offered are likely to be questioned by the Staff.

42. This is the case even though an option, warrant, or right fits the definition of “equity security” in Rule 405 under the Securities Act. 17 C.F.R. § 230.405 (2013).
As with opinions relating to debt securities, an Exhibit 5 opinion on warrants, for example, should address their enforceability under the law chosen to govern the warrants. Typically, the offer and sale of the warrants and the securities underlying the warrants are registered at the same time. In that case, the Exhibit 5 opinion should state not only that the warrants are enforceable, but also that the underlying shares (in the case of warrants to purchase stock) have been duly authorized and, upon delivery in accordance with the terms of the warrants, will be validly issued, fully paid, and nonassessable.43

Shareholder rights plans (sometimes referred to as “poison pills”) take the form of the issuance of rights to purchase shares of an issuer’s capital stock. These rights are attached to the shares of the issuer’s common stock and are issued each time a share of common stock is issued.44 The underlying stock may be common stock or preferred stock. Although the discussion above with respect to opinions on the binding effect of rights to acquire securities applies to rights issued pursuant to rights plans, the potential use of rights plans as takeover deterrents, the associated fiduciary issues under state corporate law, and the unpredictable facts and circumstances that may have an effect on whether such rights are binding in any given situation created uncertainty as to whether counsel could give an unqualified Exhibit 5 opinion with respect to these rights.

Following discussions with representatives of the ABA Business Law Section, the Staff has provided guidance regarding the assumptions that it considers permissible in Exhibit 5 opinions on rights issued pursuant to shareholder rights plans. The Staff has stated that it will not object if an Exhibit 5 opinion stating that such rights are binding obligations includes language to the effect that:

[1] the opinion does not address the determination a court of competent jurisdiction may make regarding whether the board of directors would be required to redeem or terminate, or take other action with respect to, the rights at some future time based on the facts and circumstances existing at that time;

[2] board members are assumed to have acted in a manner consistent with their fiduciary duties as required under applicable law in adopting the rights agreement; and

[3] the opinion addresses the rights and the rights agreement in their entirety, and it is not settled whether the invalidity of any particular provision of a rights agreement or of rights issued thereunder would result in invalidating such rights in their entirety.45

43. SLB 19, supra note 1, § II.B.1.e. In the case of warrants to purchase debt securities, the opinion on the underlying securities would track the opinion required to be given in respect of debt securities.

44. The rights only become separable from the issuer’s common stock and exercisable under specified circumstances, typically involving the acquisition by a third party of beneficial ownership of a specified percentage of the issuer’s common stock. Delaware courts generally have tested the validity of rights under shareholder rights plans under the Delaware General Corporation Law rather than as a matter of traditional contract law. See, e.g., Leonard Loventhal Account v. Hilton Hotels Corp., No. Civ. A. 17803, 2000 WL 1528909 (Del. Ch. Oct. 10, 2000), aff’d sub nom. Account v. Hilton Hotels Corp., 780 A.2d 245 (Del. 2001); Moran v. Household Int’l, Inc., 500 A.2d 1346 (Del. 1985). In addition, the corporation statutes of many states contain a provision that expressly permits the issuance of rights under shareholder rights plans.

45. SLB 19, supra note 1, § II.B.1.g.
IV. PARTICULAR TYPES OF OFFERINGS

Opinion practice varies, depending not only on the type of securities being offered, but also on the type of offering. A signed Exhibit 5 opinion—not simply an unsigned form of opinion—must be on file in order for the registration statement to be declared or become effective.46

A. SHELF OFFERINGS

Shelf offerings under Rule 415 permit issuers to offer and sell securities long after a registration statement becomes effective.47 Moreover, in the case of universal shelf registrations, the class or classes and types of securities to be offered and sold may not be known on the effective date. Exhibit 5 opinion practice has evolved to accommodate shelf offerings.

1. Shelf Registrations for Common Stock

When an issuer registers common stock to be issued from time to time in the future, the opinion should state that the shares have been duly authorized. The remainder of the opinion, however, often requires assumptions that various actions will be taken before the shares are issued. In addition to the assumptions that apply whenever shares are being issued in the future, such as the issuer’s receipt of the required consideration, the opinion giver typically will need to assume expressly that the board of directors adopts resolutions approving the issuance and sale of the common stock at a specified price or pursuant to a specified pricing mechanism.

If the opinion is filed prior to effectiveness of the registration statement and the only substantive assumptions are that specified actions required to set the sale price of the shares will be taken and that the consideration for their issuance and sale will be received, no further opinion will be required when the shares are issued so long as the specified actions are permitted by the law of the jurisdiction where the issuer was formed and the issuer’s constituent documents.

