No Registration Opinions (2015 Update)

Report of the Subcommittee on Securities Law Opinions, Federal Regulation of Securities Committee, ABA Business Law Section

INTRODUCTION

The Securities Act of 1933 (the Securities Act) makes it unlawful for any person to use jurisdictional means to offer or sell any security unless a registration statement is in effect as to that security or an exemption from registration is available. One of the principal exemptions is section 4(a)(2), which relates to “transactions by an issuer not involving any public offering.” These few words are the foundation for securities offerings that take place every day, without any involvement of the Securities and Exchange Commission (the SEC), based on legal advice regarding the application of section 4(a)(2) and related SEC rules to particular transactions. In many of these offerings, lawyers, in addition to advising their clients on the availability of a section 4(a)(2) or other exemption, deliver opinions to the effect that registration of the securities under the Securities Act is not required.

This Subcommittee published a report on no registration opinions in 2007. This report updates the 2007 report in light of amendments adopted by the SEC in 2013 to Rule 144A and Rule 506 of Regulation D under the Securities Act. The amendments implement provisions of the Jumpstart Our Business Startups Act (or “JOBS Act”) that directed the SEC to amend those rules to eliminate the prohibition on general solicitation and general advertising (collectively, general solicitation) for securities offerings conducted in reliance upon those rules. In the case of Rule 506, new Rule 506(c) permits general solicitation if all purchasers in the offering are “accredited investors” as defined in Regulation D and the issuer has taken reasonable steps to verify that the purchasers are accredited investors. The amendments also implement a provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act that directed the SEC to make the Rule 506 exemption unavailable for offerings in which certain disqualified persons

---

(“bad actors”) participate, subject to a “reasonable care” exception. This report considers implications of these amendments for no registration opinions.\(^2\)

Two illustrative opinion letters are attached to this report. Each addresses a typical transaction in which a no registration opinion is given. In the first, investors are purchasing shares of common or preferred stock directly from the issuer in reliance on section 4(a)(2) or Rule 506 and intend to hold the shares for some period of time. In the second, investment bankers, referred to as the Initial Purchasers, are purchasing debt securities from the issuer and promptly reselling them to “qualified institutional buyers” under Rule 144A and/or to offshore purchasers in reliance on Regulation S. In each transaction, the securities may be convertible into common stock. Each opinion letter is addressed to the purchasers of the securities from the issuer.

The two opinion letters contain the types of opinions that are typically given and the kinds of express assumptions and qualifications that are commonly included. Each opinion letter may need to be tailored to fit a particular transaction and the specific exemption relied on.

**RELIANCE ON REPRESENTATIONS, COVENANTS, AND ASSUMPTIONS**

In giving no registration opinions, lawyers, when satisfied that they may reasonably do so, rely on various representations, covenants, and assumptions addressing the requirements of the applicable exemption, as described below. The steps opinion preparers take to satisfy themselves that such reliance is reasonable will depend on the particular requirements of that exemption and circumstances of the offering, including (where applicable) their experience with the practices and procedures of the issuer and any placement agent or initial purchasers involved in the offering.\(^3\)

Each of the two illustrative opinion letters contemplates that the Purchase Agreement contains representations by the issuer relating to the offering of the securities. These representations typically confirm, among other things, the absence of prior offerings of similar securities that could be integrated with the offering covered by the opinion and, in the case of sales outside the United States in reliance on Regulation S, the absence of “directed selling efforts.” The first opinion letter also contemplates that the Purchase Agreement contains representations by the issuer confirming either the absence of general solicitation or compliance with the requirement to take reasonable steps to verify accredited investor status and, in the case of Rule 506 offerings, compliance with the bad actor disqualification provisions. Each opinion letter states expressly that the

---

2. At the time it adopted these amendments, the SEC proposed additional amendments to Regulation D, Form D, and Rule 156 under the Securities Act, including a provision under which failure by an issuer (or its predecessor or affiliates) to timely file a Form D would preclude the issuer from relying on Rule 506 until one year after the delinquent filings were ultimately made. This report does not address the possible implications of those proposed additional amendments.

opinions being given are based, as to factual matters, on representations of the issuer and certificates of its officers. Each opinion letter also contemplates that the Purchase Agreement includes covenants by the issuer to limit future offers of the same or similar securities and, in the case of Rule 144A offerings, to provide information to holders of the securities.

