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## REAL ESTATE OPINION LETTER GUIDELINES

*By the American College of Real Estate Lawyers Attorneys' Opinion Committee and the American Bar Association Section of Real Property Probate and Trust Law Committee on Legal Opinions in Real Estate Transactions\**

The American College of Real Estate Lawyers and the Real Property, Probate and Trust Section of the American Bar Association have jointly adopted the following Guidelines for the preparation and negotiation of the third party legal opinions rendered in connection with real estate secured loan transactions. These Guidelines accept and adopt in their entirety the provisions of the Guidelines for Preparation of Closing Opinions<sup>1</sup> promulgated in 2001 by the Section on Business Law of the American Bar Association and the Legal Opinion Principles<sup>2</sup> previously adopted by the Business Law Section in 1998.<sup>3</sup> While the Business Law Section Guidelines and Principles both address many issues that are common to both real estate and business law opinion practice, by their own terms they do not address several important subjects of particular relevance and significance to real estate secured loan transactions, by far the most typical context for real estate opinion letters. These Guidelines are intended to fill that void with a single,

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<sup>1</sup> Section of Business Law of the American Bar Association, Committee on Legal Opinions, *Guidelines for the Preparation of Closing Opinions*, 57 *Bus. Law.* 875 (2002). The Business Law Section Guidelines were also published in a slightly different, earlier version in 57 *Bus. Law.* 345 (2001).

<sup>2</sup> Section of Business Law of the American Bar Association, Committee on Legal Opinions, *Legal Opinion Principles*, 53 *Bus. Law.* 831 (1998). A copy of the *Legal Opinion Principles* is included with these *Guidelines* as Appendix A.

<sup>3</sup> The 2001 Business Law Guidelines were intended to replace the "Guidelines" included in the Business Law Section's 1991 *Third-Party Legal Opinion Report, Including the Legal Opinion Accord* (47 *Bus. Law.* 167 (1991)) [hereinafter BLS Accord] and to "reflect developments in customary practice in the decade since 1991." In response to the Business Law Section's original "Accord" Report, the ACREL/ABA Joint Committee in 1993 promulgated and published a *Report on Adaptation of the Legal Opinion Accord of the Business Law Section of the American Bar Association for Real Estate Secured Transactions*, 29 *Real Prop. Prob. & Tr. J.* 569 (1994) and in 1999 adopted the *Inclusive Real Estate Secured Transaction Opinion In Which Are Incorporated the Principal Concepts of the ABA Section of Business Law Legal Opinion Accord and the ABA Section of Real Property Probate and Trust Law and The American College of Real Estate Lawyers' Report on Adaptation of the Legal Opinion Accord* ([www.aba.net.org/rppt/inclusive-art.html](http://www.aba.net.org/rppt/inclusive-art.html); [www.acrel.org](http://www.acrel.org)), both of which were intended to allow adaptation and use of the Accord in real estate opinion practice. Numerous state bar association opinion committees followed suit with their own Accord-based opinion reports, reflecting variations in local law and opinion practice.

integrated set of opinion Guidelines,<sup>4</sup> reflecting the current state of customary real estate opinion letter practice.<sup>5</sup> As with both the Business Law Guidelines and Principles, these Guidelines are intended to apply to both non-Accord and Accord-based opinions and to provide guidance<sup>6</sup> regarding closing opinions whether or not referred to in the opinion letter.

## **1. PURPOSE, SCOPE, AND RELIANCE**

### **1.1 Purpose.**

The agreement for a business transaction will often condition a party's obligation to close on its receipt of a closing opinion covering specified legal matters from counsel for another party. When received, the closing opinion serves as a part of the recipient's diligence, providing the recipient with the opinion giver's professional judgment on legal issues concerning the opinion giver's client, the transaction, or both, that the recipient has determined to be important in connection with the transaction.

#### **1.1.a Role of Opinion Giver.**

In rendering a third-party closing opinion in a real estate secured loan transaction, the opinion giver normally represents its client, the borrower, in providing limited advice and information to a non-client lender or its counsel. Occasionally, the borrower's counsel is asked to render an opinion as if the recipient were a client or to act as "counsel to the transaction." Such requests that local counsel in effect represent both parties to a loan transaction, through written legal opinions or otherwise, raise considerable ethical issues, including potential or actual conflicts of interest and competing duties of primary loyalty vis a vis the respective "clients." These conflicts may be waivable in some jurisdictions; however, in such cases the opinion giver should first obtain the client's consent after the client is adequately informed concerning important possible effects on the client's interest (see Restatement (Third) The Law Governing Lawyers §95) and should not be deemed implied from loan documents providing for a third party opinion (cf. *infra* § 2.4). Where concerns for minimizing transactional costs dictate use of only one local counsel, absent a prior existing relationship between the opinion giver and the borrower or a resulting conflict of interest with the lender, such counsel should be retained by and formally represent the lender.

