710 Opinions of Counsel from the In-house Attorney

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Faculty Biographies

Richard M. Carson

Richard M. Carson is a senior attorney for The Williams Companies, Inc. in Tulsa, Oklahoma. His primary responsibilities are in the finance and securities areas. Mr. Carson was a principal contributor to the financial restructuring and subsequent recovery of Williams in the post-Enron era. Recently, he led the legal effort behind the IPO of Williams' new master limited partnership, Williams Partners L.P. Mr. Carson is responsible for developing and maintaining Williams' legal opinion policies, forms, and guidelines.

Prior to his focus in the finance and securities areas, Mr. Carson practiced environmental law, both at Williams and outside the company before he joined Williams. He also was an environmental consultant prior to joining Williams.

He has served as the chairman of the environmental law section of the Oklahoma Bar Association, and the chairman of the South Central U.S. Region of the Auditing Roundtable. He is a member of the legal opinion committee and securities law opinion committee of the ABA. Mr. Carson serves his community through his church and as a leader with a Boy Scout Troop in Tulsa.

Mr. Carson received his undergraduate from the University of Tulsa and is a graduate of The University of Oklahoma College of Law.

Charles Menges
Partner
McGuire Woods LLP

Laurie J. Sablak

Laurie J. Sablak is an assistant vice president and product manager in Chubb Specialty Insurance, located in Simsbury, Connecticut, focusing in employment practices liability and management liability coverages for law and accounting firms, and employed lawyers' professional liability. Since the start of her employment with Chubb Specialty Insurance and its predecessor, Executive Risk, Ms. Sablak has played a leading role in the development of the company's employment practices liability insurance (EPLI) and management liability programs for professional firms. Ms. Sablak also manages the company's sponsorship relationships with the American Bar Insurance Plans Consultants, Inc. with respect to Chubb's ABA employers EdgeSM and kidnap ransom and extortion products for law firms, and with ACC regarding Chubb's employed lawyers program.

Ms. Sablak's previous experience includes a law practice concentrated in employment litigation and personnel management at a Connecticut law firm.

Ms. Sablak graduated from Bowdoin College and received her J.D. from the University of Connecticut, where she was an executive editor of the Connecticut Insurance Law Journal.

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EXAMPLE GUIDELINES AND PROCESS

ACC's 2006 Annual Meeting: The Road to Effective Leadership **October 23-25, Manchester Grand Hyatt**

Example Guidelines and Process

- In-house counsel provide opinions where uniquely positioned due to their knowledge of the company.
- Opinion letters should not contain any opinions that duplicate those given by outside counsel.

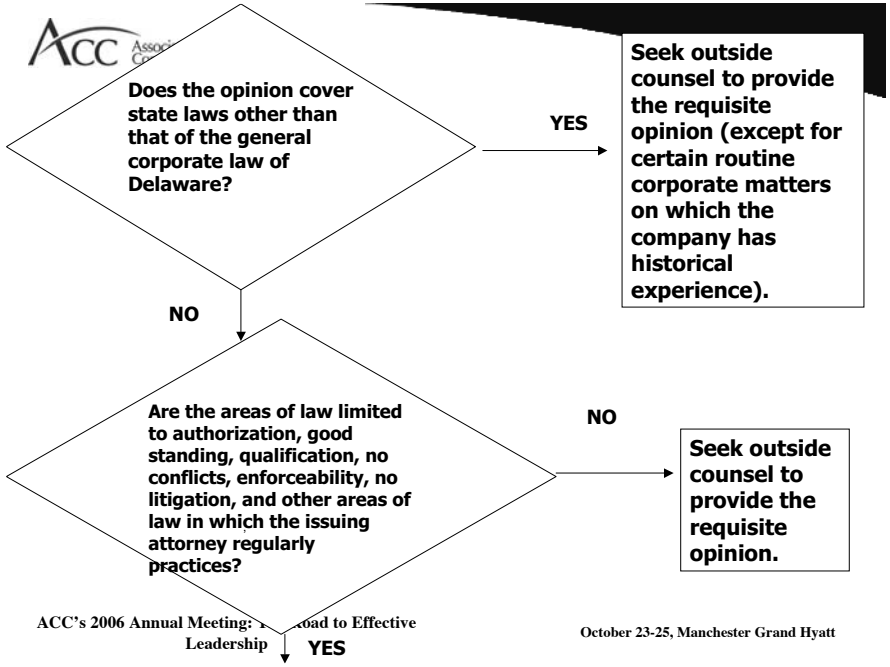
Example Guidelines and Process

Only outside counsel should give opinions regarding:

- "True Sale";
- "Non-Consolidation";
- UCC;
- Title; or
- Tax

Example Guidelines and Process

Attorneys must follow the process outlined in the following chart:



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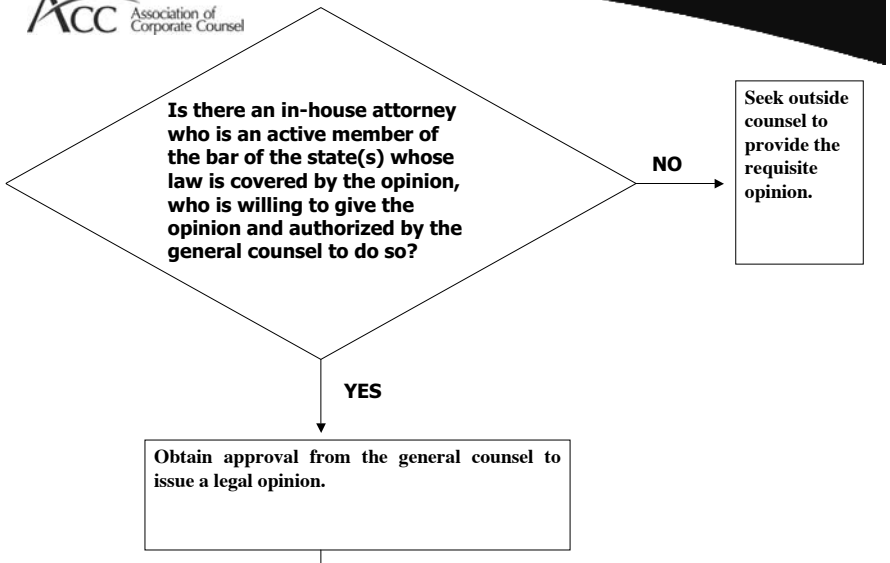

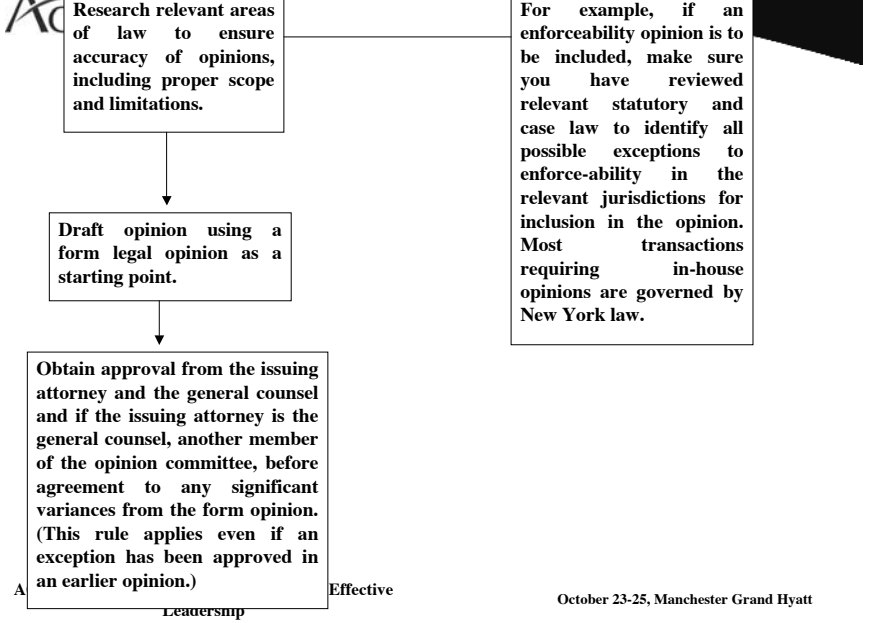

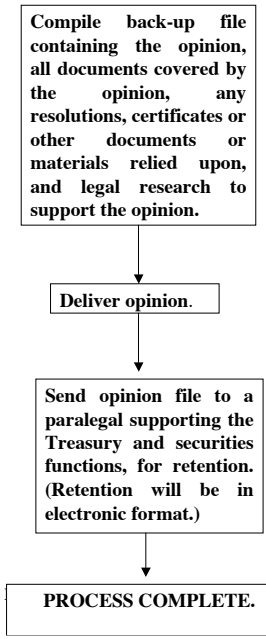

Example Guidelines

Review by opinion committee:

- ✓ General Counsel
- ✓ Associate General Counsel for the Corporate Group
- ✓ Corporate Secretary
- ✓ Senior Attorneys supporting the Treasury Department

Example Guidelines

- Often requested for credit agreements and securities issuances.
- Form opinion letters used; general counsel must approve any significant variances from forms.

Example Guidelines

- Examples of form opinion letters are in your materials.
- Forms based upon experience of committee, standards published by the Business Law Section of the American Bar Association and the Tri Bar Opinion Committee, and other published legal opinion material.

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Example Guidelines

- These forms are "issuer-friendly"
- It is customary in opinion practice to require no more broad or narrow an opinion than one is willing to deliver or accept (the "golden rule")

Example Guidelines

- Opinions may only be given by attorneys who are active members of the bar of the state whose law is the subject of the opinion.
- Some opinions do not reference the law of any state, but refer only to "The General Corporation Law of the State of Delaware", "the Laws of the United States of America", etc.
- Such opinions can be given by attorneys with the requisite knowledge.
- Don't assume that the laws of the state whose law is the subject of the opinion are same as law of state where opinion-giver is admitted.

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Example Guidelines

- May refer to states in which opinion-giver is not admitted to practice, in reliance on review by other attorneys admitted to practice in such states.

Example Guidelines

- Only deliver one signed original opinion letter for each addressee.

AND

- The attorney should sign the opinion in his or her own name and not in the name of the Legal Department.

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Example Guidelines

- Duty of care, competence, and diligence based on customary practice.
- Conduct investigation; supporting material kept in physical and electronic backup files.

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COMMON IN-HOUSE OPINIONS AND ASSOCIATED DILIGENCE

Organizational Matters

- Due Organization
- Valid Existence
- Good Standing
- Purpose: demonstrate that client is an existing entity that can enter into binding contracts.

Due Incorporation or Organization

- Refers to lawful creation of entity
- Determination of proper filing and acceptance of articles, certificates, or other instruments of incorporation or organization in accordance with laws applicable at the time of filing.

Due Incorporation or Organization

- May also cover adoption of initial by-laws, appointment of initial directors, and proper issuance of initial stock for lawful consideration.
- Due incorporation is the preferred formulation.
- Obtain copy of original articles and all subsequent amendments, review for conformity with applicable legal requirements.
- Preferred approach: rely on a good standing certificate from Secretary of State of state of formation.

Valid Existence and Good Standing

- Valid existence= absence of permanent cessation of entity's existence.
- Good standing= absence of temporary but curable suspension of existence or power to act

Valid Existence and Good Standing

They depend upon the absence of the following:

- The limitation on life of entity in its charter documents;
- Dissolution or actions leading to dissolution;
- Merger in which entity does not survive;
- Proceedings by governmental officials to revoke chartering authority; and
- Failure to pay franchise or similar taxes or take other actions such that suspension results.

Preferred approach: include a qualification in the opinion that it is based solely upon certificate from the Secretary of State.

Due Qualification and Good Standing

- Purpose: to confirm ability of corporation to conduct business, own property, and enter into contractual obligations in jurisdictions other than jurisdiction of incorporation.
- Rely solely on advice of governmental officials in relevant jurisdiction; opinion letter indicates that reliance.

Corporate Power

- Purpose: address ultra vires.

Due Authorization, Execution, and Delivery

- Addresses propriety of actions taken by entity to comply with governance procedures in undertaking obligations under transaction documents, and signing of those documents.
  - Determine required authorizing acts under entity's governing instruments and enabling legislation; and
  - Review actions taken for conformity (usually involves actions taken by directors at a meeting or by consent.)

Also verify:

- requisite numbers of directors acted;
- directors properly elected;
- action taken upon required formalities (e.g. quorum and notice); and
- actions are broad and unambiguous to cover the matter requiring approval.

Could rely upon a Secretary's Certificate.

Due Execution and Delivery

- Person who has been authorized to do so in fact signed the transaction documents on the entity's behalf.
- Confirm that the individual signing was among those indicated by name or position.
- Could rely upon a Secretary's Certificate.

Binding Effect (a/k/a "Enforceability", a/k/a "Remedies")

- Includes not only corporate power and due authorization, but also:
- The recognition by a court that documents impose obligations reflected in documents;
- The availability of remedy for failure to meet obligations; and
- The absence of terms or provisions which applicable law would render per se illegal, void, voidable, or unenforceable.

Absence of Needed Consents

- Governmental consents needed to assure the ability of the entity to create a legal obligation;
- Governmental consents which if not obtained could result in disability on entity's activities or monetary penalty; and
- Private party consents which, if not obtained, could result in monetary consequences, or subject to claims of interference with contracts.

No Conflicts (a/k/a "Noncontravention")

- Ensure that transaction will not create defaults under the agreements to which entity is a party, and not contrary to restrictions in entity's organizing documents.
- Review the specified contracts and interpret their terms.

No Conflicts (a/k/a "Noncontravention")

- Scope: Reasonable contracts to be reviewed include:
  - ✓ financing documents, and
  - ✓ capital leases.
- An appropriate standard for determining what "material" agreements means is any agreement required to be filed in accordance with the Securities and Exchange Act of 1934.

Absence of Litigation

Has a "to my knowledge" qualifier.

Review of material regarding litigation as part of preparation for letters to:

- auditors,
- preparation for board of directors meetings
- Poll other attorneys in the Legal Department

Securities

- Shares **"have been duly authorized and validly issued and fully paid and non-assessable."**
- Opinion addresses the concern that the stock will entitle purchasers and anyone to whom they may transfer the shares to all rights of a stockholder under the corporation law under which the company was incorporated and the company's charter and by laws.

Securities

Due diligence review:

- Certificate of Incorporation;
- By-laws; and
- Minute books (to determine whether each change in the company shares were authorized by proper action and to locate any applicable subscription agreements or resolutions).

Securities

Help underwriters and dealer managers meet their due diligence obligations under Section 11 of the Securities Act of 1933.

Securities

The opinion letter covers:

- The adequacy of the disclosure; and
- Binding nature of the underwriting or dealer manager agreement.

Securities

The registration statement opinion has four components:

- Whether registration statement and prospectus comply as to form with the 1933 Act and associated rules and regulations.