The first opinion letter contemplates that the purchasers are agreeing not to resell the securities except pursuant to an effective registration statement under the Securities Act or an exemption, such as the exemption provided by Rule 144 or Rule 144A. The second opinion letter contemplates that the Purchase Agreement requires the Initial Purchasers to sell the securities only to qualified institutional buyers or offshore purchasers who agree not to resell the securities except pursuant to an effective registration statement under the Securities Act or an exemption such as that provided by Rule 144A, or in a transaction outside the United States in reliance on Regulation S.

Lawyers preparing the first opinion letter must be satisfied as to the eligibility of the purchasers to acquire the securities pursuant to the exemption from registration being relied on. For example, an offering made in reliance on Rule 506 may be structured to require all of the purchasers to be accredited investors, either because the issuer wishes to use Rule 506(b) without becoming subject to the information requirements, or to use Rule 506(c), under which all purchasers must be accredited investors. In satisfying themselves as to the eligibility of purchasers, the opinion preparers typically rely, as to factual matters, on representations as to the purchasers' status in the Purchase Agreement, a placement agent's certificate, investor questionnaires, or other procedures—including, where applicable, the verification procedures referred to below. Opinion preparers may also expressly state in each opinion letter (as the illustrative opinion letters do) that they have assumed the accuracy of the representations and compliance with the covenants in the documents on which they are relying.

When a Rule 506 offering is not intended to permit general solicitation, opinion preparers ordinarily rely, as to factual matters, on a representation from the issuer and, if one is involved, the placement agent regarding the absence of general solicitation. Opinion preparers may also expressly state in the opinion letter that they have assumed the absence of general solicitation.

When a Rule 506 offering involves general solicitation, in addition to requiring that all purchasers be accredited investors, Rule 506(c) requires that the issuer take reasonable steps to verify the purchasers' accredited investor status. The SEC has stated that whether the steps taken in any particular offering are reasonable will be an objective determination by the issuer (or those acting on its behalf), considering the particular facts and circumstances of each purchaser and transaction, including the nature of the purchaser, the amount and type of information that the issuer has about the purchaser, and the nature and terms of the offering. Rule 506(c) provides issuers four non-exclusive safe harbors for verifying a natural person's accredited investor status, one of which is to rely on a written confirmation from a registered broker-dealer or investment adviser, licensed attorney, or certified public accountant as to the status of an individual.
investor. In giving an opinion on a Rule 506(c) offering, the opinion preparers must be satisfied that the issuer has met the verification requirement and once again may rely for that purpose, as to factual matters, on representations in the Purchase Agreement, a placement agent’s or third-party verifier’s confirmation, or other procedures. The opinion preparers are not required to review or investigate the actual investor verifications, only to understand the basis upon which the issuer has determined that the requirement has been met and to satisfy themselves as to the reasonableness of that basis.

The bad actor disqualification provisions apply to all Rule 506 offerings, whether or not involving general solicitation. In satisfying themselves as to compliance with those provisions, opinion preparers may rely, as to factual matters, on a representation from the issuer and, if one is involved, the placement agent as to the absence of persons or relationships that would give rise to such a disqualification, or on other procedures.