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<sup>4</sup> The following Guidelines set forth the original Business Law Section Guidelines in ordinary print with supplementary provisions adopted by the ACREL/ABA Joint Committee in bold face. No inference should be drawn from this differentiation as to the importance of, or the commitment of the ACREL/ABA Committee to, various provisions of these Guidelines.

<sup>5</sup> For a discussion of the concept of "customary practice," see, e.g., *Restatement (Third) of the Law Governing Lawyers*, §§ 51(2), 95 [hereinafter "Restatement"]; TriBar Opinion Committee, *Third-party Closing Opinions*, 53 *Bus. Law.* 592 (1998) [hereinafter "1998 TriBar Report"].

<sup>6</sup> In appropriate circumstances opinion givers and opinion recipients (or their counsel) may together decide not to follow these Guidelines in particular respects.

### **1.1.b Adequacy of document opinions.**

Third party opinion recipients sometimes seek assurance that loan documents are legally adequate for the lender's intended purposes or contain "all customary provisions and remedies." Such opinions should not be requested or given. In rendering a third party legal opinion to a lender, the opinion giver does not give legal advice to a client, but rather provides an "evaluation" of discrete legal issues specifically included in the opinion request. An opinion request addressing matters that are beyond specific legal issues and that are of the nature of the "broader guidance and counsel" that a lawyer provides to one's own client (see BLS Accord § 7) is inappropriate in scope. Accordingly, a request for an assurance that the loan documents are legally adequate for the lender's intended purposes is inappropriate (see *supra* §4.0a).

Where a lender is not represented by, or has not had its loan documents reviewed by, its own local counsel, and the chosen in-state lawyer is unable to represent the lender directly, in order to save the cost of additional local counsel, borrower's counsel may be asked to give a more limited assurance to the effect that the loan documents do not omit essential remedies that in the opinion giver's experience are generally found in similar documents for comparable mortgage loan transactions in the opinion giver's jurisdiction. In itself, the giving of such a limited assurance does not raise ethical issues and, in fact, constitutes a report of information based upon the experience of the opinion giver, as opposed to a legal opinion; however, in the event such an assurance cannot be given, the opinion giver may not provide further response without obtaining the client's informed consent (see, *supra* §1.1a, and also Model Rule of Professional Conduct 2.3(b)).« In addition, the inference created by refusal to provide such an assurance when it cannot be given places the opinion giver in an ethical dilemma in the same manner as in the case of dual representation (see *supra*, 1.1a). It is for this reason that this opinion request itself is regarded as inappropriate by many experienced opinion givers.

### **1.2 Coverage.**

The opinions included in a closing opinion should be limited to reasonably specific and determinable matters that involve the exercise of professional judgment by the opinion giver. The benefit of an opinion to the recipient should warrant the time and expense required to prepare it.<sup>7</sup> In particular, opinions from borrower's counsel in intrastate transactions (or in a multistate transaction for which the lender has retained its own local counsel for the purposes of advising it) with respect to the enforceability of loan documents prepared by the lender normally should not be necessary and may not be cost justified.

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<sup>7</sup> When the benefit of an opinion to the recipient is not sufficient, depending on the circumstances, the scope of the particular opinion could be limited (*e.g.*, the opinion on an agreement could be limited to due authorization, execution and delivery) or the opinion could be omitted entirely (*see infra* § 4.2 (opinion on all of a company's outstanding equity securities may not be cost justified)).

### **1.2.a Applicable Law**

Opinions cover only the law of the jurisdiction in which the opinion giver is licensed to practice and occasionally other specified law (such as Delaware law with respect to organizational status or Federal law). Local counsel in interstate loan transactions who serve for the limited purpose of passing on the legality, validity and enforceability of specific security documents and transaction obligations, as opposed to providing an opinion with respect to a foreign contracting entity and the transaction itself, normally are expected to address matters of applicable state law only, and should not be expected or requested to evaluate or address matters of Federal law. Unless specified to the contrary, an opinion does not by implication address Federal law. (See BLS Accord § 1.)

### **1.3 Relevance.**

Opinion requests should be limited to matters that are reasonably related to the transaction. Closing opinions should not include assumptions, exceptions, and limitations that do not relate to the transaction and the opinions given.

### **1.4 Professional competence.**

Opinion givers should not be asked for opinions that are beyond the professional competence of lawyers. To the extent a matter such as financial statement analysis, economic forecasting, or valuation is relevant to an opinion, an opinion giver may properly rely on a factual certificate or assumption.