- Registration statement has been filed in the correct form,
- but also that the opinion-giver has determined each of the items in the form is responsive
- Compliance with technical requirements

Securities

- "No reason to believe that there is an untrue statement of a material fact or omission of material fact necessary to make the statement not misleading."
  - ✓ Substantive adequacy of disclosure

Securities

- Statement that opinion-giver does not know of any contract or other documents required to be filed or described.
  - ✓ Substantive adequacy of disclosure

Securities

- In regard to the binding nature, the opinion-giver typically will only opine that the agreement has been duly authorized, executed, and delivered by the issuer.

Securities

Negative Assurance "Non-Opinion"

- Helps underwriters establish a due diligence defense under Section 11 and 12(a)(2) of the Securities Act of 1933.
- Not a legal opinion; it is a statement of belief.

Securities

Negative Assurance "Non-Opinion"

- Also requested in some unregistered offerings request negative assurance on the offering documents.
- Even though Section 11 and 12(a)(2) of the 1933 Act do not apply, to establish a defense to possible claims that might be brought pursuant to Rule 10(b)(5) under the Securities and 1934 Act.

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Securities

Negative Assurance "Non-Opinion"

- Don't provide to ultimate purchasers of securities; only to the underwriters or dealer managers.
- Not a legal opinion; generally provided in a separate letter or separate unnumbered paragraph.

Example Guidelines and Process for Issuing In-House Legal Opinions

1. These guidelines and associated materials are for use by all attorneys when an in-house legal opinion is required in connection with a transaction.

2. It is always preferable to avoid issuing an opinion at all, but it cannot always be avoided. It is the company's preference to have any required opinions be issued by outside counsel. However, it is often appropriate and more efficient for in-house counsel to provide required opinions where in-house counsel is uniquely positioned due to knowledge of the company. The in-house opinion letter should not contain any opinions that duplicate opinions given by outside counsel regarding the same transaction. Some opinions, such as "true sale", "non-consolidation", UCC, title and tax-related opinions should only be given by outside counsel.

3. Attorneys must follow the process outlined in the attached process chart.

4. Legal opinions may only be given by the general counsel or an attorney specifically authorized by the general counsel. It is anticipated that the general counsel will provide most opinions. However, he may designate that certain opinions such as those covering regulatory matters or the laws of a state in which he is not admitted to practice be given by another company attorney with more knowledge regarding those matters or those applicable laws. In any event, the general counsel will rely on the experience and knowledge of other attorneys working on the particular matter when rendering his opinions.

5. Each opinion must be reviewed by a member of the opinion committee in addition to the issuing attorney. The opinion committee is comprised of the general counsel, associate general counsel for the corporate group, the corporate secretary, and senior attorneys supporting the Treasury Department.

6. In-house opinion letters are most often requested in association with credit agreements and securities issuances. Form opinion letters for those areas are attached to these guidelines. The general counsel must approve any significant variances from the form opinions before such variances are accepted. This rule applies even if the variance has been allowed in a previous opinion. The attached forms are tools to be used in the process of preparing a legal opinion. However, any final opinion must reflect ascertainment of all relevant facts and application of those facts to the applicable laws. The forms are based upon experience of committee members, standards published by the Business Law Section of the American Bar Association and the Tri Bar Opinion Committee, and other published legal opinion material.[1] These forms are drafted as

1 The following resources are included in an appendix to these guidelines: Committee on Legal Opinions, Business Law Section, ABA "Guidelines for the Preparation of Closing Opinions", 57 Bus. Law. 875 (2002); Committee on Legal Opinions, Business Law Section, ABA "Legal Opinion Principles," 53 Bus. Law. 831 (1998); Section of Business Law, ABA "Third Party Legal Opinion Report, including the Legal Opinion Accord," 47 Bus. Law.

"issuer-friendly" forms and should not necessarily be used as templates for the acceptable contents of opinions being received by the company. However, it is customary in opinion practice to require no more broad or narrow an opinion than one is willing to deliver or accept.

7. Opinions may only be given by attorneys who are active members of the bar (i.e. admitted and current in CLE and generally informed on legal matters in the jurisdiction) of the state whose law is the subject of the opinion. Some opinions do not reference the law of any state, but refer only to the "The General Corporation Law of the State of Delaware", "the Laws of the United States of America", etc." Such opinions can be given by attorneys with the requisite knowledge. It is contrary to our policy to assume that the laws of the state whose law is the subject of the opinion are the same as the law of a state where the opinion-giver is admitted. However, it may be possible to render an opinion based on an assumption that the law of a state where the opinion-giver is admitted applies notwithstanding a different choice of law. A company general counsel opinion may refer to states in which the opinion-giver is not admitted to practice, in reliance on review by other attorneys admitted to practice in such states. As a practical matter, on occasion and with the consent of the opinion recipient, the company general counsel opinion may address routine matters governed by the laws of a state in which neither the opinion-giver nor another attorney working on the matter is admitted, where the company has a history dealing with such matter and has in the past received guidance from counsel admitted in such state.

8. Only deliver one signed original opinion letter for each addressee.

9. The attorney who delivers the opinion should sign the opinion in his or her own name and not in the name of the Legal Department. This is because Legal Department is not a lawyer or law firm and thus lacks the professional standing required to deliver a legal opinion.

10. The attorney rendering the opinion has a duty of care to exercise the competence and diligence normally exercised by lawyers in similar circumstances. The scope and nature of the work an opinion-giver is expected to perform are based on customary practice. Although the general counsel signs most opinion letters, he relies on the assistance of attorneys and other members of the Legal Department and in some cases obtains certificates from officers of the relevant entities regarding factual matters underlying the opinions.

11. The attorneys assisting the opinion-giver must conduct the investigation necessary to give the opinion and ensure that any supporting material relied upon in the investigation are kept in physical and electronic backup files. Physical opinion backup files are maintained by paralegals supporting the corporate finance and securities attorneys. These paralegals are also responsible for ensuring that electronic versions of such files are promptly scanned into the company's document management system and associated with the appropriate matter number in the company's matter management system. If the material relied upon is already kept in the document management system or the closing books associated with the transaction, it is acceptable for the opinion file to merely identify such material and reference its location. Except in unusual circumstances, it is not necessary to create a memorandum supporting a legal opinion.

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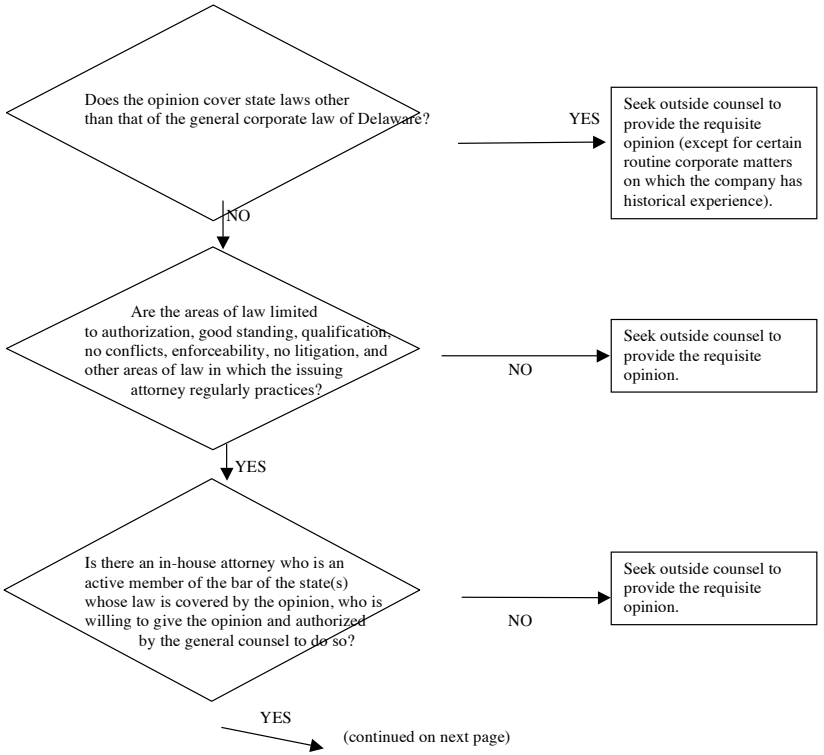
167 (1991); and TriBar Opinion Committee, "Third-party 'Closing' Opinions: A Report of the TriBar Opinion Committee", 53 Bus. Law. 591 (1998).

EXAMPLE IN-HOUSE LEGAL OPINION PROCESS FLOW-CHART

In transactions that require one or more legal opinions to be delivered, the following process should be followed:



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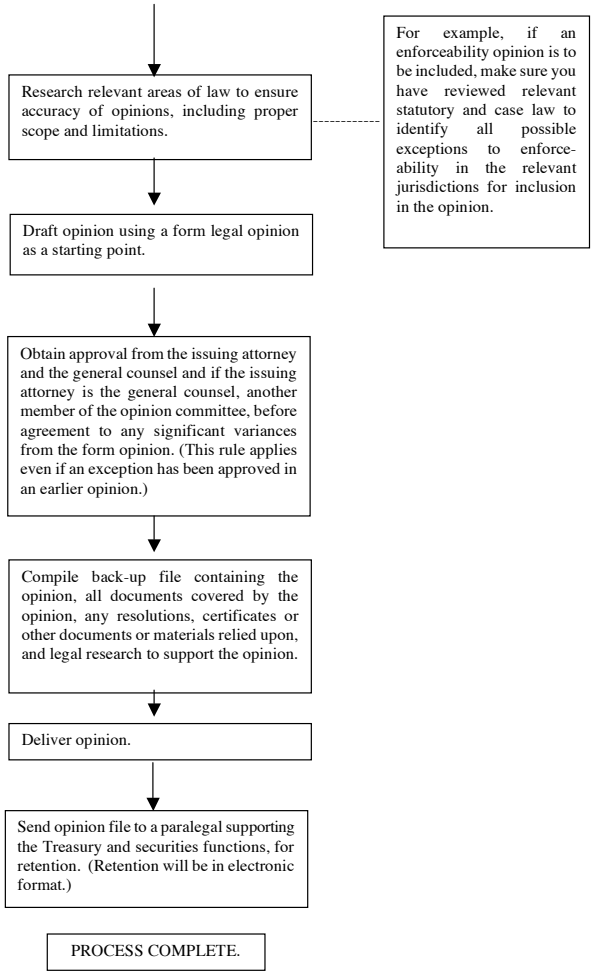
Obtain approval from the general counsel to issue a legal opinion.



Common In-House Opinions and Associated Diligence

A discussion of the specific types of investigation appropriate for the various types of opinions follows:

a. Credit Agreements
   i. Due Organization, Valid Existence, and Good Standing (a/k/a, collectively, "Organizational Matters").

      1. The purpose of this opinion is to demonstrate that the opinion-giver's client is an existing entity that can enter into binding contracts.

      2. Due incorporation or organization refers to the lawful creation of a corporate entity and normally involves a determination of the proper filing with and acceptance by the appropriate governmental officials of articles, certificates, or other instruments of incorporation or organization in accordance with the laws applicable at the time of filing. Due organization may also cover adoption of the initial bylaws, appointment of initial directors, and under some commentary, proper issuance of initial stock for lawful consideration, so due incorporation is the preferred formulation (and if the corporation was formed by a non-affiliated company, a "valid existence" formulation permits the opinion-giver to avoid going back to review the status at the time of incorporation.) The opinion-giver should obtain a copy of the original articles and all subsequent amendments, including merger filings, to review those documents for conformity with the applicable legal requirements as to content and adoption, and to confirm the absence of other purported amendments, by relying on a Secretary Certificate or reviewing the corporate records. Consequently, the preferred approach is to have the opinion-giver rely on a good standing certificate from the Secretary of State of the state of formation. Typically, lenders' counsel in commercial banking transactions have allowed such a qualification, but underwriter's/dealer manager's counsel in a securities transaction have not.

      3. The remaining two elements of this part of the opinion, valid existence and good standing, are inter-related. Valid existence refers to the absence of a permanent cessation of the entity's existence and good standing refers to the absence of a temporary but curable suspension of existence or power to act. They depend upon the absence of the following:

         a. The limitation on life of the entity in its charter documents;
         b. Dissolution or actions leading to a dissolution;
         c. A merger in which the entity does not survive;
         d. Proceedings by governmental officials to revoke the chartering authority;

e. Failure to pay certain franchise or similar taxes or to take other actions such that suspension results.

However, the preferred approach is to include a qualification in the opinion that such opinion is based solely upon a certificate from the Secretary of State of the state of organization.

ii. Due Qualification and Good Standing in Other Jurisdictions

1. The purpose of this opinion is to confirm the ability of the corporation to conduct business, own property, and enter into contractual obligations in jurisdictions other than the jurisdiction of its incorporation. This opinion usually involves the laws of jurisdictions in which in-house counsel are not expert. Thus, the opinion-giver relies solely on advice of governmental officials in the relevant jurisdiction, and the opinion letter must indicate that reliance. At times, opinion-recipients request opinions that the corporation is admitted in all states necessary for the conduct of its business. While this is sometimes done (and an implicit exception to the general rule of limiting opinions to states in which the opinion-giver is admitted), there is support in published legal opinion commentary for the view that the issue is more appropriate in a company representation.

iii. Corporate Power

1. The purpose of this opinion is to address the question of ultra vires. The banks are concerned whether the borrower has the power to enter into the financing documents. Counsel should review certified charter documents and enabling legislation, and conduct a review to ensure the absence of other laws creating a disability for entities such as the borrower.

iv. Due Authorization, Execution, and Delivery

1. This opinion is intended to address the propriety of actions taken by the entity to comply with the governance procedures in undertaking the obligations under the transaction documents, and the signing of those documents. The attorney preparing the opinion should determine the required authorizing acts under the entity's governing instruments and enabling legislation and review the actions taken for conformity and sufficient coverage of the transaction. This usually involves actions taken by the directors at a meeting or by consent. The attorney preparing the opinion should verify that the requisite numbers of directors acted, that the directors appear to have been properly elected, that their action was taken upon required formalities (such as quorum and notice requirements), and that the actions, as evidenced by written minutes of a meeting or a signed consent, are sufficiently broad and unambiguous to cover the matter requiring approval. The opinion-giver could also rely upon a Secretary's Certificate as to such matters.