Some issuers filing a shelf registration statement for common stock register a specific number of shares rather than an aggregate dollar amount. If the issuer decides to register an aggregate dollar amount of common stock, the opinion giver should expressly assume that no more than a specified number of shares, based on the then current market price, will be issued and sold under the registration statement and should confirm that the number of shares so specified is authorized and available under the issuer’s charter. If the issuer ultimately wishes to sell more shares than were covered by the original opinion or the opinion includes other substantive assumptions, a new unqualified opinion should be filed at the time of the sale as described below.

46. Id. § II.B.2.a.
2. Universal Shelf Registrations

Universal shelf registrations permit issuers to register an aggregate dollar amount of securities, designating by class the various types of securities (e.g., common stock, debt securities, convertible debt securities, preferred stock, and warrants) that may subsequently be issued, without allocating such aggregate dollar amount among the several types of securities. In addition, following the adoption of securities offering reform in 2005, a universal shelf registration statement filed by a well-known seasoned issuer (a “WKSI”) may omit altogether any specific amount of securities registered, thus registering an unspecified and indeterminate aggregate initial offering price or number of securities. An Exhibit 5 opinion for a universal shelf registration statement thus requires more assumptions than even a shelf registration for a particular class of security. The board of directors typically will not have approved the terms of the debt securities or preferred stock at the time of effectiveness of the shelf registration statement. In the case of common stock, the issuer may not have sufficient authorized shares to permit an opinion that, were the issuer to elect to sell the entire aggregate dollar amount of securities registered as common stock at current market prices (or, in the case of universal shelf filed by a WKSI, were the issuer to elect to sell any common stock whatsoever), the stock to be sold has been duly authorized. Assumptions and qualifications, therefore, are necessary, and the Staff has not objected to opinions that include appropriate assumptions.

3. Filing Updated Opinions

Shelf registration was not contemplated at the time Congress enacted the legality opinion requirement. Permitting assumptions in Exhibit 5 opinions is necessary for the shelf registration process to work. Consistent with a position it had previously taken in its telephone interpretations, in Staff Legal Bulletin No. 19 the Staff permits the filing, before a shelf registration statement is declared or becomes effective, of an Exhibit 5 opinion that includes assumptions regarding the future issuance of the securities being registered that “would not generally be acceptable in connection with a non-shelf offering.” In Staff Legal Bulletin No. 19, however, the Staff, again consistent with its previous position, conditioned inclusion of those assumptions on the filing of “an appropriately unquali-
fied opinion . . . no later than the closing date of the offering of the securities covered by the registration statement.”

Thus, in connection with a shelf registration statement, counsel for the issuer typically files more than one opinion: an opinion before the registration statement becomes effective and subsequent opinions for each takedown. The initial opinion is highly qualified and contains broad assumptions intended to address the different securities being registered for subsequent issuance. The subsequent opinions, which are filed no later than the closing date for the offering to which they relate, address the particular securities being issued and take the form of a traditional unqualified Exhibit 5 opinion.

In filing an updated opinion, an issuer can make an exhibit-only filing pursuant to Rule 462(d), which provides for the immediate effectiveness of post-effective amendments filed solely to include exhibits. Alternatively, for shelf offerings conducted by an issuer under Rule 415(a)(1)(x), which must be registered under Form S-3 or F-3, the opinion may be incorporated by reference into the registration statement through a Form 8-K or 6-K filing.

**B. ACQUISITIONS AND EXCHANGE OFFERS**

Acquisitions and exchange offers that involve the offer and sale of securities are registered on Form S-4. These registration statements require an Exhibit 5 opinion on the securities being issued in the acquisition. Often the issuance of the securities being registered requires the approval of shareholders, whether as a requirement of state corporation law or a securities exchange. Because an opinion must be on file before the registration statement is declared effective, as with shelf registrations, these opinions may be based on an express assumption that the required shareholder approval will be received. As with a qualified opinion filed prior to the effectiveness of an initial shelf registration statement, any such qualified opinion must be supplemented by an unqualified opinion filed by post effective amendment or on Form 8-K or Form 6-K, as outlined above, no later than the closing date of the exchange offer.

---

53. Id.
55. Id. § 230.415(a)(1)(x).
56. See SLB 19, supra note 1, § II.B.2.a.
57. An assumption will not be necessary, however, if shareholder approval is needed solely to satisfy listing requirements because the shares would still be validly issued even if shareholder approval is not obtained.
58. SLB 19, supra note 1, § II.B.2.d. The Staff’s position appears to be that the requirement to file an unqualified opinion by closing applies in any situation in which an initial and necessarily qualified opinion has been filed prior to the effectiveness of any type of registration statement (e.g., an acquisition shelf registration statement with respect to which an initially filed opinion necessarily assumed that the number of shares to be offered and sold will not exceed the number of shares authorized in the issuer’s certificate or articles of association, and that the board will adopt resolutions in appropriate form and content authorizing the issuance and sale of the shares). Id.