### **1.5 Misleading opinions.**

An opinion giver should not render an opinion that the opinion giver recognizes will mislead the recipient with regard to the matters addressed by the opinions given.<sup>8</sup>

#### **1.5.a Implied opinions.**

A legal opinion speaks only to the specific issues that it expressly addresses. Opinions as to other matters should not be inferred, but rather explicitly requested. Examples of opinions that in the real estate secured loan context should not be implied by a general enforceability opinion, and are not to be deemed to have been given unless expressly stated, include opinions regarding land use laws, environmental laws and other similar matters (see *infra* § 4.3.a).

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<sup>8</sup> For a general discussion of this subject (including the role of disclosure), see *1998 TriBar Report supra* note 3-5 at 602-03, 607. This *Guideline* does not preclude limiting the matters addressed by an opinion through the use of specific language if the limitation itself will not mislead the recipient. See *Legal Opinion Principles* §§ I.B, I.C. For an opinion giver's ethical obligations to its client, see *infra* § 2.4.

### **1.5.b "Conduit" opinions.**

"Conduit opinions" (that is, opinions that rely exclusively upon public agency certificates, title policies, UCC searches or other third party sources) are generally objectionable, as they contain no substantive assurance by the opinion giver and may be misconstrued by the opinion recipient as reflecting independent evaluation of the underlying source or other due diligence by the opinion giver. As with opinions regarding qualification to do business or good standing in foreign jurisdictions based on public agency certificates (see *infra* § 4.1), the delivery of the underlying public agency documents, title policies or other primary sources should suffice.

### **1.6 "Market" opinions.**

An assertion that a specific opinion is "market" – i.e., that lawyers are rendering it in other transactions – does not make it appropriate to request or render such an opinion if it is inconsistent with these Guidelines.

### **1.7 Reliance [by Recipient].**

An opinion giver is entitled to assume, without so stating, that in relying on a closing opinion the opinion recipient (alone or with its counsel) is familiar with customary practice concerning the preparation and interpretation of closing opinions. On occasion, a closing opinion expressly authorizes persons to whom it is not addressed (for example, assignees of notes) to rely on it. Those persons are permitted to rely on the closing opinion to the same extent as – but to no greater extent than – the addressee.

## **2. PROCESS**

### **2.1 Opinion request and response.**

Early in the negotiation of the transaction documents, counsel for the opinion recipient should specify the opinions the opinion recipient wishes to receive. The opinion giver should respond promptly with any concerns or proposed exceptions, providing, to the extent practicable, the form of its proposed opinions. Both sides should work in good faith to agree on a final form of opinion letter. Discussion of opinion issues while the transaction documents are being prepared can produce constructive adjustments in the documents and the transaction structure and help to avoid delays in closing the transaction. Should a problem be identified that might prevent delivery of an opinion in the form discussed, the opinion giver should promptly alert counsel for the opinion recipient.

### **2.2 Other counsel's opinion.**

When the opinion giver lacks the legal expertise to render a requested opinion, consideration should be given to whether that opinion should be sought from other counsel. An opinion of other counsel should be sought by the opinion recipient only when the opinion's benefits justify its costs. A primary opinion giver normally should not be asked to express its concurrence in the substance of an opinion of other counsel.

### **2.3 Financial interest in or other relationship with client.**

Lawyers preparing a closing opinion do not normally attempt to determine whether others in their firm have a financial interest (including an equity or prospective equity interest) in, or other relationship with, the client nor do they ordinarily disclose in an opinion letter any such interest or relationship that they or others in the firm may have. Although some lawyers may choose to make such disclosures, disclosure does not excuse those preparing a closing opinion from considering whether a financial interest in, or relationship with, the client that is known to them will compromise their professional judgment in delivering the closing opinion.

### **2.4 Client consent and confidential information.**

Subject to the need for express and informed client consent when the counsel's role extends beyond provision of a typical third party opinion (see supra § 1.1.a), when the client's consent to the delivery of a closing opinion is required by applicable rules of professional conduct, that consent normally may be inferred from a provision in the agreement that makes delivery of a closing opinion a condition to closing. The opinions contained in a closing opinion ordinarily do not disclose information the client would wish to keep confidential. If, however, an opinion would require disclosure of information that the lawyers preparing the opinion are aware the client would wish to keep confidential, the implications should be discussed with the client and the opinion should not be rendered unless the client consents to the disclosure.