2. Due execution and delivery is usually taken to mean that a person who has been authorized to do so by the authorizing action in fact signed the transaction documents on the entity's behalf with the intent that they be effective. The attorney preparing the opinion should confirm that the individual signing was among those indicated by name or position and the authorizing actions to have that authority and, if indicated by position, that the person properly holds that position. The opinion-giver could also rely upon a Secretary's Certificate as to such matters.

v. Binding Effect (a/k/a "Enforceability", a/k/a "Remedies")

This opinion at a minimum encompasses threshold matters such as corporate power and due authorization (already discussed), the recognition by a court of the transaction documents as imposing upon the entity the obligations reflected in the documents, the availability of some appropriate remedy for the entity's failure to conform generally to those obligations and the absence in the documents of any term or provision which applicable law would render per se illegal, void, voidable, or unenforceable or limit to a degree not expressly contemplated in the documents. The attorney preparing the opinion should analyze the fundamental aspects of the transaction in the documents. What these aspects are will vary considerably depending upon the nature of the transaction and the parties involved. They will include such basics as the elements of contractual formation, the creation of obligations or indebtedness and the essential legality of the contract subject matter, and may include such matters as usury or margin requirements. Include the relevant exceptions from the long list of exceptions included in the attached form.

vi. Absence of Needed Consents

1. Although almost always combined, this opinion addresses three separate matters:

a. Governmental consents needed to assure the ability of the entity to create a legal obligation;

b. Governmental consents which if not obtained could result in some significant disability on the entity's activities or substantial monetary penalty, thereby affecting its ability to perform; and

c. Private party consents which, if not obtained, could result in substantial monetary consequences such as the acceleration of other indebtedness, or could subject the counterparty to possible claims of interference with contracts.

Of course, if such actions are needed, the opinion must except and identify the required consents.

vii. No Conflicts (a/k/a "Noncontravention")

1. This opinion is intended to ensure that the transaction will not create defaults under other agreements to which the entity is a party, and that it is not contrary to restrictions in the entity's organizing documents. The opinion should normally only cover specified material contracts (such as Form 10-K exhibits), agreed to in advance. The attorney preparing the opinion should review the specified contracts and interpret their terms.

The basis for determining which contract is to be reviewed should be agreed upon early. Reasonable contracts to be reviewed include other financing documents and capital leases. An appropriate standard for determining what "material" agreements means is any agreement required to be filed in accordance with the Securities and Exchange Act of 1934.

viii. Absence of Litigation

1. This opinion has a "to my knowledge" qualifier. The scope of investigation should include a review by the general counsel of material provided to him regarding litigation as part of preparation for letters to auditors, preparation for board of directors meetings, or otherwise. The opinion preparer should poll the managing attorneys in the Legal Department regarding the existence of other pending or threatened claims, and such managing attorneys should return a signed certificate in a form similar to the one attached hereto.

ix. Regulatory

1. The general "no violation of law" opinion may not be broad enough to encompass the Investment Company Act, or the margin Regulations U and X. Consequently, some lenders will insist that the company provide an opinion regarding the applicability of these regulations. In-house counsel is more familiar with the company and therefore could perform the diligence required to give such opinions more quickly and efficiently than outside counsel. The Public Utility Holding Company Act ("PUHCA") was repealed in 2005; consequently, PUHCA opinions should no longer be required.

    a. Regulation U sets out certain requirements for lenders, other than securities brokers and dealers, who extend credit secured by margin stock. Margin stock includes any equity security registered on a national securities exchange such as the New York Stock Exchange, NASDAQ stock, and any debt security convertible into a margin stock. The regulation covers entities that are not brokers or dealers, including commercial banks and companies that have employee stock option plans. Regulation U states that no lender shall extend any "purpose credit" secured directly or indirectly by margin stock, in an amount that exceeds the maximum loan value of the collateral securing the credit. "Purpose credit" is any credit for the purpose, whether immediate, incidental, or ultimate, of buying or carrying margin stock.

    In order to provide a Regulation U opinion, the opinion-giver must determine whether the company is acting as a lender extending credit for the purpose of buying or carrying margin stock. If so, the opinion-giver must determine whether such extension of credit is limited to its employees to purchase company stock under an eligible employee stock option, purchase, or ownership plan. If so, the company need not obtain a statement of purpose for each extension of credit but it must still comply with registration requirements and file annual reports. In order to deliver this opinion, an authorized officer of the entity would certify to certain factual matters that would reflect that the entity falls under an exemption from coverage under Regulation U. A form certificate is attached hereto.

    Bank lenders may also request opinions that the bank's extension of credit does not violate Regulation U, which may require a determination that the credit will not be secured "directly or indirectly" by margin stock. Indirect security may arise from negative pledge or asset sale covenants. The analyses underlying these opinions may be complex and are usually handled by outside counsel.

    b. Regulation X extends to borrowers the provisions of regulations governing the extension of credit by brokers and dealers (Regulation T) and by banks and other lenders (Regulation U) for the purpose of purchasing or carrying securities. A borrower who obtains credit within the United States to purchase or carry securities issued by any company is subject to Regulation X only in the event that the borrower willfully causes the credit to be extended in contravention of Regulation T or U. Generally, a borrower who obtains credit outside the United States to purchase or carry securities issued by a company incorporated in the United States is subject to Regulation X if the borrower is a "U.S. person" or a "non-U.S. person" controlled by or acting on behalf of or in conjunction with a "U.S. person". Borrowers subject to Regulation X have the burden of ensuring that the credit they obtain conforms to Regulation T or U.

    In order to provide a Regulation U opinion, the opinion-giver must determine whether the extension of credit is for the purpose of purchasing or carrying margin securities. Regulation T has a broader scope and may apply to any extension of credit by a broker-dealer (or certain affiliates) for the purpose of purchasing any stock (not only listed stock or NASDAQ stock). Although it may be unlikely that the factual predicates would exist for an assertion that the borrower is willfully causing the credit to be extended in contravention of Regulation T or U, because of the complexities of the analysis and the "cost-benefit" aspects of opinion rendering, Regulation X opinions should generally be resisted. In order to deliver this opinion, an authorized officer of

the entity would certify to certain factual matters that would reflect that the entity falls under an exemption from coverage under Regulation X. A form certificate is attached hereto.

d. An "investment company" is any issuer which engages primarily in the business of investing, reinvesting or trading in securities; is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been engaged in such business and has any such certificate outstanding, or is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding forty percent (40%) of the value of such issuer's total assets (excluding government securities and cash) on an unconsolidated basis. "Investment securities" includes all securities except government securities, securities issued by employees' securities companies, and securities issued by majority-owned subsidiaries of the owner, which are not "investment companies". Also there is an exemption from the definition of "investment company" for any issuer primarily engaged, directly or through a wholly-owned subsidiary or subsidiaries, in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities.

When opining that the relevant company entity is not an "investment company", the opinion-giver merely confirms that the company continues to meet the above test which, absent a dramatic change in our strategy and asset holdings, should continue to be correct. In order to deliver this opinion, an authorized officer of the entity in question would certify to certain factual matters that would reflect that the entity falls under an exemption from coverage under the Investment Company Act of 1940.

b. Securities

i. Opinion letters delivered in regard to issuances of debt or equity securities often include many of the opinions discussed in Section 11(a) of these guidelines. A discussion of opinions commonly included in securities transactions, but not discussed in Section 11(a), follows.

ii. ***Opinions & Registration Statements***. In an equity financing, counsel for the company customarily renders an opinion to the purchasers of the shares of stock they are acquiring from the company, that such shares "have been duly authorized and validly issued and fully paid and non-assessable". This opinion addresses the concern of the purchasers that the stock they are acquiring will entitle them and anyone to whom they may transfer the shares to all the rights of a stockholder under the corporation law under which the company was incorporated and the company's charter and bylaws. This opinion is filed with the registration statement. A similar opinion is often given to the dealer managers or underwriters. In order to perform due diligence on the foregoing opinion, the following actions must be taken: (i) review the Certificate of Incorporation or other formation documents of the subject entity, (ii) review the minute books of the entity to determine whether each change in the company shares of the entity were authorized by proper action, (iii) review the By-laws of the entity, and (iv) reviewed the current minute book of the entity to locate any applicable subscription agreements or resolutions.

iii. ***Opinion Required by the Underwriting or Dealer Manager Agreement.*** Underwriting agreements and dealer manager agreements typically require legal opinions from issuer's counsel. One of the important functions of the opinion is to help the underwriters or dealer managers meet their due diligence obligations under Section 11 of the Securities Act of 1933. The opinion letter typically covers three categories of opinions: (a) Those dealing with the registration statement; (b) those dealing with the binding nature of the underwriting or dealer manager agreement; and (c) those dealing with the other matters referenced in subsection 11(a) above.

The part dealing with the registration statement usually has four components. The first component addresses whether the registration statement and prospectus comply as to form with the Securities Act of 1933 and associated rules and regulations. This means not only that the registration statement has been filed in the correct form, but also that the opinion-giver has reviewed each of the items in the applicable form and determined that it is responsive. It also means that certain technical requirements have been complied with, e.g., that the prospectus is dated and that the signature requirements are fulfilled. The intent of the phrase "comply as to form" is intended to free the opinion-giver from passing on the substance of the material contained in the registration statement. In registration statements incorporating reports filed under the Securities and Exchange Act of 1934, this "complies as to form" opinion is often rendered with respect to the incorporated documents. The second component of the registration statement opinion is a statement that the opinion-giver has no reason to believe that there is an untrue statement of a material fact or omission of material fact necessary to make the statement not misleading. This assertion is intended to compliment the former opinion and to reach, by way of negative assurance, the substance of the registration statement. This component is discussed in greater detail in subsection iv, below. The third component calls for the opinion-giver to state that he or she does not know of any contracts or other documents required to be filed or described therein. It also often includes an opinion that counsel knows of no default in any material agreement. A fourth component may contain affirmative assurances with respect to specified portions of the registration statement.

In regard to the binding nature of the underwriting or dealer manager agreement, the opinion-giver typically will only opine that the agreement has been duly authorized, executed, and delivered by the issuer. There are three reasons for this: (1) it is customary practice; (2) there is some legal doubt as to the binding

nature of the indemnification provisions that are usually a part of an underwriting agreement; and (3) there are cases suggesting that if a prospectus is materially misleading, the underwriting contract cannot itself be binding.

iv. ***Negative Assurance "Non-Opinion."*** It is customary practice for underwriters to require that issuer's counsel provide them negative assurance regarding the disclosure in the registration statement and prospectus to help them establish a due diligence defense under Sections 11 and 12(a)(2) of the Securities Act of 1933. Negative assurance is not a legal opinion. Instead it is a statement of belief, unique to securities offerings, based on participation in the process of preparing, reviewing and revising the registration statement and prospectus. The practice is evolving such that, in many types of unregistered offerings such as 144A and Regulation S offerings, placement agents and financial intermediaries request negative assurance on the offering documents. They do so even though Section 11 and 12(a)(2) of the Securities Act of 1933 do not apply, to help them establish a defense to possible claims that might be brought pursuant to Rule 10(b)(5) under the Securities and Exchange Act of 1934. Also, dealer managers are increasingly requesting negative assurance in exchange offers and in cash tender offers if the process for preparing the disclosure document is comparable to that followed in a registered offering. The dealer manager's position is stronger on exchange offers (which involve the "purchase" of a new security rather than simply a sale for cash) but it is not uncommon for opinions to be rendered in tender offers too (although some firms have policies against rendering such opinions). In no instance should negative assurance be provided to the ultimate purchasers of securities; only to the underwriters or dealer managers. Because negative assurance is not a legal opinion, it is generally provided in a separate letter or in a separate unnumbered paragraph of the closing opinion letter.

v. Purchase agreements in Rule 144A or other unregistered offerings typically require legal opinions analogous to opinions required in registered offerings. Opinion items are omitted if irrelevant (e.g., there is no opinion that a registration statement has become effective) but other items may be added as appropriate (a "no required registration" opinion being the most typical example).

c. Other

i. Opinion letters delivered in regard to mergers, acquisitions, divestitures, and other commercial transactions typically include many of the opinions discussed in Section 11 of these guidelines.

Back Up Certification
Legal Opinion

I, _____, Assistant General Counsel of The XYZ Company, Inc., hereby certify that:

1. I have reviewed Section(s) _____of the draft distributed _____, 200__, of the _____between _____, as _____, and [the lenders named therein] OR [_____, as underwriter(s)];

2. Based on my knowledge, those representations and warranties contained in the named portion of the draft are true and correct as stated therein;

3. In my review of this report I have taken into account my areas of responsibility in The XYZ Company, Inc. (the "Company") as Assistant General Counsel; and

4. I confirm further that I will promptly advise the General Counsel of the Company if any matters subsequently come to my attention that would have made the representations and warranties incorrect when made.

Date: _____

_____
Name: _____
Title: Assistant General Counsel

FORM LEGAL OPINION: CREDIT AGREEMENTS

[*Letterhead of Issuing Counsel*]

[*date*]

To the Parties Listed on Schedule A hereto:

Re: [*brief transaction description*]

Ladies and Gentlemen:

I am [*issuing counsel's title (e.g. General Counsel)*] of [The XYZ Companies, Inc. *or XYZ subsidiary*] (the "Company") and have acted as counsel to the Company in connection with the [_____ Agreement] dated [_____, 20__], among the Company and [*name counterparties*] (the "Agreement"). [*Add definitions of other agreements covered by the opinion, if necessary.*] This opinion is furnished to you at the request of the Company pursuant to Section _____ of the Agreement. Terms defined in the Agreement not otherwise defined herein are used herein as therein defined.

In connection with this opinion, I or other attorneys acting under my supervision have (i) investigated such questions of law, (ii) examined such corporate documents and records of the Company and certificates of public officials, and (iii) received such information from officers and representatives of the Company and made such investigations as I or other attorneys under my supervision have deemed necessary or appropriate for the purposes of this opinion. As to certain matters of fact material to the opinions expressed herein, I have relied on the representations made in the Agreement, certificates of officers of the Company or certificates from public officials or others. I have not, nor have other attorneys under my supervision, conducted independent investigations or inquiries to determine the existence of matters, actions, proceedings, items, documents, facts, judgments, decrees, franchises, certificates, permits, or the like and have made no independent search of the records of any court, arbitrator, or governmental authority affecting any person, and no inference as to my knowledge thereof shall be drawn from the fact of my representation of any party or otherwise.

In rendering the opinions herein, I have with your permission and without independent verification assumed the legal capacity of all natural persons executing documents, the genuineness of all signatures, the authenticity of all documents submitted to me as originals and the conformity to authentic original documents of all documents submitted to me as certified, conformed or reproduction copies. [In making my examination of documents executed by parties other than the Company, I have assumed that such parties had the power, corporate or other, to enter into and perform all obligations thereunder and have also assumed the due authorization by all requisite action, corporate or other, and the due execution and delivery by such parties of such documents and the validity and binding effect thereof as to such parties. As to any facts material to the opinions expressed herein which I did not independently establish or verify, I have relied upon statements and representations of representatives of the Company, or upon the representations of the Company made in the Agreement.]

Based upon and subject to the foregoing and the other qualifications, limitations, and assumptions set forth below and upon such other matters as I have deemed appropriate, I am of the opinion that:

1. The Company is a corporation duly [formed], validly existing, and in good standing under the laws of the State of Delaware. The Company is qualified as a foreign corporation and in good standing under the laws [*preferred option*: list states relevant to transaction and in which the opinion-giver is admitted][*second alternative*: of each jurisdiction where its ownership, lease or operation of property or the conduct of its business require such qualification, except to the extent that a failure to so qualify or be in good standing would not, in the aggregate, result in a material adverse effect on the Company's performance of its obligations under the Agreement].