When an opinion is based on representations and covenants of relevant parties, the text of the opinion letter may but need not refer to those representations and covenants. Notwithstanding that they will have satisfied themselves regarding the requirements for the exemption—for example the issuer’s compliance with the “reasonable steps to verify” requirement of Rule 506(c) (when applicable) and compliance with the bad actor disqualification provisions—many lawyers include an express assumption regarding those matters in their opinion letters. Some opinion preparers also expressly assume that the purchasers will comply with their covenants not to resell unless the securities are registered or an exemption is available, but many consider this unnecessary.

The amendment to Rule 144A eliminating the prohibition on general solicitation may affect offering practices and procedures, but it should have no effect on how an opinion giver addresses the eligibility of purchasers in the offering, since the only requirement in that regard—that all purchasers be qualified institutional buyers—has not changed.

COVERING SHARES ISSUABLE ON CONVERSION OR EXERCISE

When the securities being sold are convertible into common stock or accompanied by warrants to purchase common stock, no registration opinions are sometimes given covering the issuance of the underlying common stock on conversion or exercise. In light of the added complexity in giving this opinion, many lawyers prefer not to include it and will do so only if requested. When the issuance of common stock on conversion is covered, some lawyers refer in the opinion letter to the conditions of the Securities Act section 3(a)(9) exemption from registration, for example by expressly assuming that no commission or other re-

4. The verifier must confirm that it has taken reasonable steps to verify that the purchaser is an accredited investor. This report does not address what steps a verifier, including a licensed attorney, should take when providing the third-party verification contemplated by Rule 506(c).
5. The opinion preparers may address compliance with these provisions by satisfying themselves that the issuer exercised “reasonable care” as provided in Rule 506(d)(2)(iv).
muneration will be paid or given directly or indirectly for soliciting conversion. Others, regarding these conditions to be so well understood that they need not be stated or for other reasons, do not refer to these conditions.

Because the section 3(a)(9) exemption does not extend to the issuance of common stock on exercise of warrants (except for “net” exercise as discussed below), no registration opinions covering the issuance of common stock on exercise of warrants, when given, are often based on an express assumption that the warrants are exercised by the initial purchasers on the date of the opinion letter, or otherwise drafted to apply only to such an exercise. The opinion also may be given based on net exercise (i.e., part of the common stock issuable on exercise is used to pay the exercise price) that takes place once the Rule 144 holding period has run, where net exercise is required by the terms of the warrants, or it is permitted and the opinion is limited to cases in which it is employed.

Excluding Coverage of Resales

Some lawyers include in the opinion letter a sentence emphasizing that the opinion does not cover resales by the investors in the offering or of common stock issued on conversion. For example, in the first opinion letter: “We express no opinion as to when or under what circumstances any [securities] purchased by you may be reoffered or resold, or any common stock of the Company issuable on conversion of the [securities] may be offered or sold.” Other lawyers consider such a sentence unnecessary where the restrictions on resale are adequately disclosed in the offering materials, since the opinion as written does not purport to address resales by purchasers of the securities in the offering or offers or sales of the underlying common stock.

Trust Indenture Act

In offerings of debt securities, including convertible debt securities, it is common practice to include, with the no registration opinion, an opinion that an indenture is not required to be qualified under the Trust Indenture Act of 1939 in connection with the offering. Because the Trust Indenture Act has an exemption covering any transaction exempted from registration by section 4 of the Securities Act, the no qualification opinion may be given whenever a no registration opinion is given in a section 4(a)(2) offering, including under Rule 506, or in a Rule 144A offering.