## **3. CONTENT**

### **3.1 Golden Rule.**

An opinion giver should not be asked to render an opinion that counsel for the opinion recipient would not render if it were the opinion giver and possessed the requisite expertise. Similarly, an opinion giver should not refuse to render an opinion that lawyers experienced in the matters under consideration would commonly render in comparable situations, assuming that the requested opinion is otherwise consistent with these Guidelines and the opinion giver has the requisite expertise and in its professional judgment is able to render the opinion. Opinion givers and counsel for opinion recipients should be guided by a sense of professionalism and not treat opinions simply as if they were terms in a business negotiation.

### **3.2 Materiality.**

When possible, an opinion giver should avoid use of a materiality standard by using objective criteria (for example, a particular dollar amount, a specific category, or inclusion on a specified list) when limiting the matters addressed by an opinion.

### **3.3 Presumption of regularity.**

An opinion giver may rely upon the presumption of regularity<sup>9</sup> for matters relating to its client, such as actions taken at meetings during the period covered by a missing minute book, that are not verifiable from the client's records (assuming the matters are not inconsistent with those records). Opinion givers ordinarily need not disclose their reliance on the presumption.<sup>10</sup>

#### **3.3.a Limitations on document review and due diligence.**

Absent qualification, the opinion giver may be presumed to have undertaken such legal research, reviewed such documentation, and investigated such matters as is professionally appropriate to render the opinions given. (See BLS Accord § 2.) However, any expressly stated limitations as to documents reviewed or the scope of legal and factual inquiry will be given effect. Such limitations may be particularly appropriate where the opinion giver is local counsel without a long standing client relationship with the borrower or first hand involvement in the negotiation of transactional documents.

### **3.4 Use of the phrase "to our knowledge."**

Certain factually oriented opinions, such as the opinions on the existence of legal proceedings,<sup>11</sup> ordinarily are expressed as being to the opinion giver's knowledge.<sup>12</sup> To avoid a possible misunderstanding over the meaning of "knowledge," the opinion preparers should consider describing in the opinion letter the factual inquiry they have conducted (for example, by stating what they intend "to our knowledge" to mean or by indicating that they are rendering the opinion based solely on their personal knowledge without making any inquiry).<sup>13</sup>

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<sup>9</sup> See *Rogers v. Hill*, 289 U.S. 582, 591 (1933).

<sup>10</sup> An exception is when, based on the available facts, the lawyers preparing the opinion conclude that the deficiency in company records is likely to be significant.

<sup>11</sup> Because these opinions lack legal analysis, some lawyers prefer to refer to them as "confirmations."

<sup>12</sup> "To our knowledge" is also sometimes used in opinions that address other factual matters, such as the no breach or default opinion. The trend today in many types of transactions is away from using "to our knowledge" to limit the scope of the opinion. Instead, for example, when giving a no breach or default opinion, lawyers often prefer to identify the contracts covered by referring expressly in the opinion to an existing list or a list prepared specifically for opinion purposes.

<sup>13</sup> Such a description would not be required if the opinion preparers have conducted the inquiry described in the 1998 TriBar Report, *supra* note 5, at 618-9, 659, 664-65 or there otherwise is no risk of misunderstanding.

### **3.4.a Definition of knowledge.**

Qualifications as to the knowledge of the opinion giver are often stated in terms of the actual knowledge of the opinion author and identified other individuals in his or her law firm, e.g., a "primary lawyer group" including the opinion author, lawyers involved in preparing or supporting the opinion and lawyers actively involved in the transaction and, occasionally, the attorney who is the primary client contact. The term "actual knowledge" (or words to that effect) means that the opinion in question is being limited to the conscious awareness of the identified persons, with no other investigation or inquiry having been made (see BLS Accord § 6-B), and such limitations will be given effect.

### **3.5 Explained opinions; "would/should."**

Although closing opinions ordinarily do not set forth any legal analysis, opinion givers may include their legal analysis in an opinion when they believe it involves a difficult or uncertain question of professional judgment and have decided that the conclusions expressed should not be stated without setting forth the underlying reasoning. Such an opinion, which is commonly referred to as an "explained" or "reasoned" opinion, may be unqualified or qualified (i.e., subject to exceptions that are not customary for opinions of the type involved).

Opinions have the same meaning whether stated as "would" or "should."<sup>14</sup> Either way they express the opinion giver's professional judgment in the circumstances.