2. The Agreement has been duly and validly executed and delivered by the Company and such execution, delivery, and performance by the Company of the Agreement (a) have been duly authorized by all necessary corporate action of the Company, (b) are within the corporate power and authority of the Company, and (c) do not contravene the Certificate of Incorporation or Bylaws of the Company.

3. The execution, delivery, and performance by the Company of the Agreement (a) do not contravene any [*insert state where the opinion-giver is admitted*] or United States law, rule or regulation applicable to the Company, and (b) based solely on a review of the documents identified to me in an officer's certificate as constituting all material contracts of the Company, which are listed in Schedule __ hereto, [*or*: review of exhibits to the Company's Report on Form 10-K for the year ended ____ (and any subsequent report on Form 10-Q (collectively, "Material Contracts")] do not result in the breach of, or constitute a default under, any material contract to which the Company is a party or by which the Company is bound, except as would not have a material adverse effect on the Company's performance of its obligations under the Agreement.

4. [Assuming that the Agreement is a valid and legally binding obligation of the other parties thereto, the Agreement constitutes the valid and binding obligation of the Company, enforceable in accordance with its terms.]

5. No authorization, consent, approval, license, permission or registration of or with any governmental authority of [*insert state where opinion-giver is admitted*] or the United States [or, to my knowledge, any other person or entity under any material contract], which has not been obtained and is not in full force and effect, is required in connection with the execution, delivery and performance by the Company of the Agreement, except [for filings required for the perfection of liens and] to the extent that a failure to obtain such would not, in the aggregate, result in a material adverse effect on the Company's performance of its obligations under the Agreement.

6. To my knowledge, there is no action, suit or proceeding pending or threatened against the Company before any court or arbitrator or any governmental body, agency (a) with respect to the Agreement[, or (b) except as set forth in the Public Filings, as defined below, or as disclosed in the Agreement [*or if applicable, an attachment thereto*]. As used in this paragraph, "Public Filings" means all documents which the Company has filed pursuant to Sections 13, 14, or 15(d) of the Securities and Exchange Act of 1934 on or prior to the date of this opinion].

7. Neither the Company nor any of its Subsidiaries is required to be registered as an "investment company" within the meaning of the Investment Company Act of 1940, as amended. None of the execution, delivery or performance of any of the Credit Documents violates either of Regulations U and X of the Board of Governors of the Federal Reserve System.

The opinions expressed in this letter are subject to the following additional exceptions, qualifications and limitations:

A. My opinion in paragraph 1 with respect to whether the Company is duly [organized/formed], validly existing, qualified, and in good standing is based solely on a certificate[s], dated as of [_____, 20__] from the Secretary of State of the States of [Delaware] [list other states regarding good standing], certifying as to such matters.

B. My opinions in paragraph 4 are subject, insofar as enforceability is concerned, to the effect of any applicable bankruptcy, insolvency, reorganization, Section 548 of the United States Bankruptcy Code, Title 11, U.S.C., Article 10 of the New York Debtor and Creditor Law or any other law dealing with fraudulent transfer or conveyance, moratorium, or similar law affecting creditors' rights and remedies generally, and general principles of equity including the possible unavailability of specific performance, injunctive relief or any other equitable remedy, principles of materiality, commercial reasonableness, good faith, and fair dealing (regardless of whether considered in a proceeding in equity or at law).

C. [I express no opinion in paragraph 4 with respect to the enforceability of any of the following: (i) indemnification provisions to the extent the same are violative of federal or state securities laws, rules, or regulations, or of public policy, (ii) clauses relating to recovery of attorneys' fees in connection with the enforcement of obligations, (iii) clauses relating to release of unmatured claims and integration clauses to the effect that no representation was made other than as appears in the Agreement, (iv) clauses purporting to waive unmatured rights, representations, warranties, or affirmative or negative covenants to the extent such representations, warranties, or covenants can be construed to be independent clauses which purport to be legal, valid, binding, and enforceable by themselves, as distinguished from being clauses that trigger an event of default, and severability and similar clauses, (v) clauses relating to rights of set-off or subrogation rights (or the waiver thereof), (vi) clauses that purport to establish evidentiary standards for suits or proceedings to enforce such document or otherwise, to establish or negate applicable rules of construction based upon participation in negotiations or document preparation, to permit the administrative agent or any lender to act in its sole discretion or to waive a right to a jury trial or service of process; (vii) clauses requiring indemnification or reimbursement of any person in respect of negligence, willful misconduct or unlawful behavior, (viii) clauses that purport to limit the liability of or exculpate any person, (ix) clauses that contain any agreement to agree or purport to bind non-parties, (x) clauses that purport to require that all amendments, waivers, and terminations be in writing or to require disregard of any course of dealing between the parties, (xi) clauses that purport to waive the right to assert defenses, counterclaims or cross-claims, or the right to object to venue or to assert *forum non conveniens*, (xii) clauses that purport to waive notice of acceleration, (xiii) clauses that purport to render the obligation of any party absolute and unconditional regardless of the happening or existence of any event, occurrence or other state of facts, (xiv) clauses that purport to ratify future acts, (xv) clauses relating to severability or separability, (xvi) clauses that purport to confer subject matter jurisdiction in respect of bringing suit, enforcement of judgments or otherwise on any court, to the extent that such court does not have such jurisdiction, (xvii) clauses that purport to restore the parties to their former positions, (xviii) liquidated damages clauses, and (xix) the effect on the enforceability of any guaranty against any guarantor or other surety of any facts or circumstances that would constitute a defense to the obligation of a surety, unless such defense has been effectively waived by such guarantor or other surety.]

E. I express no opinion as to the effect on the opinions herein stated of compliance or non-compliance by any [lender] with any applicable state, federal, or other laws or regulations applying only to banks or other lenders, or the legal or regulatory status of any lender.

F. My opinion in paragraph 4 assumes application of [*list relevant state(s)*] law would not be found to be contrary to a fundamental policy of a state with a materially greater interest in determining the question presented and the laws of which would govern in absence of an effective choice of law.

G. Qualification of any statement or opinion herein by the use of the words "to my knowledge" means that during the course of representation in connection with the transactions contemplated by the Agreement, no information has come to the attention of me or attorneys reporting to me that would give me or such attorneys current actual knowledge of the existence of facts or matters so qualified. I have not undertaken any investigation to determine the existence of facts, and no inference as to my knowledge thereof shall be drawn from the fact of the representation by me or attorneys reporting to me of any party or otherwise.

H. The opinions herein expressed are limited to the matters expressly set forth in this opinion letter, and no opinion is implied or may be inferred beyond the matters expressly so stated.

I. Without limiting the generality of and subject to the paragraph below, in rendering my opinions herein I have considered only those laws, statutes, rules and regulations that, in my experience, are customarily applicable to transactions of the character contemplated by the Agreement.

J. For purposes of the opinion in paragraph __ dealing with Regulations U and X, I have assumed without independent investigation that the representation and warranty of the Company set forth in Section __ of the Agreement is and will be true and correct at all relevant times. [*If the Agreement does not have a representation or covenant negating the possibility of "purpose credit" then additional assumptions negating the possibility of direct or indirect security may be needed.*]

K. In rendering my opinion expressed in paragraph 3 insofar as it requires interpretation of Material Contracts, I express no opinion with respect the compliance of the Company with, or any financial calculations or data in respect of, financial covenants included in any Material Contract.

L. In rendering my opinions in paragraph 3 and 5, I render no opinion regarding the federal or state securities or blue sky laws or regulations.

I am admitted to practice law in the State[s] of [*list relevant state or states*], and, accordingly, the opinions expressed herein are based upon and limited exclusively to the laws of such state[s], the General Corporation Law of the State of Delaware and the laws of the United States of America insofar as any of such laws are applicable. I render no opinion with respect to any other laws.

This opinion letter is solely for the benefit of the [*list counterparties*], in consummating the transaction contemplated by the Agreement, and may not be used or relied upon by any other person or for any other purpose whatsoever without in each instance my prior written consent. The [*list counterparties*] may not furnish this opinion or copies hereof to any other person except to (i) regulatory authorities upon request, (ii) independent auditors and attorneys of [*list counterparties*], (iii) in connection with any legal actions arising out of the transactions contemplated by the Agreement, (iv) pursuant to order or legal process of any court or governmental authority or (v) to successors, assigns, participants and other transferees. This opinion may not be quoted without my prior written consent. This opinion speaks as of its date, and I undertake no, and hereby expressly disclaim any, duty to advise you or any other person entitled to rely hereon as to any changes of fact or law coming to my attention after the date hereof.

Very truly yours,

FORM LEGAL OPINION: SECURITIES

[LETTERHEAD OF ISSUING COUNSEL]

[Date]

[Name and Address(es) of underwriter(s) or dealer manager(s)]

Re: [*Brief transaction description*]

Ladies and Gentlemen:

I am [*issuing counsel's title (e.g. General Counsel)*] of [The XYZ Companies, Inc., or XYZ subsidiary] (the "Company"), and in such capacity I am charged with general supervisory responsibilities for the legal affairs of the Company and its subsidiaries. I am furnishing this opinion letter to you at the request of the Company, pursuant to Section [_____ of the Underwriting Agreement, dated as of _____ (the "Underwriting Agreement")], among the Company and the [Underwriters] named in Schedule I thereto (the ["Underwriters"]), in connection with the consummation of the sale by the Company to the Underwriters of $_____ aggregate principal amount of the Company's [*describe securities*] (the "Securities"). The Securities are being sold pursuant to the [Underwriting Agreement] and issued pursuant to the [senior indenture], dated as of _____ between the Company and _____, as trustee (the "Trustee") and (such indenture so amended and supplemented is herein referred to as the "_____"). Capitalized terms used but not defined herein have the respective meanings given to such terms in the [Underwriting Agreement.]

In connection with this opinion, I, or attorneys under my supervision, have examined and are familiar with originals or copies, certified or otherwise identified to my satisfaction, of [*list documents reviewed*]:

(i) the prospectus;

(ii) the registration statement;

(iii) an executed copy of the indenture;

(iv) a specimen of the certificate representing the Securities;

(v) an executed copy of the Underwriting Agreement;

(vi) the certificate of incorporation of the Company and all amendments thereto, as presently in effect (the "Certificate of Incorporation");

(vii) the bylaws of the Company and all amendments thereto, as presently in effect (the "Bylaws");

(viii) certain resolutions adopted by the board of directors of the Company relating to the issuance and sale of the Securities and related matters;

(ix) the Company's Annual Report on Form 10-K for the fiscal year ended _____;

(x) the Company's Quarterly Reports on Form 10-Q for the fiscal quarters ended _____; and

(xi) the Company's Current Reports on Form 8-K filed _____.

In connection with this opinion, I or other attorneys acting under my supervision have (i) investigated such questions of law, (ii) examined such corporate documents and records of the Company and certificates of public officials, and (iii) received such information from officers and representatives of the Company and made such investigations as I or other attorneys under my supervision have deemed necessary or appropriate for the purposes of this opinion. Except as otherwise expressly stated below, I have not, nor have other attorneys under my supervision, conducted independent investigations or inquiries to determine the existence of matters, actions, proceedings, items, documents, facts, judgments, decrees, franchises, certificates, permits, or the like and have made no independent search of the records of any court, arbitrator, or governmental authority affecting any person, and no inference as to my knowledge thereof shall be drawn from the fact of my representation of any party or otherwise.

In my examination, I have with your permission assumed without independent verification the legal capacity of all natural persons, the genuineness of all signatures, the authenticity and completeness of all documents submitted to me as originals, the conformity to original documents of all documents submitted to me or attorneys under my supervision, as certified, conformed or photostatic copies and the authenticity of the originals of such latter documents. In making my examination of documents executed by parties other than the Company, I have assumed that such parties had the power, corporate or other, to enter into and perform all obligations thereunder and have also assumed the due authorization by all requisite action, corporate or other, and the due execution and delivery by such parties of such documents and the validity and binding effect thereof as to such parties. As to any facts material to the opinions expressed herein which I did not independently establish or verify, I have relied upon certificates of officers of the Company or

certificates from public officials or others, or upon the representations of the Company made in the [Underwriting Agreement].

I am a member of the bar of the State[s] of [*list relevant state of states*] and for purposes of this opinion do not express any opinion as to the laws of any jurisdiction other than (i) to the extent applicable, if at all, the laws of the State[s] of [*repeat states listed above*], (ii) the General Corporation Law of the State of Delaware and (iii) the laws of the United States of America [(including any Federal statute law, rule or regulation relating to the operation or conduct of energy industry businesses, including regulations and orders of the Federal Energy Regulatory Commission)].

(a) Qualification of any statement or opinion herein by the use of the words "to my knowledge" means that no information has come to my attention or to the attention of attorneys reporting to me that would give me or such attorneys current actual knowledge of facts contrary to the existence or absence of facts or matters indicated.

(b) I express no opinion as to the effect on the opinions herein stated of compliance or non-compliance by the [Underwriters] with any applicable state, federal, or other laws or regulations applying only to banks or similar institutions, or the legal or regulatory status of the [Underwriters.]

(c) The opinions herein expressed are limited to the matters expressly set forth in this opinion letter, and no opinion is implied or may be inferred beyond the matters expressly so stated.

(d) Without limiting the generality of and subject to the paragraph below, in rendering my opinions herein I have considered only those laws, statutes, rules and regulations that, in my experience, are customarily applicable to transactions of the character contemplated by the [Underwriting Agreement] and the registration statement.

Based upon and subject to the foregoing and to the other qualifications and limitations set forth in this letter, I am of the opinion that:

1. The Company [and each of its significant subsidiaries] have been duly incorporated or otherwise validly formed and are validly existing in good standing under the laws of their respective jurisdictions of formation or incorporation, have the requisite power and authority to own their property and to conduct their business as described in the prospectus and are duly qualified to do business and are in good standing laws [*preferred option: list states relevant to transaction and in which the opinion-giver is admitted*][*second alternative:* of each jurisdiction where its ownership, lease or operation of property or the conduct of its business require such qualification, except to the extent that a failure to so qualify or be in good standing would not, in the aggregate, result in a material adverse effect on the Company's performance of its obligations under the Agreement]and all of the issued shares of capital stock of each significant subsidiary that is a corporation have been duly and validly authorized and issued, are fully paid, and non-assessable and are owned of record directly or indirectly by the Company free and clear of all liens, encumbrances, equities or claims.

2. Each of the [Underwriting Agreement], the indenture and the Securities have been duly authorized, executed, and delivered by the Company;

3. The company shares have been duly authorized for issuance and conform to the description thereof contained in the prospectus. When any company shares are issued and delivered by the Company as provided in the offer material, such company shares will be validly issued, fully paid and nonassessable, and the stockholders of the Company have no preemptive rights with respect to the company shares.