Information Provided by the Issuer

In offerings made in reliance on Rule 505 or Rule 506(b) of Regulation D or on Rule 144A, specific requirements relating to information to be furnished by the issuer to the purchasers may have to be met. Where these requirements

6. If such a sentence is included in the second opinion letter, the words “purchased by you” could be replaced with “sold by the Initial Purchasers.”
apply, many lawyers expressly assume that they have been satisfied. Neither the statute itself (i.e., section 4(a)(2)) nor Rule 506(c) contains any information requirement, but some lawyers nevertheless expressly assume the adequacy of the information disclosed to investors (whether by delivery or by access) in offerings made under those exemptions. The concern giving rise to this assumption may derive from the decision of the U.S. Court of Appeals for the Second Circuit in SEC v. Manor Nursing Centers, Inc., which imposed “a mandate of truthfulness” on exempt offerings. Although the implications of this holding have been criticized for making every antifraud lawsuit under the securities laws relating to exempt offerings also a potential claim for violation of section 5, and in the private placement context may have been substantially circumscribed by Gustafson v. Alloyd Co., the holding of Manor Nursing Centers has never been specifically overruled in the Second Circuit. Other lawyers believe that the assumption is implicit and therefore unnecessary.

**SHORT POSITIONS**

If the security being sold is common stock (or is convertible into or accompanied by warrants to purchase common stock) of a class that is publicly traded, and if the purchasers have created or may create short positions in the common stock, issues concerning violation of section 5 of the Securities Act could arise. For example, use of the stock purchased in the exempt offering to cover the short position could result in a violation of section 5. These issues, which are beyond the scope of this report, can be addressed by representations or covenants in the Purchase Agreement, a certificate, or in other ways. If a certificate is being relied on, the opinion letter may refer to it expressly.

**CONCLUSION**

The following illustrative opinion letters do not cover all situations in which no registration opinions are given, but they reflect the form and substance of opinion letters commonly delivered.

---

7. The assumption as to adequacy of the information may be included even in those circumstances where the opinion giver is also providing negative assurance on the information being disclosed. See the Subcommittee’s report, Negative Assurance in Securities Offerings (2008 Revision), 64 BUS. LAW. 395 (2009).
8. 458 F.2d 1082, 1098–1100 (2d Cir. 1972).
Ladies and Gentlemen:

We have acted as counsel to ____________________, a ____________ corporation (the “Company”), in connection with the sale by the Company to you of _______ shares (the “Shares”) of the Company’s [Common] [Series __ Convertible Preferred] Stock, [par value $_____ per share] [without par value], pursuant to the Purchase Agreement, dated _________________, between the Company and you (the “Purchase Agreement”). This opinion letter is delivered to you pursuant to Section __ of the Purchase Agreement. Capitalized terms defined in the Purchase Agreement and not otherwise defined herein are used herein as defined in the Purchase Agreement.

We have examined such documents and made such investigation of law as we have deemed appropriate for purposes of the opinions set forth below. In giving these opinions, we have relied without independent verification on certificates of public officials and, as to matters of fact material to our opinions, on the representations, warranties and covenants of the Company in the Purchase Agreement and on certificates of officers of the Company [and others].

Based on the foregoing and subject to the qualifications set forth below, we express the following opinions:

(__) [Opinions as to corporate status, validity of the Shares and any Common Stock into which the Shares are convertible, the Purchase Agreement and consents, authorizations and approvals are omitted.]

(__) Assuming the accuracy of your representations and warranties and compliance with your covenants in the Purchase Agreement, no registration of the Shares [or the Common Stock issuable upon conversion of the Shares] under the Securities Act of 1933 is required in connection with the offer, sale and delivery of the Shares by the Company to you in accordance with the Purchase Agreement.

1. If shares are being offered by a placement agent, reference should be made to a certificate or representation of the placement agent describing the manner in which it has offered the shares. Where the issuer has engaged a third party to confirm verification of investor status, a reference to that procedure may be added. See “Reliance on Representations, Covenants, and Assumptions” in the accompanying Report for express assumptions that may be stated in the opinion letter.
Agreement[, or the offer, sale and delivery of the Common Stock issuable on conversion of the Shares]. 2 [In connection with our opinion set forth in paragraph (__) above, we have also relied, among other things, on your certificate dated the date hereof as to _______.] 3

The opinions expressed herein are limited to the federal law of the United States [and][, the law of the State of __________] [and the Delaware General Corporation Law].