## **4. SPECIFIC OPINIONS**

### **4.0 Enforceability opinions; [General Exceptions and Assurances]**

The inclusion of some form of generic exception to an enforceability opinion, with a corollary assurance from the opinion giver, is nearly universal in real estate secured loan transaction opinions. In one form of assurance that is commonly used in connection with the generic exception, the opinion giver states that, notwithstanding a general exception to enforceability, such exception will not impair the "practical realization of the principal benefits included in loan documents" (or words to that effect). The "practical realization" assurance is increasingly disfavored, inasmuch as the parties may have significantly different understandings of the meaning of "practical realization" or "principal benefits". Instead, there is a growing consensus in favor of the use of a version of the ACREL formulation of generic exception: that is, that certain provisions of the loan documents may be unenforceable; however, such unenforceability will not render the transaction documents "invalid as a whole" nor preclude judicial enforcement of repayment, acceleration of the note or foreclosure of collateral in the event of a

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<sup>14</sup> See TriBar Opinion Committee, *Opinions in the Bankruptcy Context: Rating Agency, Structured Financing, and Chapter 11 Transactions*, 46 *Bus. Law.* 717, 733 (1991); *1998 TriBar Report*, *supra* note 5, at 607 n. 37. Closing opinions may be different in this regard from tax opinions.

material breach of a payment obligation or other material provisions of the transaction documents.

Given the breadth of most formulations of generic exception and assurance and the scope of the generally accepted equitable principles exception, the typical "laundry list" of additional specific exceptions to enforceability in most cases can be considerably shortened or eliminated altogether. Such specific exceptions, when taken, should be unnecessary except with respect to (i) matters that may not be clearly encompassed by the bankruptcy, equitable principles or generic exceptions, and (ii) matters that may be of notable importance to the opinion recipient, such as unusual limitations on judicial or non-judicial remedies of which an out-of-state lender may not be aware (e.g., anti-deficiency foreclosure legislation) or contractual provisions that are known by the opinion giver to have been controversial or heavily negotiated during the preparation of transactional documents.

#### **4.0.a General assurances.**

Requests for a general assurance to the effect that, notwithstanding specifically stated exceptions to enforceability (e.g., bankruptcy, equitable principles and other specific exceptions), such exceptions will not impair the practical realization of the principal benefits included in loan documents (or comparable language) are inappropriate. Once identified by the opinion giver, the importance of specific exceptions to enforceability should be evaluated by the opinion recipient.

#### **4.0.b Usury opinions.**

An enforceability opinion includes by implication an opinion that the loan evidenced by transaction documents is not usurious because the remedies opinion addresses the enforceability of the borrower's agreement to pay interest at the rate stated in the loan documents. It is common practice that such opinions are expressly stated. If a usury opinion is not intended to be given, it should be expressly excluded.

When a usury opinion is given or implied, the opinion giver may assume without so stating that the lender will not receive, directly or indirectly, any fees, charges, benefits or other compensation except as set forth in the transaction documents. When a usury opinion is based upon an exemption related to the identity or status of the lender, the involvement of a real estate broker or other special circumstances, such facts need not be stated; however, the better and customary practice is to expressly state such factual understandings as opinion assumptions or qualifications.

#### **4.0.c Real property title opinions.**

Because of the availability of title insurance, the existence of difficult factual issues, and the need for title searches beyond the capacity and expertise (and/or the scope of engagement) of most real estate attorneys, opinions requested as to the ownership of property, the effectiveness of the lien of security instruments or exceptions to or encumbrances on title to real property are inappropriate. Opinions as to the form of a mortgage or deed of trust necessary to create a lien against real property collateral and a

recitation of the procedures necessary to perfect and provide record notice of such lien are, on the other hand, frequently given. Neither such a "form of documents" opinion nor a general enforceability opinion implies a substantive title opinion, and no express disclaimer of such opinion is necessary.

#### **4.0.d Personal property security interest opinions.**

Because of the often disproportionate amount of time and effort required and the relatively limited value of the typically heavily qualified opinions on such matters, requests for personal property security interest opinions are appropriate only when the transaction involves personal property constituting a significant part of the loan collateral (e.g., the financing of hotel or hospital projects). Opinions describing the form of documents and procedures necessary to create, perfect and maintain a security interest in real property are frequently requested and given. A substantive opinion, if any, as to the status of the security interest in personal property collateral should be given separately from the general enforceability opinion and is not implied by an enforceability opinion. Such opinions are commonly limited to property covered by Article 9 of the Uniform Commercial Code because of uncertainties as to the status of other types of property.

#### **4.1 Foreign qualification and good standing [of Borrower].**

An opinion giver should not be asked for an opinion that the opinion giver's client is qualified to do business as a foreign corporation in all jurisdictions in which its property or activities require qualification or in which the failure to qualify would have a material adverse effect on the client. Analysis of the "doing business" requirements of each jurisdiction in which the client has property or conducts activities would require an extensive factual inquiry and a review of the law of jurisdictions as to which the opinion giver cannot reasonably be expected to have expertise. This analysis rarely would be cost-justified. Because an opinion on qualification to do business or good standing in foreign jurisdictions is based solely on certificates of public officials, delivery of those certificates without an opinion ordinarily should be sufficient to satisfy the needs of the opinion recipient.