4. To my knowledge, there are no contracts, agreements or understandings between the Company and any person granting such person the right to require the Company to file a registration statement under the Securities Act of 1933 with respect to any securities of the Company owned or to be owned by such person or to require the Company to include such securities in the securities registered pursuant to the registration statement or in any securities being registered pursuant to any other registration statement filed by the Company under the Securities Act of 1933.

5. The execution, delivery, and performance by the Company of the [Underwriting Agreement, the Securities, and the indenture] (a) do not contravene the Certificate of Incorporation or Bylaws of the Company, (b) any [*insert state where the opinion-giver is admitted*] or United States law, rule or regulation applicable to the Company, and (c) based solely on a review of the documents identified to me in an officer's certificate as constituting all material contracts of the Company, which are listed in Schedule __ hereto, [*or*: review of exhibits to the Company's Report on Form 10-K for the year ended ____ (and any subsequent report on Form 10-Q (collectively, "Material Contracts")] do not result in the breach of, or constitute a default under, any material contract to which the Company is a party or by which the Company is bound, except as would not have a material adverse effect on the Company's performance of its obligations under the [Underwriting Agreement, the Securities, and the indenture]. This paragraph 5 does not include any opinion regarding any federal or state securities or blue sky laws or regulations;

6. To my knowledge, the Company has filed all documents with the Commission that it is required file from and after January 1, [ ] under the Securities and Exchange Act of 1934;

7. There is no pending, or, to my knowledge, threatened action, suit or proceeding by or before any court or governmental agency, authority or body or any arbitrator involving the Company or any of its subsidiaries or its or their property, of a character required to be disclosed in the Registration Statement which is not adequately disclosed in the Final Prospectus, and there is no franchise, contract or other document of a character required to be described in the Registration Statement or Final Prospectus, or to be filed as an exhibit thereto, which is not described or filed as required; and the statements included or incorporated by reference in the Final Prospectus; and

I, or attorneys under my supervision have participated in conferences with officers and other representatives of the Company, the Company's outside counsel, representatives of the independent auditors for the Company, your representatives and your counsel at which the contents of the registration statement and the prospectus and related matters were discussed and, although I am not passing upon, and do not assume any responsibility for, the accuracy, completeness or fairness of the statements contained or incorporated by reference in the registration statement or the prospectus, on

the basis of the foregoing, no facts have come to my attention that have led me to believe that (a) the registration statement and the prospectus (in each case excluding (x) the incorporated documents and (y) the Trustee's Statement of Eligibility on Form T-1 (as to which I express no opinion)), as amended or supplemented, if applicable, did not comply as to form, when filed, in all material respects with the requirements of the Securities Act of 1933 and the rules and regulations of the commission thereunder, (b) the incorporated documents did not comply as to form, when filed, in all material respects with the requirements of the Securities Exchange Act of 1934 and the rules and regulations of the commission thereunder, (c) the registration statement, on the date of the [Underwriting Agreement], contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or to make the statements therein not misleading, or (d) the prospectus, as amended or supplemented, if applicable, as of its date or as of the date hereof, contained or contains any untrue statement of a material fact or omitted or omits to state a material fact necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading, except that with respect to each of clauses (a)-(d), I do not express an opinion or belief with respect to the financial statements, schedules and other financial and accounting data and the proved reserve estimates included or incorporated by reference in the registration statement, the prospectus or the Schedule TO.

In addition, I have been advised by the staff of the Securities Exchange Commission ("Commission") that the registration statement has been declared effective under the Securities Act of 1933 by the Commission and the indenture qualified under the Trust Indenture Act of 1939, as amended.

In addition, I believe that the statements in the prospectus incorporated by reference from (A) Item 3 of Part I of the Company's Annual Report on Form 10-K for the fiscal year ended December 31, [ ] (B) Item 1 of Part II of the Company's Quarterly Reports on Form 10-Q for the fiscal quarters ended [ ] and (C) Item 5 (or Item 8.01 with respect to reports filed on or after [ ] of the Company's current reports on Form 8-K, if any, filed since such annual report, insofar as such statements constitute summaries of legal matters and proceedings, present in all material respects an accurate summary of such legal matters or proceedings.

This opinion letter is being furnished only to you in connection with the sale of the Securities under the [Underwriting Agreement] occurring today and is solely for your benefit and is not to be used, circulated, quoted or otherwise referred to for any other purpose or relied upon by any other person, including any purchaser of any Securities from you, for any other purpose, without my prior written consent. The opinions expressed herein are as of the date hereof only and are based on laws, orders, contract terms and provisions, and facts as of such date, and I disclaim any obligation to update this opinion letter after such date or to advise you of changes of facts stated or assumed herein or any subsequent changes in applicable law.

Very truly yours,

Example Support Memorandum for Opinion File

THE SMITH COMPANIES, INC.
Interoffice Memorandum

TO: Opinion File

FROM: Jane Doe

DATE: January 1, 2000

RE: Diligence for John Doe's legal opinion for the XYZ transactions

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I performed due diligence for the distinct statements, (*i*) through (*v*), that you requested for John Doe's opinion to be delivered at closing of the XYZ transactions.

(i) Each of AAA and XYZ LLC has been duly formed and is validly existing in good standing as a limited liability company under the Delaware LLC Act, is duly registered or qualified to do business and is in good standing as a foreign limited liability company under the laws of the jurisdictions set forth on Annex I to this Agreement, except where the failure to so register or so qualify would not (A) reasonably be expected to have a Material Adverse Effect, or (B) subject the limited partners of the Partnership to any material liability or disability; and each such limited liability company has all requisite limited liability company power and authority necessary to own or hold its properties and to conduct the businesses in which it is engaged, in each case as described in the most recent Preliminary Prospectus and the Prospectus.

ACTION TAKEN: In order to perform due diligence on the foregoing, I took the following actions: 1) a good standing certificate for both AAA and XYZ LLC was obtained from the Delaware Secretary of State, 2) the certificate of formation for both AAA and XYZ LLC was reviewed to ensure the existence of the entities, 3) the Delaware LLC Act was reviewed as of the date that the Certificate of Formation for each of AAA and XYZ LLC were filed to ensure that each entity complied with the relevant requirements if the Delaware LLC Act in effect as of such date, 4) the minute books of both AAA and XYZ LLC were reviewed to ensure the absence of pending amendments to the Certificates of Formation.

CONCLUSION: No matters were noted that would cause any concern in giving this opinion. No changes in the Delaware LLC Act addressed this matter.

Exhibits:

A. Good standing Certificate of AAA

B. Certificate of Formation of AAA

C. Good Standing Certificate of XYZ LLC

D. Certificate of Formation of XYZ LLC

E. Delaware LLC Act

(ii) On the First Delivery Date, and after giving effect to the Transactions, SFS Company will own a 74.9% limited liability company interest in XYZ LLC;

ACTION TAKEN: In order to perform diligence on the foregoing opinion, the following actions were taken: 1) the Amended and Restated Limited Liability Company Agreement of Smith XYZ LLC between Smith Floor Services Company LLC and Smith Partners Operating LLC was reviewed to confirm ownership, 2) the minute book of XYZ LLC was reviewed to determine whether there are any claims against the interest.

CONCLUSION: Schedule 3.1 of the agreement confirms that SFS Company will own a 74.9% interest in XYZ LLC. No matters were noted in the agreement or the minute books that would cause any concern in giving this opinion.

Exhibits: R. Amended and Restated Limited Liability Company Agreement of Smith XYZ LLC between Smith Floor Services Company LLC and Smith Partners Operating LLC

such limited liability company interest has been duly authorized and validly issued in accordance with the XYZ LLC Agreement, and is fully paid (except as provided under the XYZ LLC Agreement) and non-assessable (except as such non-assessability may be affected by the XYZ LLC Agreement and Section 18-607 of the Delaware LLC Act); and

ACTION TAKEN: In order to perform diligence on the foregoing opinion, the following actions were taken: 1) the Amended and Restated Limited Liability Company Agreement of Smith XYZ LLC was reviewed, 2) the minute book was reviewed to locate any applicable subscription agreements or resolutions.

CONCLUSION: No matters were noted that would cause any concern in giving this opinion.

Exhibits: Exhibit R

SFS Company owns such limited liability company interest free and clear of all liens, encumbrances, security interests or claims (A) in respect of which a financing statement under the Uniform Commercial Code of the State of Delaware naming SFS Company as debtor is on file as of the date in such counsel's opinion with the Secretary of State of the State of Delaware, (B) in respect of which a financing statement under the Uniform Commercial Code of the State of Oklahoma naming SFS Company as debtor is on file as of the date in such counsel's opinion with the Oklahoma UCC Central Filing Office – Oklahoma County Clerk or (C) otherwise known to such counsel, without independent investigation, other than those created by or arising under the Delaware LLC Act or the XYZ LLC Agreement.

ACTION TAKEN: In order to perform diligence on the foregoing opinion, the following actions were taken: 1) reviewed financing statements for SFS Company filed with the Delaware UCC Central Filing Office and the Oklahoma UCC Central filing office since August 1, 2005, 2) the minute books were reviewed to discover any claims against SFS Company's interest, for the dates August 1, 2005 to present.

CONCLUSION: No matters were noted that would cause any concern in giving this opinion.

Exhibits: S. Oklahoma UCC Financing statements for SFS Company

T. Delaware UCC Financing statements for SFS Company

(iii) Each of the Operative Agreements to which any of the Smith Entities, other than the Smith Parties, is a party has been duly authorized and validly executed and delivered by or on behalf of each of the Smith Entities party thereto.

ACTION TAKEN: In order to perform diligence on the foregoing opinion, the following actions were taken: 1) reviewed the Contribution, Conveyance and Assumption Agreement to determine the parties and signatories, 2) reviewed the minute books for such parties to identify resolutions or other action authorizing the execution of the agreement and to ensure that the signatories to the agreement were authorized to sign.

CONCLUSION: The parties to the agreement are Smith Floor Services Company LLC and Smith XYZ LLC. The signatory for Smith Floor Services Company LLC was Alex Anderson, Senior Vice President, and the signatory for Smith XYZ LLC was Alex Anderson, Senior Vice President. Alex Anderson is an authorized signatory for both companies. No matters were noted in the agreement or the minute books that would cause any concern in giving this opinion.

Exhibits: U. Contribution, Conveyance and Assumption Agreement by and Among Smith Floor Services Company LLC and Smith XYZ LLC

(iv) The offering, issuance and sale by the Partnership of the Units, the execution, delivery and performance by the Smith Entities of any of the Operative Agreements and the consummation of the transactions contemplated thereby will not result in: (A) a violation of the certificate of incorporation, bylaws, limited liability company agreement, limited partnership agreement or similar organizational document of any of the Smith Entities (other than the Smith Parties),

ACTION TAKEN: In order to perform diligence on the foregoing opinion, the following actions were taken: 1) I reviewed the certificate of incorporation, certificate of formation, bylaws, and any other organizational documents of the Smith Entities (other than the Smith Parties).

CONCLUSION: The Smith Entities (minus the Smith Parties) are The Smith Companies, Inc., Smith Discovery Property LLC, Smith Partners Holdings LLC, Smith Engineering LLC, Smith Engineering Services

LLC, SFS Group, and SFS Company. No applicable provisions that might impact or prohibit any of the primary objectives of the master limited partnership transaction were found.

Exhibits:

V. Certificate of Designation of The Smith Companies, Inc.

W. Smith Discovery Property LLC Documents: (Certificate of Amendment of Name, Second Amended Operating Agreement of Smith Discovery Property LLC, and Resolution of Smith Discovery Property LLC dated 8/17/2005)

X. Smith Partners Holding LLC Documents: (Certificate of Formation, Amended and Restated Limited Liability Company Agreement of Smith Partners Holding LLC, and Resolution of Smith Partners Holding LLC dated 8/17/2005)

Y. Smith Engineering LLC Documents: (Certificate of Amendment of Name, Operating Agreement of Smith Engineering LLC, and Resolution of Smith Engineering LLC dated 8/17/2005)

Z. Smith Engineering Services LLC Documents: (Certificate of Formation, Amended and Restated Operating Agreement of Smith Engineering Services LLC, Resolution of Smith Engineering Services LLC dated 8/17/2005, and Resolution of Smith Engineering Services LLC dated 4/21/2006)

(B) a breach or violation of any of the terms or provisions of, or constitute a default under, any indenture, mortgage, deed of trust, loan agreement or other agreement or instrument to or by which any of the Smith Entities (other than the Smith Parties) is bound or to which any of the property or assets of any of the Smith Entities (other than the Smith Parties), is subject, or

ACTION TAKEN: Rick Scott performed a noncontravention analysis regarding covenants in debt agreements. Other agreements are supported by representations from Greg Raines and Tom Gray.

CONCLUSION: At the TLC level, all indentures and similar instruments (e.g., those under the Synthetic Letter of Credit facilities) contain investment-grade covenant packages. Of the covenants contained in such agreements, only the restrictions on secured debt have potential noncontravention impact. However, the XYZ transactions do not include secured debt, so they do not conflict with such restrictions.

The only bank facility at the TLC level is the $1.5 billion revolving credit facility, of which Smith Partners is a party. The credit agreement was structured such that the restrictive covenants do not apply to Smith Partners. Consequently, nothing occurring in the XYZ transactions conflicts with the credit agreement.

Covenants in the debt agreements of the Smith subsidiaries do not run to Smith or Smith Partners, so no conflict with the XYZ transactions exists.

Although they did not deliver a legal opinion, White Jones & Gibson reviewed the XYZ transaction as set forth in the S-1 and the relevant Smith agreements. According to Jim Henry, they found no potential conflicts issues.

Exhibits:

AA. Back Up Certification Legal Opinion of Tom Gray

BB. Back Up Certification Legal Opinion of Greg Raines

(C) any violation of any order, rule or regulation of any court or governmental agency or body having jurisdiction over any of the Smith Entities (other than the Smith Parties) or any of their properties or assets, except as described in the Prospectus and any such conflicts, breaches, violations or defaults that would not have a Material Adverse Effect.

ACTION TAKEN: This statement is supported by representations from Greg Raines and Tom Gray.

Exhibits:

AA. Back Up Certification Legal Opinion of Tom Gray

BB. Back Up Certification Legal Opinion of Greg Raines

(v) Except as described in the Prospectus or the Partnership Agreement, there are no contracts, agreements or understandings between the any of the Smith Entities and any person granting such person the right to require the Partnership to file a registration statement under the Securities Act with respect to any securities of the Partnership Entities owned or to be owned by such person or to require the Partnership to include such securities in the Units registered pursuant to the Registration Statement or in any securities being registered pursuant to any other registration statement filed by any of the Partnership Entities under the Securities Act.

ACTION TAKEN: This statement is supported by representations from Greg Raines and Tom Gray.