This opinion letter is being delivered to you in connection with the above described transaction and may not be relied on by you for any other purpose. This opinion letter may not be furnished to or relied on by any other person without our prior written consent.

Very truly yours,

---

2. See “Covering Shares Issuable on Conversion or Exercise” in the accompanying Report.
3. See “Short Positions” in the accompanying Report. Some lawyers also expressly refer to the ABA Legal Opinion Principles, which state that they apply to legal opinions whether or not expressly mentioned. See 53 Bus. Law. 831 (1998).
Form of opinion letter including no registration opinion for debt securities sold to intermediaries for resale in reliance on Rule 144A or Regulation S

[Letterhead of Opinion Giver]

[Date]

[To the Initial Purchasers]

________________________________
________________________________
________________________________

Ladies and Gentlemen:

We have acted as counsel to ________________, a __________ corporation (the “Company”), in connection with the offer and sale of $____________ aggregate principal amount of the Company’s __________ Notes (the “Notes”), issued pursuant to the Indenture, dated as of ________________, between the Company and ________________, as trustee (the “Trustee”), which are being purchased by you (the “Initial Purchasers”) pursuant to the Purchase Agreement, dated ________________, between the Company and the Initial Purchasers (the “Purchase Agreement”). 1 This opinion letter is delivered to you pursuant to Section __ of the Purchase Agreement. Capitalized terms defined in the Purchase Agreement and not otherwise defined herein are used herein as defined in the Purchase Agreement.

We have examined such documents and made such investigation of law as we have deemed appropriate for purposes of the opinions set forth below. In giving these opinions, we have relied without independent verification on certificates of public officials and, as to matters of fact material to our opinions, on the representations, warranties and covenants of the Company in the Purchase Agreement and on certificates of officers of the Company [and others]. 2

Based on the foregoing and subject to the qualifications set forth below, we express the following opinions:

(__) [Opinions as to corporate status, execution, delivery and enforceability of the Indenture, validity of the Notes (and any Common Stock issuable on conversion of the Notes), the Purchase Agreement and consents, authorizations and approvals are omitted.]

(__) Assuming the accuracy of the representations and warranties and compliance with the covenants of the Initial Purchasers in the Purchase Agreement, neither registration of the Notes [or the Common Stock issuable upon conversion of the Notes] under the Securities Act of 1933 nor qualification of the Indenture

1. If the Notes are convertible into or accompanied by warrants to purchase Common Stock, add appropriate references.
2. See “Reliance on Representations, Covenants, and Assumptions” in the accompanying Report for express assumptions that may be stated in the opinion letter.
under the Trust Indenture Act of 1939 is required in connection with the offer, sale and delivery of the Notes by the Company to the Initial Purchasers[,,] [or] the initial offer, sale and delivery of the Notes by the Initial Purchasers [or the offer, sale and delivery of Common Stock on conversion of the Notes],\(^3\) in each case in accordance with the arrangements relating to offers, sales and deliveries of the Notes [and Common Stock] contemplated by the Purchase Agreement, the [Offering Circular] [other document(s)] and the Indenture.

[In connection with our opinion set forth in paragraph (__) above, we have also relied, among other things, on certificates of [___________] dated the date hereof as to __________________.]\(^4\)

The opinions expressed herein are limited to the federal law of the United States [and][, the law of the State of _________] [and the Delaware General Corporation Law]. This opinion letter is being delivered to you in connection with the above described transaction and may not be relied on by you for any other purpose. This opinion letter may not be relied on by or furnished to any other person without our prior written consent.

Very truly yours,

---

3. See “Covering Shares Issuable on Conversion or Exercise” in the accompanying Report.
4. See “Short Positions” in the accompanying Report. Some lawyers also expressly refer to the ABA Legal Opinion Principles, which state that they apply to legal opinions whether or not expressly mentioned. See 53 BUS. LAW. 831 (1998).