##### **4.1.a Jurisdictional requirements [for Lender].**

Opinion requests in multistate secured loan transactions sometimes address (a) the necessity, by virtue of the transaction in question, for the lender to qualify to do business in a given jurisdiction, (b) the consequences of failure to qualify, (c) the ability to rectify any failure to qualify, and (d) whether making the loan, in and of itself, will subject the lender to taxation imposed by the relevant jurisdiction. Such opinion requests are generally not cost justified in view of the extensive and time consuming legal and factual inquiry required and the often limited value of the resulting opinion.

Opinions with respect to the need to qualify to do business with respect to an individual loan transaction are often difficult to give because of the inability to isolate relevant issues through factual assumptions, which themselves may be vitiated by facts or subsequent business activities of the lender, both of which are more readily known by the

lender and its counsel. Similar challenges exist for opinions that a single loan transaction will not subject the lender to local taxation. An opinion based on assumptions which may be rendered false by previous unknown activities of the lender or probable additional transactions in the future rarely justifies the cost and effort. Indeed, the decision to qualify to do business in a given jurisdiction and to structure operations in a manner to avoid jurisdictional taxes is a decision that may have little to do with a given transaction. Such issues may often be best addressed by lender's own counsel, who has greater familiarity with the lender's overall operations and is in a position to provide advice to its client on these matters, as well as the state-by-state consequences of various business operations and strategies regarding taxation of the lender, rather than by counsel for the borrower in a single loan transaction. On the other hand, where the law is sufficiently clear, an advisory opinion as to the consequences of, and the ability to cure, improper failure to qualify to do business locally may be more feasible for the opinion giver and valuable to the recipient.

The foregoing may be distinguished from situations, which exist in some states, with respect to taxation of mortgages, notes, and other transactional documents and various tax minimization strategies lawfully utilized in such jurisdictions. As these situations are often specific to a given transaction and not necessarily related to the overall operations of the lender or borrower, opinions with respect to such forms of taxation may be appropriate if the factual circumstances and legal analysis support the conclusions to be provided in the requested opinion. In such cases, in light of the relative costs and benefits of the opinion, the parties may determine, in those jurisdictions where such coverages are available, that an appropriate mortgage tax endorsement to a title insurance policy provides the requisite assurances to the lender.

#### **4.2 Outstanding equity securities.**

An opinion that all outstanding equity securities of the client are duly authorized, validly issued, fully-paid, and non-assessable can require an extensive legal and factual inquiry (for example, when the client has been in existence for a long time and has had many stock issuances). Consideration should be given to whether the benefit of the opinion to the opinion recipient justifies the cost and time required to support it.

#### **4.3 Comprehensive legal or contractual compliance.**

An opinion giver should not be asked for an opinion that its client possesses all necessary licenses and permits or has obtained all approvals and made all filings required for the conduct of the client's business. Similarly, an opinion giver should not be asked for an opinion that its client is not in violation of any applicable laws or regulations or that its client is not in default under any of the client's contractual obligations.<sup>15</sup> Neither a materiality exception nor a knowledge limitation makes these opinions appropriate. Any legal compliance opinion should be expressly and specifically requested and limited to

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<sup>15</sup> This *Guideline* is not intended to preclude a request for an opinion, otherwise appropriate, on a specific matter, for example, on whether specified activities of the client comply with the requirements of a specific statute.

specific laws. In some cases (e.g., with respect to land use and environmental matters), such opinions may not be appropriate (see *infra* § 4.3.a).

#### **4.3.a Land use and environmental opinions.**

Opinions on zoning, land use and environmental matters are fundamentally different from the evaluations of other issues typically addressed in opinion letters in that they involve complex, technical matters that are not easily, or sometimes at all, susceptible to separation into factual and legal components. Opinions on such matters are not customary. Land use and environmental matters are normally considered to be the subject of the lender's due diligence, which frequently includes certificates from architects, engineers and other professionals and communications from relevant public agencies.

#### **4.4 Lack of knowledge of particular factual matters.**

An opinion giver normally should not be asked to state that it lacks knowledge of particular factual matters.<sup>16</sup> Matters such as the absence of prior security interests or the accuracy of the representations and warranties in an agreement or the information in a disclosure document (subject to § 4.5 below) do not require the exercise of professional judgment and are inappropriate subjects for a legal opinion even when the opinion is limited by a broadly worded disclaimer.