Exhibits:

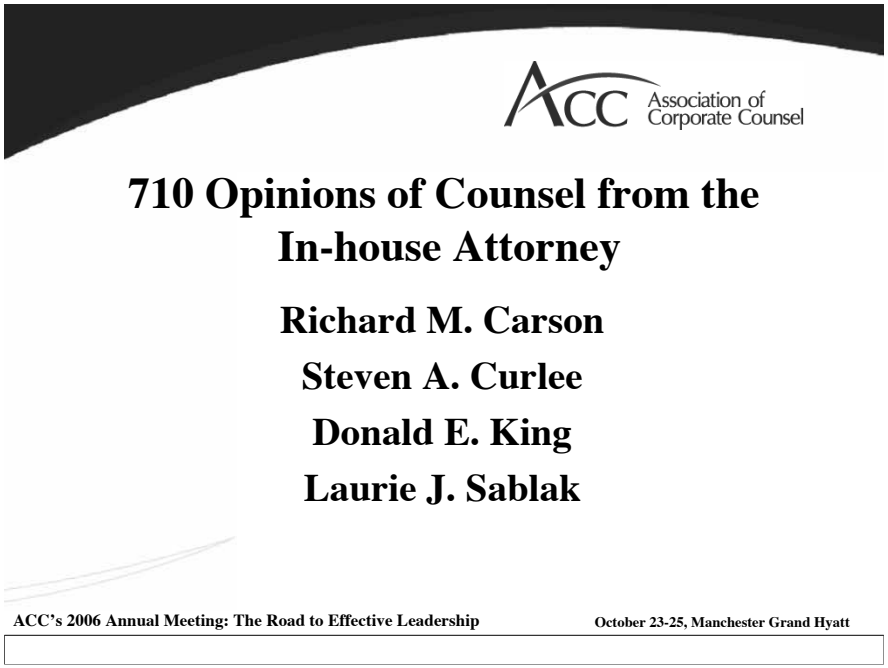
AA. Back Up Certification Legal Opinion of Tom Gray

BB. Back Up Certification Legal Opinion of Greg Raines

(vi) To such counsel's knowledge, other than as set forth in the Prospectus, there are no legal or governmental proceedings pending to which any of the Partnership Entities is a party or to which any property or assets of any of the Partnership Entities is the subject which, if determined adversely to such Partnership Entity, might (A) reasonably be expected to have a Material Adverse Effect, or (B) subject the limited partners of the Partnership to any material liability or disability; and, to such counsel's knowledge, no such proceedings are threatened or contemplated by governmental authorities or by others.

ACTION TAKEN: This statement is supported by representations from Greg Raines and Tom Gray.

Exhibits:
AA. Back Up Certification Legal Opinion of Tom Gray
BB. Back Up Certification Legal Opinion of Greg Raines



What is more likely to create liability?

A. An opinion on the enforceability of a merger agreement.
B. A tax opinion.
C. An audit opinion that omits or incorrectly describes a loss contingency.

Audit opinion letters often have deadlines.

- Sometimes the deadlines don't matter.
- Sometimes the letter is holding up a billion dollar closing!

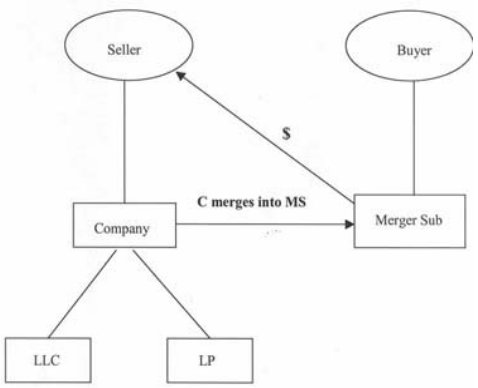
When your client request's an immediate letter to its auditor, what should you do?

A. Reprint last year's letter with today's date.
B. Dash off what the auditor's ask for, ASAP.
C. Carefully follow established procedures.

Use a good standard form.

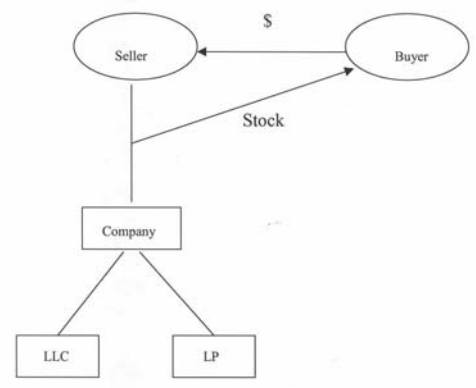
A. Expressly decline to give information about unasserted claims.
B. Use brief descriptions of loss contingencies.
C. Do not predict the outcome of a pending matter.
D. Use all of the good boiler plate from the ABA Statement of Policy.

Merger Opinions



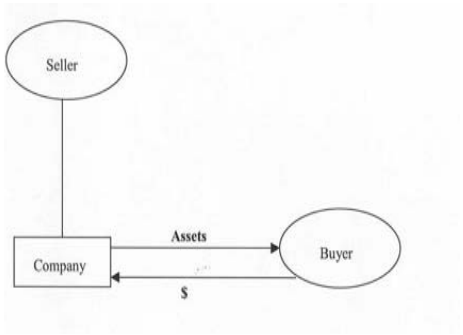
1. Organizational Status
2. Power and Authority
3. Execution, Validity and Enforceability
4. Non-contravention
5. Governmental Approvals
6. Proceedings
7. Ownership of Shares
8. Merger Effective

Sale of Stock Opinions



1. Organizational Status
2. Power and Authority
3. Execution, Validity and Enforceability
4. Non-contravention
5. Governmental Approvals
6. Proceedings
7. Ownership of Shares

Sale of Assets Opinions



1. Organizational Status
2. Power and Authority
3. Execution, Validity and Enforceability
4. Non-contravention
5. Governmental Approvals
6. Proceedings

You may want to use headings.

1. **Documents Reviewed**
2. **Assumptions Underlying Our Opinions**
3. **Our Opinions**
4. **Exclusions**
5. **Qualifications and Limitation**
6. **Reliance on Opinions**

- To make the opinions easier to understand.
- That is good in the case of your own lawyers and usually, but not always, good in the case of opposing counsel.

1. Documents Reviewed

Transaction Documents
Organizational Documents
Good Standing Certificates
Reviewed Agreements
Other Documents, as needed

In connection with this opinion letter, we have examined the following documents:

(a) the Agreement;
(b) the [Employment Agreement(s)];
(c) the [Non-competition Agreement(s)];
(d) the [Escrow Agreement];
(e) the [Tax Agreement];

- These are the "Transaction Documents."
- Be careful about what you include on this list.
- The opinion is mostly about these documents

(f) the certificate of incorporation, bylaws and board of directors resolutions, certificate of organization, operating agreement and members' consent, or certificate of limited partnership, limited partnership agreement and consent of general partner, as the case may be, of the Seller and each Acquired Company (the "Organizational Documents")

- The Organizational Documents are the foundation for the opinions on
  - Power and Authority
  - Execution, Validity and Enforceability
  - Non-Contravention (in part)

(g) with respect to the Seller and each Acquired Company, a certificate issued by the [Secretary of State] or other appropriate official of the state of organization of such party attesting to the continued existence and good standing of such party in such state (the "Good Standing Certificates")

- Good Standing Certificates" are for the Organizational Status opinion

(h) the agreements and instruments identified in Section [_____] of the Agreement (the "Reviewed Agreements")

- "Reviewed Agreements" are often the Company's material contracts with third parties.
- Limit them to a specific list.
- The non-contravention opinion normally says that none of the Reviewed Agreements are breached by the deal.
- That may be the hardest opinion to give of any in the letter.

(i) such other records, documents and other instruments as we have deemed necessary for the purposes of this opinion letter.

- This catchall lets you avoid listing everything that you review.
- It also lets you avoid reviewing documents that are inconsequential to the opinion without explicitly declaring that the documents are not being reviewed.

2. Assumptions Underlying Our Opinions

(a) Factual Matters. With regard to factual matters, to the extent that we have reviewed and relied upon (i) certificates of the Seller and each Acquired Company or their authorized representatives, (ii) representations of the Seller and each Acquired Company set forth in the Transaction Documents and (iii) certificates and assurances from public officials, all of such certificates, representations and assurances are accurate;

- This lets you rely on the reps, warranties and certificates of your client and public officials.

(b) Contrary Knowledge of Addressee. No addressee of this opinion letter has any actual knowledge that any of our factual assumptions or opinions is inaccurate;

- This protects you from being sandbagged by problems the Buyer may know about and doesn't reveal.

(c) Signatures. The signatures of individuals signing the Transaction Documents are genuine and (other than of individuals signing on behalf of the Seller or any of the Acquired Companies) authorized;

- If you can't get this assumption and you do not know the person signing for your client, get a certificate signed by someone you do know with specimen signatures of the other signers.

(d) Authentic and Conforming Documents. All documents submitted to us as originals are authentic, complete and accurate, and all documents submitted to us as copies conform to authentic original documents;

(e) Capacity of Certain Parties. All parties to the Transaction Documents (other than the Seller and the Acquired Companies) have the capacity and full power and authority to execute, deliver and perform the Transaction Documents and the documents required or permitted to be delivered and performed thereunder;

(f) Transaction Documents Binding on Certain Parties. Except with respect to the Seller and the Acquired Companies, all of the Transaction Documents and the documents required or permitted to be delivered thereunder have been duly authorized by all necessary corporate or other action on the part of the parties thereto, have been duly executed and delivered by such parties and are valid and binding obligations enforceable against such parties in accordance with their terms;

(g) Consents for Certain Parties. All necessary consents, authorizations, approvals, permits or certificates (governmental and otherwise) which are required as a condition to the execution and delivery of the Transaction Documents by the parties thereto (other than the Seller and the Acquired Companies) and to the consummation by such parties of the transactions contemplated thereby have been obtained; and

(h) Accurate Description of Parties' Understanding. The Transaction Documents accurately describe and contain the mutual understanding of the parties, and there are no oral or written statements or agreements that modify, amend or vary, or purport to modify, amend or vary, any of the terms thereof.

- These are important assumptions but should not be controversial.

3. Our Opinions.

Based on and subject to the foregoing and the other limitations, assumptions, qualifications and exclusions set forth in this opinion letter, we are of the opinion that:

(a) Organizational Status. Based solely upon the Good Standing Certificates, the Seller and each of the Acquired Companies is validly existing [and in good standing] under the laws of its jurisdiction of organization as of the date set forth in the applicable Good Standing Certificate.

- Notice how narrow this opinion is. New York banks accept it, so it should be good enough for everybody.
- You will often be asked to say that the selling parties:
  - Are "duly incorporated" or "duly organized"
  - Are "qualified to do business" everywhere that they need to be
- Don't do it. Stick to what you can tie to a certificate.

(b) Power and Authority. The Seller and each of the Acquired Companies has the organizational power and authority to execute, deliver and perform the terms and provisions of each Transaction Document to which it is party and has taken all necessary organizational action to authorize the execution, delivery and performance thereof.

- You must review the Organizational Documents carefully to give this opinion.
- You must have proper resolutions from directors, managers, shareholders, members or partners that refer to the transaction specifically and in sufficient detail.
- Be sure there are no special restrictions in the charter, bylaws or other Organizational Documents.
- Be sure that special statutory requirements have been met; e.g., in some states a significant transaction needs approval of a supermajority of shares eligible to vote.
- If asked to insert "full" as a modifier of "power and authority" say no; the meaning of "full" is unclear.

(c) Execution, Validity and Enforceability. The Seller and each of the Acquired Companies has duly executed and delivered each Transaction Document to which it is party, and each such Transaction Document constitutes the valid, binding and enforceable obligation of such party.

- This opinion is aided greatly by the assumptions and qualifications elsewhere in the letter.
- You should have a resolution that authorizes the signing persons.
- You should have a certificate that authenticates the signatures of such persons if genuineness has not been assumed.
- The Transactions Documents must have been delivered. If they are in escrow, the opinion should be in escrow.
- "Valid, binding and enforceable" are the terms of art in contemporary practice. These terms are qualified elsewhere in the opinion. Do not try to qualify them here.
- Do not add "legal" to the list. Legality is covered by the non-contravention opinion that follows.

(d) Noncontravention. Neither the execution, delivery and performance by the Seller or any of the Acquired Companies of any Transaction Document to which it is a party, nor the compliance by the Seller or any of the Acquired Companies with the terms and provisions thereof: (i) violates any present law, statute or regulation that, in each case, is applicable to such party; (ii) violates any provision of the Organizational Documents of such party; or (iii) results in any breach of any of the terms of, or constitutes a default under, any Reviewed Agreement.

- This opinion says that the transaction will not violate:
  - the law
  - our clients' Organizational Documents
  - any Reviewed Agreement
- You cannot give this opinion without the limitations and assumptions elsewhere in the letter.
- Try not to give (iii) and never expand it to cover more than a specific list of agreements and instruments.
- Do not opine that the selling parties are in compliance with laws generally.

(e) Governmental Approvals. [Except for the requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (to the extent applicable) and except as disclosed on Schedule [_____] of the Agreement], no consent, approval or authorization of, or filing with, any governmental authority that, in each case, is applicable to the Seller or any of the Acquired Companies is required for (i) the due execution, delivery and performance by the Seller or any of the Acquired Companies of any Transaction Document to which it is a party or (ii) the validity, binding effect or enforceability of any Transaction Document to which the Seller or any of the Acquired Companies is a party, except (A) in each case as have previously been made or obtained and (B) consents, approvals, authorizations or filings as may be required to be obtained or made by the Buyer or the Merger Subsidiary as a result of its involvement in the transactions contemplated by the Transaction Documents.

- This opinion is not always given. It is arguably covered by the non-contravention and enforceability opinions.
- Never give it for all governmental approvals needed for the selling parties to conduct business.

(f) Proceedings. To our knowledge, there is no outstanding judgment, action, suit or proceeding pending against the Seller or any Acquired Company before any court, governmental agency or arbitrator which challenges the legality, validity, binding effect or enforceability of any Transaction Document to which the Seller or such Acquired Company is a party.

- This opinion is limited by knowledge.
- It refers only to proceedings directed against the Transaction Documents.
- Do not give an opinion about proceedings generally.
- Avoid giving an opinion about "threatened" proceedings, although the knowledge limitation helps.
- Do not give up the knowledge limitation.

(g) Ownership of Shares. Based upon our review of the share ledger of the Company, the Seller is the record owner of all of the outstanding shares of the Company, free of any adverse claim.

- A much more expansive opinion will often be requested concerning capitalization of the Company, whether the shares are validly issued, fully paid and non-assessable and whether the Seller has good title to the shares free of liens and encumbrances. Resist.
- These are fundamentally factual matters that the Buyer can investigate as well as you can. On that basis, try to avoid the opinion altogether.
- Do not take on the burden of researching years of Company records to determine proper issuance of the shares.
- In a stock sale, you may be asked to give this additional sentence:
  - Upon consummation of the transactions contemplated by the Agreement, Buyer will acquire all right, title and interest of the Seller to such shares.
    - If asked to take out "of the Seller", resist.

