

No Registration Opinions

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

INTRODUCTION

The Securities Act of 1933 (the “Securities Act”) makes it unlawful for any person to use jurisdictional means to 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(2) of the Securities Act, “transactions by an issuer not involving any public offering.” These few words are the foundation for substantial transactions conducted every day, without any involvement of the Securities and Exchange Commission (the “SEC”), based on legal advice regarding the application of Section 4(2) and related SEC rules to a particular transaction. In many of these transactions lawyers deliver opinions to the effect that registration of the securities under the Securities Act is not required. This report discusses these opinions.

Two illustrative opinion letters are attached to this report, addressing typical transactions 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(2) or Regulation D 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 reselling them to “qualified institutional buyers” under Rule 144A and/or to offshore purchasers under Regulation S. In each case, the securities may be convertible into Common Stock. Each opinion letter is addressed to the purchasers of the securities from the issuer.

The illustrative opinion letters contain the types of opinions that are typically given and the kinds of express assumptions and qualifications that are commonly included. Each form may need to be tailored to fit a particular transaction.

REPRESENTATIONS IN PURCHASE AGREEMENT

Each form is based on the assumption that the Purchase Agreement contains representations by the issuer relating to the offering of the securities, including

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the absence of “general solicitation” and “general advertising” and prior sales 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.” Each form also assumes that the Purchase Agreement includes agreements by the issuer to limit future offers of the same or similar securities and, in certain cases, to provide information to holders of the securities.

The first opinion letter assumes 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 Rule 144. The second opinion letter assumes 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 Rule 144A or Regulation S.

The opinion giver of 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 being made in reliance on Rule 506 of Regulation D may be structured so as to require all of the purchasers to be “accredited investors.” The opinion giver may rely on representations in the Purchase Agreement, a placement agent’s certificate, investor questionnaires or other procedures in confirming the eligibility of the purchasers.

Ordinarily, the text of the opinion letter itself will not refer to any of the above matters. Some lawyers expressly assume that the purchasers will comply with their agreements not to resell unless the securities are registered or an exemption is available, but many consider this unnecessary. Occasionally, lawyers expressly rely on a placement agent’s certificate where the placement agent has undertaken to determine whether the purchasers meet specified eligibility criteria.

COVERING SHARES ISSUABLE ON CONVERSION OR EXERCISE

In cases where 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 Section 3(a)(9) exemption from registration, for example by expressly assuming that no commission or other remuneration 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.

In some cases, a no registration opinion may be given covering issuance of Common Stock on conversion only to the initial purchasers of the convertible securities but not to subsequent holders, who may not meet eligibility criteria.

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 normally based on an express assumption or condition that on exercise the shares of Common Stock will be issued to the initial purchasers of the warrants who will continue to be eligible to purchase the Common Stock pursuant to the exemption from registration being relied on. 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) 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 REALES

Some lawyers include a sentence in the first form of opinion letter emphasizing that the opinion does not cover resales by the purchasers of the securities being purchased or of Common Stock issued on conversion. For example, “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 or offers or sales of the underlying Common Stock.

INFORMATION PROVIDED BY THE ISSUER

In offerings made in reliance on Rule 505 or 506 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 apply, many lawyers expressly assume that they have been satisfied. The statute itself (i.e., Section 4(2)) does not contain any information requirement, but even when no information requirement is applicable some lawyers nevertheless expressly assume the adequacy of the information disclosed to investors (whether by delivery or by access).¹ The concern giving rise to this assumption may derive from the decision of the Second Circuit Court of Appeals in *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1098–1100 (2d Cir. 1972), 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., Inc.*, 513 U.S.

1. The assumption as to adequacy of the information may be included even in 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*, 59 Bus. Law. 1513 (August 2004).

561 (1995) (holding that the Section 12(a)(2) antifraud provision does not apply to exempt offerings), 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 or may create short positions in the Common Stock, issues concerning violation of Section 5 of the Securities Act could arise. Such issues are beyond the scope of this report. 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 can be addressed by representations or agreements 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.

ABA PRINCIPLES

Some lawyers expressly refer to the ABA Legal Opinion Principles, which purport to apply to legal opinions whether or not expressly mentioned. See 53 *BUS. LAW.* 831 (May 1998).

CONCLUSION

These illustrative opinion letters do not attempt to cover all situations in which no registration opinions are given, but they illustrate the form and substance of opinion letters customarily delivered.

Form of no registration opinion for common or convertible preferred stock sold directly to purchasers in reliance on Section 4(2) or Regulation D

[Letterhead of Law Firm]

[Date]

[To the purchasers]

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 agreements of the Company in the Purchase Agreement and on certificates of officers of the Company [and others].¹

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, consents, authorizations and approvals and execution, delivery and enforceability of the Purchase Agreement omitted.]

Assuming the accuracy of your representations and warranties and compliance with your agreements in the Purchase Agreement, the offer, sale and delivery of the Shares by the Company to you in accordance with the Purchase Agreement [, and the offer, sale and delivery of the Common Stock issuable on conversion of the Shares,]² are not required to be registered under the Securities Act of 1933.

[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

1. If shares are being offered by a placement agent, reference should be made to a certificate or representations of the placement agent describing the manner in which it has offered the shares.

2. See "Covering Shares Issuable on Conversion or Exercise" in the accompanying Report.

3. See "Short Positions" in the accompanying Report.

The opinions expressed herein are limited to the federal law of the United States, 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,

**Form of no registration opinion for debt securities sold to intermediaries
for resale in reliance on Rule 144A or Regulation S**

[Letterhead of Law Firm]

[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 agreements 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, execution, delivery and enforceability of the Indenture, validity of the Notes (and any Common Stock issuable on conversion of the Notes), consents, authorizations and approvals and execution, delivery and enforceability of the Purchase Agreement omitted.]

Assuming the accuracy of the representations and warranties and compliance with the agreements of the Initial Purchasers in the Purchase Agreement, the offer, sale and delivery of the Notes by the Company to the Initial Purchasers[,] [and]² the initial offer, sale and delivery of the Notes by the Initial Purchasers [and the offer, sale and delivery of Common Stock on conversion of the Notes],² in each case in accordance with the arrangements relating to offers, sales and deliveries of

1. If the Notes are convertible into or accompanied by warrants to purchase Common Stock, add appropriate references.

2. See “Covering Shares Issuable on Conversion or Exercise” in the accompanying Report.

the Notes [and Common Stock]² contemplated by the Purchase Agreement, the [Offering Circular] [other document(s)] and the Indenture, are not required to be registered under the Securities Act of 1933, and the Indenture is not required to be qualified under the Trust Indenture Act of 1939.

[In connection with our opinion set forth in paragraph (___) above, we have also relied, among other things, on certificates of [the Initial Purchasers] dated the date hereof as to _____.]³

The opinions expressed herein are limited to the federal law of the United States, 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 "Short Positions" in the accompanying Report.