#### **4.5 Negative assurances.**

Opinion recipients sometimes seek negative assurance from the opinion giver regarding the adequacy of the disclosure in the prospectus or other disclosure documents furnished to investors in connection with a sale of securities. Such negative assurance is not an opinion in the traditional sense. Rather, the practice of providing negative assurance is unique to securities offerings and is intended to assist the opinion recipient in establishing a due diligence or similar defense. A request for negative assurance is appropriate only when it is requested for that purpose in connection with a registered securities offering or, depending on the nature of the disclosure document and the process by which it was prepared, an offering of securities exempt from registration.<sup>17</sup>

#### **4.6 Fraudulent transfer.**

An opinion on the enforceability of an agreement does not address the effect of fraudulent transfer laws on the other party's rights under the agreement.<sup>18</sup> Although a

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<sup>16</sup> The principal exception is the “confirmation” often included in closing opinions regarding the opinion giver’s knowledge of legal proceedings to which the client is a party. *See supra* § 3.4.

<sup>17</sup> A request for negative assurance will be appropriate, for example, in many Rule 144A and Regulation S offerings.

<sup>18</sup> The “bankruptcy exception” (which is implied even when not stated) excludes the effect of fraudulent transfer laws from the enforceability opinion. *See 1998 TriBar Report, supra* note 3, at 624.

party to a transaction may be concerned about the effect of fraudulent transfer laws, an opinion giver could not render an opinion on those laws without relying heavily on assumed facts. Because opinions on the effect of fraudulent transfer laws are of limited value, they should not be requested absent a compelling justification.

#### **4.6.a Substantive non-consolidation.**

"Substantive nonconsolidation" opinions address whether the borrowing entity and its assets will be substantively consolidated with an affiliated entity if the affiliated entity becomes subject to a bankruptcy proceeding. In view of the considerable legal research and expense required for such opinions, they should not be requested unless justified by the size of the transaction or the needs of a regulatory agency or underwriter (as in the case of "conduit" or securitized loan transactions). Opinions on this subject, when given, generally rely upon a thoughtful structuring, and require careful analysis, of a special purpose "bankruptcy remote" borrowing entity. Because of the fact intensive nature of the evaluation, such opinions are usually given in the form of heavily qualified or "reasoned" or "explained" opinions. Such opinions should be rendered only by, or with the involvement of, competent bankruptcy counsel or other counsel with expertise regarding the relevant substantive issues.

#### **4.7 Litigation evaluation.**

The opinion giver ordinarily should not be asked to express an opinion on the expected outcome of pending or threatened litigation.<sup>19</sup>

#### **4.8 Matters of public policy.**

Because public policy is a principal basis for invalidating contractual provisions, opinion givers should not qualify their opinions as a whole with a general exception for "matters of public policy."<sup>20</sup> When appropriate, however, an opinion giver may include an exception for matters of public policy with respect to a particular provision (such as a provision releasing the other party from liability without excluding liability for willful misconduct or fraud).

#### **4.9 When law covered by opinion and law selected to govern agreement are different.**

When a closing opinion does not cover the law of a jurisdiction whose law is selected as the governing law in an agreement, the opinion giver should explore with counsel for the opinion recipient how best to respond to a request for an opinion on the agreement's enforceability. Specifically, secured loan documents in multistate transactions frequently provide a choice of law for certain documents (e.g., a note or

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<sup>19</sup> See American Bar Association Statement of Policy Regarding Lawyers Responses to Auditors' Requests for Information, 31 *Bus. Law.* 1709 (1976).

<sup>20</sup> See *supra* note 7.

guaranty) different from the law of the jurisdiction of the opinion giver and from the law specified to govern other transactional documents (e.g., the mortgage, deed of trust and other security instruments). When an opinion of local counsel is not cost justified, an acceptable alternative may be an opinion of the opinion giver that is limited to the enforceability of the governing law clause under the law covered by the opinion. Another acceptable alternative (which might be combined with the first) may be an opinion that the entire agreement would be enforceable if the law covered by the opinion were to apply (notwithstanding the governing law clause).

When loan documents specify the substantive law addressed by the opinion, a general enforceability opinion includes the enforceability of such choice of law. It is common for opinion givers to expressly exclude choice of law opinions; conversely, the better and customary practice where such opinions are sought is for such opinions to be expressly requested and separately stated. Choice of law opinions are often given as "reasoned" or "explained" opinions based upon factual assumptions bearing on the opinion conclusion and most often can be only a description of the approach likely to be taken by a court applying existing law in the opinion giver's jurisdiction.