(h) Merger. Based upon the certificate of merger issued by the [State][Commonwealth] of [Organizational Jurisdiction], the Merger has become effective under the laws of such jurisdiction.

- This is commonly requested in a merger transaction.
- Make sure that Buyer's counsel gives the same opinion.

4. Exclusions

We call your attention to the following matters as to which we express no opinion:

1. Indemnification. Any agreement of the Seller or an Acquired Company in a Transaction Document relating to indemnification, contribution or exculpation from costs, expenses or other liabilities that is contrary to public policy or applicable law;

2. Fraudulent Transfer. The effect, if applicable, of fraudulent conveyance, fraudulent transfer and preferential transfer laws and principles of equitable subordination;

3. Jurisdiction, Venue, etc. Any agreement of the Seller or an Acquired Company in a Transaction Document to submit to the jurisdiction of a specific federal or state court**,** to waive any objection to the laying of the venue, to waive the defense of forum non-conveniens in any action or proceeding referred to therein, to waive trial by jury, to effect service of process in any particular manner or to establish evidentiary standards, and any agreement of the Seller or an Acquired Company regarding the choice of law governing a Transaction Document (except as otherwise expressly provided in this opinion letter);

4. Certain Laws. Federal securities laws or regulations, state securities and Blue Sky laws or regulations, pension and employee benefit laws and regulations, federal and state environmental laws and regulations, federal and state tax laws and regulations, federal and state health and occupational safety laws and regulations, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and other federal and state antitrust and unfair competition laws and regulations, the Assignment of Claims Act of 1940, and the effect of any of the foregoing on any of the opinions expressed;

5. Local Ordinances. The ordinances, statutes, administrative decisions, orders, rules and regulations of any municipality, county, special district or other political subdivision of any state;

6. Certain Agreements of the Seller and Acquired Companies. Any agreement of the Seller or an Acquired Company in a Transaction Document providing for:
   a. specific performance of any such party's obligations;
   b. the granting of any power of attorney; or
   c. obligations to make an agreement in the future;

7. Remedies. Any provision in any Transaction Document to the effect that rights or remedies are not exclusive, that every right or remedy is cumulative and may be exercised in addition to any other right or remedy, that the election of some particular remedy does not preclude recourse to one or more others or that failure to exercise or delay in exercising rights or remedies will not operate as a waiver of any such right or remedy; and

8. Waivers. Provisions to the effect that delay or failure to exercise any right, remedy or option shall not constitute a waiver of such right, remedy or option and provisions prohibiting or limiting the effect of waivers, oral agreements or course of dealing on the terms of any Transaction Document:

9. [Security Interests. The creation, validity, perfection, priority or enforceability of any security interest or lien;]

10. [Employment Agreements. The enforceability of any agreement of employment; and]

11. [Noncompetition Agreements. The enforceability of any agreement not to compete.]

- All of the foregoing exclusions are important.
- If you have to opine about a security interest, it requires pages.
- Always avoid opining that an employment agreement or a non-compete agreement is enforceable.

5. Qualifications and Limitations

The opinions set forth above are subject to the following qualifications and limitations:

a) Applicable Law. Our opinions are limited to the laws of the [State][Commonwealth] of [Governing Law Jurisdiction], the general [corporate][limited liability company][partnership] laws of the respective jurisdictions in which the Seller and the Acquired Companies are organized], the federal law of the United States and the governmental authorities of [Governing Law Jurisdiction] and the United States, and we do not express any opinion concerning any other law or governmental authority.

- This is one of the most important provisions in the letter. Notice how it limits both the law and the governmental consents you have to worry about.
- Do not opine about the law of a jurisdiction where you are not admitted to practice, with the possible exception of Delaware entity law if you are well experienced with it.
- You may be able to solve the problem by making assumptions about the law of a foreign jurisdiction, such as:

  We have assumed that the law governing each Transaction Document would have the same effect as the law of California.

b) Bankruptcy. Our opinions are subject to the effect of any applicable bankruptcy, insolvency (including, without limitation, laws relating to preferences and fraudulent transfers or conveyances), reorganization, moratorium and other similar laws affecting creditors' rights generally.

c) Equitable Principles. Our opinions are subject to the effect of general principles of equity (regardless of whether considered in a proceeding in equity or at law), including, without limitation, concepts of materiality, reasonableness, good faith and fair dealing. In applying such principles, a court, among other things, might limit the availability of specific equitable remedies (such as injunctive relief and the remedy of specific performance), might not allow exercise of other remedies upon the occurrence of a default deemed immaterial or might decline to order a party to perform covenants in a Transaction Document. Further, a court may refuse to enforce a covenant if and to the extent that it deems such covenant to be violative of applicable public policy, including, for example, provisions requiring indemnification of the Buyer or the Merger Subsidiary against liability for its own wrongful or negligent acts.

- These are important but not controversial.

d) Knowledge. Whenever our opinions are stated to be "to our knowledge" or "known to us" (or words of similar import), it means the actual knowledge of the particular McGuireWoods LLP attorneys who have represented the Seller and the Acquired Companies in connection with the Transaction Documents and who have given substantive attention to the preparation and negotiation thereof. Except as expressly set forth herein, we have not undertaken any independent investigation (including, without limitation, conducting any review, search or investigation of any public files or records or dockets or any review of our files) to determine the existence or absence of any facts, and no inference as to our knowledge concerning such facts should be drawn from our reliance on the same in connection with the preparation and delivery of this opinion letter.

- Notice how narrowly knowledge is defined.
- Only the knowledge of lawyers giving substantive attention to the preparation and negotiation of the Transaction Documents applies.
- Independent investigation is disclaimed.
- Do not give this up.

e) Non-contravention and Governmental Approvals. With respect to the opinions expressed in clauses 3(d)(i) and (iii) and paragraph 3(e), our opinions are limited (i) to our knowledge, if any, of the Seller's and the Acquired Companies' specially regulated business activities and properties based solely upon Section [_____] of the Agreement in respect of such matters and (ii) to our review of only those laws and regulations that, in our experience, are normally applicable to transactions of the type contemplated by the Transaction Documents.

- This limits your responsibility to laws and regulations that are normally applicable to transactions like the one in question.
- This also limits your responsibility for considering specially regulated business activities or properties to those that have been specifically identified.

f) Reviewed Agreements. With respect to our opinion in clause 3(d)(iii), we have assumed that the law governing each Reviewed Agreement would have the same effect as the law of the [State][Commonwealth] of [Governing Law Jurisdiction], and we express no opinion as to any violation not readily ascertainable from the face of any Reviewed Agreement or arising from any cross-default provision insofar as it relates to a default under an agreement that is not a Reviewed Agreement or arising under a covenant of a financial or numerical nature or requiring computation.

g) Incorporated Documents. This opinion does not relate to (and we have not reviewed) any documents or instruments other than the Transaction Documents and the Reviewed Agreements, and we express no opinion as to such other documents or instruments (including, without limitation, any documents or instruments referenced or incorporated in any of the Transaction Documents) or as to the interplay between the Transaction Documents and any such other documents and instruments.

h) Headings. Headings in this opinion letter are intended for convenience of reference and shall not affect its interpretation.

- Reviewed Agreements may be governed by law different from the Transaction Documents. The language above solves that problem with an assumption.

6. Reliance on Opinions

The foregoing opinions are being furnished to the Buyer for the purpose referred to in the first paragraph of this opinion letter, and this opinion letter is not to be furnished to any other person or entity or used or relied upon for any other purpose without our prior written consent. The opinions set forth herein are made as of the date hereof, and we assume no obligation to supplement this opinion letter if any applicable laws change after the date hereof or if we become aware after the date hereof of any facts that might change the opinions expressed herein.

Very truly yours,

- If you are asked to expand who can rely on the opinion, limit the expansion to specific parties who need the opinion to participate in the closing, such as a lender.

710 Opinions of Counsel from the In-house Attorney

Richard M. Carson
Charles L. Menges
Laurie J. Sablak

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C. An audit opinion that omits or incorrectly describes a loss contingency.

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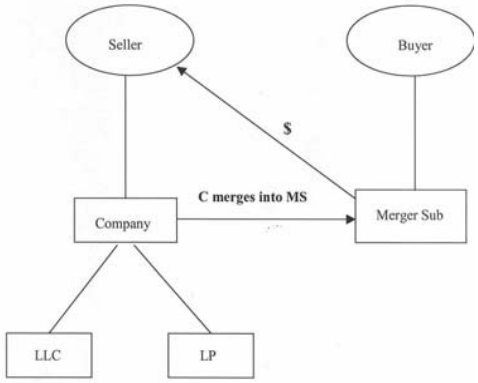
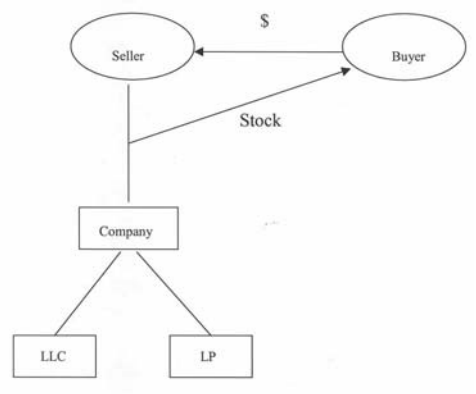
B. Use brief descriptions of loss contingencies.
C. Do not predict the outcome of a pending matter.
D. Use all of the good boiler plate from the ABA Statement of Policy.

Merger Opinions



1. Organizational Status
2. Power and Authority
3. Execution, Validity and Enforceability
4. Non-contravention
5. Governmental Approvals
6. Proceedings
7. Ownership of Shares
8. Merger Effective

Sale of Stock Opinions



1. Organizational Status
2. Power and Authority
3. Execution, Validity and Enforceability
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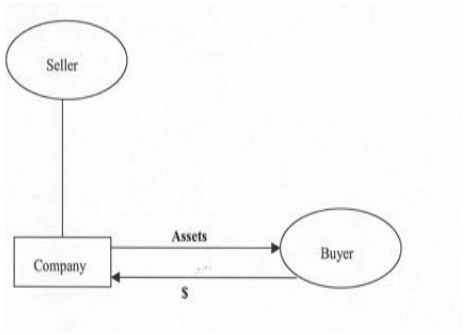
6. Proceedings
7. Ownership of Shares

Sale of Assets Opinions



1. Organizational Status
2. Power and Authority
3. Execution, Validity and Enforceability
4. Non-contravention
5. Governmental Approvals
6. Proceedings

You may want to use headings.

1. **Documents Reviewed**
2. **Assumptions Underlying Our Opinions**
3. **Our Opinions**
4. **Exclusions**
5. **Qualifications and Limitation**
6. **Reliance on Opinions**

- To make the opinions easier to understand.
- That is good in the case of your own lawyers and usually, but not always, good in the case of opposing counsel.

1. Documents Reviewed

Transaction Documents

Organizational Documents

Good Standing Certificates

Reviewed Agreements

Other Documents, as needed

In connection with this opinion letter, we have examined the following documents:

(a) the Agreement;
(b) the [Employment Agreement(s)];
(c) the [Non-competition Agreement(s)];
(d) the [Escrow Agreement];
(e) the [Tax Agreement];

- These are the "Transaction Documents."
- Be careful about what you include on this list.
- The opinion is mostly about these documents

(f) the certificate of incorporation, bylaws and board of directors resolutions, certificate of organization, operating agreement and members' consent, or certificate of limited partnership, limited partnership agreement and consent of general partner, as the case may be, of the Seller and each Acquired Company (the "Organizational Documents")

- The Organizational Documents are the foundation for the opinions on
  - Power and Authority
  - Execution, Validity and Enforceability
  - Non-Contravention (in part)

(g) with respect to the Seller and each Acquired Company, a certificate issued by the [Secretary of State] or other appropriate official of the state of organization of such party attesting to the continued existence and good standing of such party in such state (the "Good Standing Certificates")

- Good Standing Certificates" are for the Organizational Status opinion

(h) the agreements and instruments identified in Section [_____] of the Agreement (the "Reviewed Agreements")

- "Reviewed Agreements" are often the Company's material contracts with third parties.
- Limit them to a specific list.
- The non-contravention opinion normally says that none of the Reviewed Agreements are breached by the deal.
- That may be the hardest opinion to give of any in the letter.

(i) such other records, documents and other instruments as we have deemed necessary for the purposes of this opinion letter.

- This catchall lets you avoid listing everything that you review.
- It also lets you avoid reviewing documents that are inconsequential to the opinion without explicitly declaring that the documents are not being reviewed.

2. Assumptions Underlying Our Opinions

(a) Factual Matters. With regard to factual matters, to the extent that we have reviewed and relied upon (i) certificates of the Seller and each Acquired Company or their authorized representatives, (ii) representations of the Seller and each Acquired Company set forth in the Transaction Documents and (iii) certificates and assurances from public officials, all of such certificates, representations and assurances are accurate;

- This lets you rely on the reps, warranties and certificates of your client and public officials.

(b) Contrary Knowledge of Addressee. No addressee of this opinion letter has any actual knowledge that any of our factual assumptions or opinions is inaccurate;

- This protects you from being sandbagged by problems the Buyer may know about and doesn't reveal.

(c) Signatures. The signatures of individuals signing the Transaction Documents are genuine and (other than of individuals signing on behalf of the Seller or any of the Acquired Companies) authorized;

- If you can't get this assumption and you do not know the person signing for your client, get a certificate signed by someone you do know with specimen signatures of the other signers.

(d) Authentic and Conforming Documents. All documents submitted to us as originals are authentic, complete and accurate, and all documents submitted to us as copies conform to authentic original documents;

(e) Capacity of Certain Parties. All parties to the Transaction Documents (other than the Seller and the Acquired Companies) have the capacity and full power and authority to execute, deliver and perform the Transaction Documents and the documents required or permitted to be delivered and performed thereunder;

(f) Transaction Documents Binding on Certain Parties. Except with respect to the Seller and the Acquired Companies, all of the Transaction Documents and the documents required or permitted to be delivered thereunder have been duly authorized by all necessary corporate or other action on the part of the parties thereto, have been duly executed and delivered by such parties and are valid and binding obligations enforceable against such parties in accordance with their terms;

(g) Consents for Certain Parties. All necessary consents, authorizations, approvals, permits or certificates (governmental and otherwise) which are required as a condition to the execution and delivery of the Transaction Documents by the parties thereto (other than the Seller and the Acquired Companies) and to the consummation by such parties of the transactions contemplated thereby have been obtained; and

(h) Accurate Description of Parties' Understanding. The Transaction Documents accurately describe and contain the mutual understanding of the parties, and there are no oral or written statements or agreements that modify, amend or vary, or purport to modify, amend or vary, any of the terms thereof.

- These are important assumptions but should not be controversial.

3. Our Opinions.

Based on and subject to the foregoing and the other limitations, assumptions, qualifications and exclusions set forth in this opinion letter, we are of the opinion that:

(a) Organizational Status. Based solely upon the Good Standing Certificates, the Seller and each of the Acquired Companies is validly existing [and in good standing] under the laws of its jurisdiction of organization as of the date set forth in the applicable Good Standing Certificate.