## APPENDIX A

### LEGAL OPINION PRINCIPLES

*By the Committee on Legal Opinions [of the Section of Business Law of the American Bar Association]*

In the Committee's 1991 Third Party Legal Opinion Report the Committee undertook to monitor developments respecting the Report and the Legal Opinion Accord contained in the Report. It also undertook in due course to take such further action as might seem appropriate. These Legal Opinion Principles are a product of those undertakings. The Report and the Accord have made an important contribution to the learning on legal opinions. While the Accord has not gained the national acceptance the Committee had hoped, the Guidelines in the Report are frequently looked to for guidance regarding customary legal opinion practice. In Section 152 of the recently adopted Restatement (Third) of the Law Governing Lawyers, the American Law Institute affirmed the importance of customary practice in the preparation and interpretation of legal opinions. The Committee has prepared these Principles to provide further guidance regarding the application of customary practice to third-party "closing" opinions that do not adopt the Accord. The Committee hopes that these Principles will prove useful both to lawyers and their clients and to courts that from time to time are called upon to address legal opinion issues. The Committee intends to consider the possible extension of these Principles to issues they do not now address. The Committee would welcome the assistance of all who are interested in participating in that effort.

#### I. GENERAL

A. At the closing of many business transactions legal counsel for one party delivers legal opinion letter(s) to one or more other parties. Those opinion letters, often referred to as third party opinion letters, are the subject of these Legal Opinion Principles.

B. The matters usually addressed in opinion letters, the meaning of the language normally used, and the scope and nature of the work counsel is expected to perform are based (whether or not so stated) on the customary practice of lawyers who regularly give, and lawyers who regularly advise opinion recipients regarding, opinions of the kind involved. These Legal Opinion Principles are intended to provide a ready reference to selected aspects of customary practice.

C. An opinion giver may vary the customary meaning of an opinion or the scope and nature of the work customarily required to support it by including an express statement in the opinion letter or by reaching an express understanding with the opinion recipient or its counsel.

D. The opinions contained in an opinion letter are expressions of professional judgment regarding the legal matters addressed and not guarantees that a court will reach any particular result.

E. In accepting an opinion letter, an opinion recipient ordinarily need not take any action to verify the opinions it contains.

F. The lawyer or lawyers preparing an opinion letter and the opinion recipient and its legal counsel are each entitled to assume that the others are acting in good faith with respect to the opinion letter.

## II. LAW

A. Opinion letters customarily specify the jurisdiction(s) whose law they are intended to cover and sometimes limit their coverage to specified statutes or regulations of the named jurisdiction(s). When that is done, an opinion letter should not be read to cover the substance or effect of the law of other Jurisdiction(s) or other statutes or regulations.

B. An opinion letter covers only law that a lawyer in the jurisdiction(s) whose law is being covered by the opinion letter exercising customary professional diligence would reasonably be expected to recognize as being applicable to the entity, transaction, or agreement to which the opinion letter relates.

C. An opinion letter should not be read to cover municipal or other local laws unless it does so expressly.

D. Even when they are generally recognized as being directly applicable, some laws (such as securities, tax, and insolvency laws) are understood as a matter of customary practice to be covered only when an opinion refers to them expressly.

## III. FACTS

A. The lawyers who are responsible for preparing an opinion letter do not ordinarily have personal knowledge of all of the factual information needed to support the opinions it contains. Thus, those lawyers necessarily rely in large measure on factual information obtained from others, particularly company officials. Customary practice permits such reliance unless the factual information on which the lawyers preparing the opinion letter are relying appears irregular on its face or has been provided by an inappropriate source.

B. As a matter of customary practice the lawyers preparing an opinion letter are not expected to conduct a factual inquiry of the other lawyers in their firm or a review of the firm's files, except to the extent the lawyers preparing the opinion letter have identified a particular lawyer or file as being reasonably likely to have or contain information not otherwise known to them that they need to support an opinion.

C. An opinion should not be based on a factual representation that is tantamount to the legal conclusion being expressed. An opinion ordinarily may be based, however, on legal conclusions contained in a certificate of a government official.

D. Opinions customarily are based in part on factual assumptions. Some factual assumptions need to be stated expressly. Others ordinarily do not. Examples of factual assumptions that ordinarily do not need to be stated expressly are assumptions of general application that apply regardless of the type of transaction or the nature of the parties. These include assumptions that copies of documents are identical to the originals, signatures are genuine and the parties other than the opinion giver's client have the power to enter into the transaction.

#### IV. DATE

An opinion letter speaks as of its date. An opinion giver has no obligation to update an opinion letter for subsequent events or legal developments.