- Notice how narrow this opinion is. New York banks accept it, so it should be good enough for everybody.
- You will often be asked to say that the selling parties:
  - Are "duly incorporated" or "duly organized"
  - Are "qualified to do business" everywhere that they need to be
- Don't do it. Stick to what you can tie to a certificate.

(b) Power and Authority. The Seller and each of the Acquired Companies has the organizational power and authority to execute, deliver and perform the terms and provisions of each Transaction Document to which it is party and has taken all necessary organizational action to authorize the execution, delivery and performance thereof.

- You must review the Organizational Documents carefully to give this opinion.
- You must have proper resolutions from directors, managers, shareholders, members or partners that refer to the transaction specifically and in sufficient detail.
- Be sure there are no special restrictions in the charter, bylaws or other Organizational Documents.
- Be sure that special statutory requirements have been met; e.g., in some states a significant transaction needs approval of a supermajority of shares eligible to vote.
- If asked to insert "full" as a modifier of "power and authority" say no; the meaning of "full" is unclear.

(c) Execution, Validity and Enforceability. The Seller and each of the Acquired Companies has duly executed and delivered each Transaction Document to which it is party, and each such Transaction Document constitutes the valid, binding and enforceable obligation of such party.

- This opinion is aided greatly by the assumptions and qualifications elsewhere in the letter.
- You should have a resolution that authorizes the signing persons.
- You should have a certificate that authenticates the signatures of such persons if genuineness has not been assumed.
- The Transactions Documents must have been delivered. If they are in escrow, the opinion should be in escrow.
- "Valid, binding and enforceable" are the terms of art in contemporary practice. These terms are qualified elsewhere in the opinion. Do not try to qualify them here.
- Do not add "legal" to the list. Legality is covered by the non-contravention opinion that follows.

(d) Noncontravention. Neither the execution, delivery and performance by the Seller or any of the Acquired Companies of any Transaction Document to which it is a party, nor the compliance by the Seller or any of the Acquired Companies with the terms and provisions thereof: (i) violates any present law, statute or regulation that, in each case, is applicable to such party; (ii) violates any provision of the Organizational Documents of such party; or (iii) results in any breach of any of the terms of, or constitutes a default under, any Reviewed Agreement.

- This opinion says that the transaction will not violate:
  - the law
  - our clients' Organizational Documents
  - any Reviewed Agreement
- You cannot give this opinion without the limitations and assumptions elsewhere in the letter.
- Try not to give (iii) and never expand it to cover more than a specific list of agreements and instruments.
- Do not opine that the selling parties are in compliance with laws generally.

(e) Governmental Approvals. [Except for the requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (to the extent applicable) and except as disclosed on Schedule [_____] of the Agreement], no consent, approval or authorization of, or filing with, any governmental authority that, in each case, is applicable to the Seller or any of the Acquired Companies is required for (i) the due execution, delivery and performance by the Seller or any of the Acquired Companies of any Transaction Document to which it is a party or (ii) the validity, binding effect or enforceability of any Transaction Document to which the Seller or any of the Acquired Companies is a party, except (A) in each case as have previously been made or obtained and (B) consents, approvals, authorizations or filings as may be required to be obtained or made by the Buyer or the Merger Subsidiary as a result of its involvement in the transactions contemplated by the Transaction Documents.

- This opinion is not always given. It is arguably covered by the non-contravention and enforceability opinions.
- Never give it for all governmental approvals needed for the selling parties to conduct business.

(f) Proceedings. To our knowledge, there is no outstanding judgment, action, suit or proceeding pending against the Seller or any Acquired Company before any court, governmental agency or arbitrator which challenges the legality, validity, binding effect or enforceability of any Transaction Document to which the Seller or such Acquired Company is a party.

- This opinion is limited by knowledge.
- It refers only to proceedings directed against the Transaction Documents.
- Do not give an opinion about proceedings generally.
- Avoid giving an opinion about "threatened" proceedings, although the knowledge limitation helps.
- Do not give up the knowledge limitation.

(g) Ownership of Shares. Based upon our review of the share ledger of the Company, the Seller is the record owner of all of the outstanding shares of the Company, free of any adverse claim.

- A much more expansive opinion will often be requested concerning capitalization of the Company, whether the shares are validly issued, fully paid and non-assessable and whether the Seller has good title to the shares free of liens and encumbrances. Resist.
- These are fundamentally factual matters that the Buyer can investigate as well as you can. On that basis, try to avoid the opinion altogether.
- Do not take on the burden of researching years of Company records to determine proper issuance of the shares.
- In a stock sale, you may be asked to give this additional sentence:
  - Upon consummation of the transactions contemplated by the Agreement, Buyer will acquire all right, title and interest of the Seller to such shares.
    - If asked to take out "of the Seller", resist.

(h) Merger. Based upon the certificate of merger issued by the [State][Commonwealth] of [Organizational Jurisdiction], the Merger has become effective under the laws of such jurisdiction.

- This is commonly requested in a merger transaction.
- Make sure that Buyer's counsel gives the same opinion.

4. Exclusions

We call your attention to the following matters as to which we express no opinion:

1. Indemnification. Any agreement of the Seller or an Acquired Company in a Transaction Document relating to indemnification, contribution or exculpation from costs, expenses or other liabilities that is contrary to public policy or applicable law;

2. Fraudulent Transfer. The effect, if applicable, of fraudulent conveyance, fraudulent transfer and preferential transfer laws and principles of equitable subordination;

3. Jurisdiction, Venue, etc. Any agreement of the Seller or an Acquired Company in a Transaction Document to submit to the jurisdiction of a specific federal or state court, to waive any objection to the laying of the venue, to waive the defense of forum non-conveniens in any action or proceeding referred to therein, to waive trial by jury, to effect service of process in any particular manner or to establish evidentiary standards, and any agreement of the Seller or an Acquired Company regarding the choice of law governing a Transaction Document (except as otherwise expressly provided in this opinion letter);

4. Certain Laws. Federal securities laws or regulations, state securities and Blue Sky laws or regulations, pension and employee benefit laws and regulations, federal and state environmental laws and regulations, federal and state tax laws and regulations, federal and state health and occupational safety laws and regulations, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and other federal and state antitrust and unfair competition laws and regulations, the Assignment of Claims Act of 1940, and the effect of any of the foregoing on any of the opinions expressed;

5. Local Ordinances. The ordinances, statutes, administrative decisions, orders, rules and regulations of any municipality, county, special district or other political subdivision of any state;

6. Certain Agreements of the Seller and Acquired Companies. Any agreement of the Seller or an Acquired Company in a Transaction Document providing for:
   a. specific performance of any such party's obligations;
   b. the granting of any power of attorney; or
   c. obligations to make an agreement in the future;

7. Remedies. Any provision in any Transaction Document to the effect that rights or remedies are not exclusive, that every right or remedy is cumulative and may be exercised in addition to any other right or remedy, that the election of some particular remedy does not preclude recourse to one or more others or that failure to exercise or delay in exercising rights or remedies will not operate as a waiver of any such right or remedy; and

8. Waivers. Provisions to the effect that delay or failure to exercise any right, remedy or option shall not constitute a waiver of such right, remedy or option and provisions prohibiting or limiting the effect of waivers, oral agreements or course of dealing on the terms of any Transaction Document:

9. [Security Interests. The creation, validity, perfection, priority or enforceability of any security interest or lien;]

10. [Employment Agreements. The enforceability of any agreement of employment; and]

11. [Noncompetition Agreements. The enforceability of any agreement not to compete.]

- All of the foregoing exclusions are important.
- If you have to opine about a security interest, it requires pages.
- Always avoid opining that an employment agreement or a non-compete agreement is enforceable.

5. Qualifications and Limitations

The opinions set forth above are subject to the following qualifications and limitations:

a) Applicable Law. Our opinions are limited to the laws of the [State][Commonwealth] of [Governing Law Jurisdiction], the general [corporate][limited liability company][partnership] laws of the respective jurisdictions in which the Seller and the Acquired Companies are organized], the federal law of the United States and the governmental authorities of [Governing Law Jurisdiction] and the United States, and we do not express any opinion concerning any other law or governmental authority.

- This is one of the most important provisions in the letter. Notice how it limits both the law and the governmental consents you have to worry about.
- Do not opine about the law of a jurisdiction where you are not admitted to practice, with the possible exception of Delaware entity law if you are well experienced with it.
- You may be able to solve the problem by making assumptions about the law of a foreign jurisdiction, such as:

  We have assumed that the law governing each Transaction Document would have the same effect as the law of California.

b) Bankruptcy. Our opinions are subject to the effect of any applicable bankruptcy, insolvency (including, without limitation, laws relating to preferences and fraudulent transfers or conveyances), reorganization, moratorium and other similar laws affecting creditors' rights generally.

c) Equitable Principles. Our opinions are subject to the effect of general principles of equity (regardless of whether considered in a proceeding in equity or at law), including, without limitation, concepts of materiality, reasonableness, good faith and fair dealing. In applying such principles, a court, among other things, might limit the availability of specific equitable remedies (such as injunctive relief and the remedy of specific performance), might not allow exercise of other remedies upon the occurrence of a default deemed immaterial or might decline to order a party to perform covenants in a Transaction Document. Further, a court may refuse to enforce a covenant if and to the extent that it deems such covenant to be violative of applicable public policy, including, for example, provisions requiring indemnification of the Buyer or the Merger Subsidiary against liability for its own wrongful or negligent acts.

- These are important but not controversial.

d) Knowledge. Whenever our opinions are stated to be "to our knowledge" or "known to us" (or words of similar import), it means the actual knowledge of the particular McGuireWoods LLP attorneys who have represented the Seller and the Acquired Companies in connection with the Transaction Documents and who have given substantive attention to the preparation and negotiation thereof. Except as expressly set forth herein, we have not undertaken any independent investigation (including, without limitation, conducting any review, search or investigation of any public files or records or dockets or any review of our files) to determine the existence or absence of any facts, and no inference as to our knowledge concerning such facts should be drawn from our reliance on the same in connection with the preparation and delivery of this opinion letter.

- Notice how narrowly knowledge is defined.
- Only the knowledge of lawyers giving substantive attention to the preparation and negotiation of the Transaction Documents applies.
- Independent investigation is disclaimed.
- Do not give this up.

e) Non-contravention and Governmental Approvals. With respect to the opinions expressed in clauses 3(d)(i) and (iii) and paragraph 3(e), our opinions are limited (i) to our knowledge, if any, of the Seller's and the Acquired Companies' specially regulated business activities and properties based solely upon Section [_____] of the Agreement in respect of such matters and (ii) to our review of only those laws and regulations that, in our experience, are normally applicable to transactions of the type contemplated by the Transaction Documents.

- This limits your responsibility to laws and regulations that are normally applicable to transactions like the one in question.
- This also limits your responsibility for considering specially regulated business activities or properties to those that have been specifically identified.

f) Reviewed Agreements. With respect to our opinion in clause 3(d)(iii), we have assumed that the law governing each Reviewed Agreement would have the same effect as the law of the [State][Commonwealth] of [Governing Law Jurisdiction], and we express no opinion as to any violation not readily ascertainable from the face of any Reviewed Agreement or arising from any cross-default provision insofar as it relates to a default under an agreement that is not a Reviewed Agreement or arising under a covenant of a financial or numerical nature or requiring computation.

g) Incorporated Documents. This opinion does not relate to (and we have not reviewed) any documents or instruments other than the Transaction Documents and the Reviewed Agreements, and we express no opinion as to such other documents or instruments (including, without limitation, any documents or instruments referenced or incorporated in any of the Transaction Documents) or as to the interplay between the Transaction Documents and any such other documents and instruments.

h) Headings. Headings in this opinion letter are intended for convenience of reference and shall not affect its interpretation.

- Reviewed Agreements may be governed by law different from the Transaction Documents. The language above solves that problem with an assumption.

6. Reliance on Opinions

The foregoing opinions are being furnished to the Buyer for the purpose referred to in the first paragraph of this opinion letter, and this opinion letter is not to be furnished to any other person or entity or used or relied upon for any other purpose without our prior written consent. The opinions set forth herein are made as of the date hereof, and we assume no obligation to supplement this opinion letter if any applicable laws change after the date hereof or if we become aware after the date hereof of any facts that might change the opinions expressed herein.

Very truly yours,

- If you are asked to expand who can rely on the opinion, limit the expansion to specific parties who need the opinion to participate in the closing, such as a lender.

EXAMPLE GUIDELINES AND PROCESS

Example Guidelines and Process

- In-house counsel provide opinions where uniquely positioned due to their knowledge of the company.
- Opinion letters should not contain any opinions that duplicate those given by outside counsel.

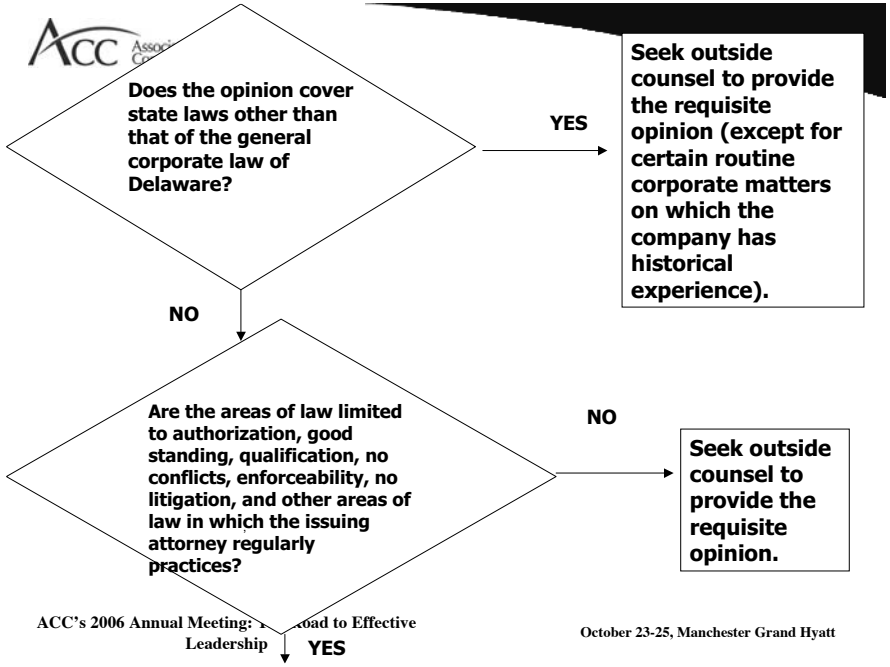
Example Guidelines and Process

Only outside counsel should give opinions regarding:

- "True Sale";
- "Non-Consolidation";
- UCC;
- Title; or
- Tax

Example Guidelines and Process

Attorneys must follow the process outlined in the following chart:



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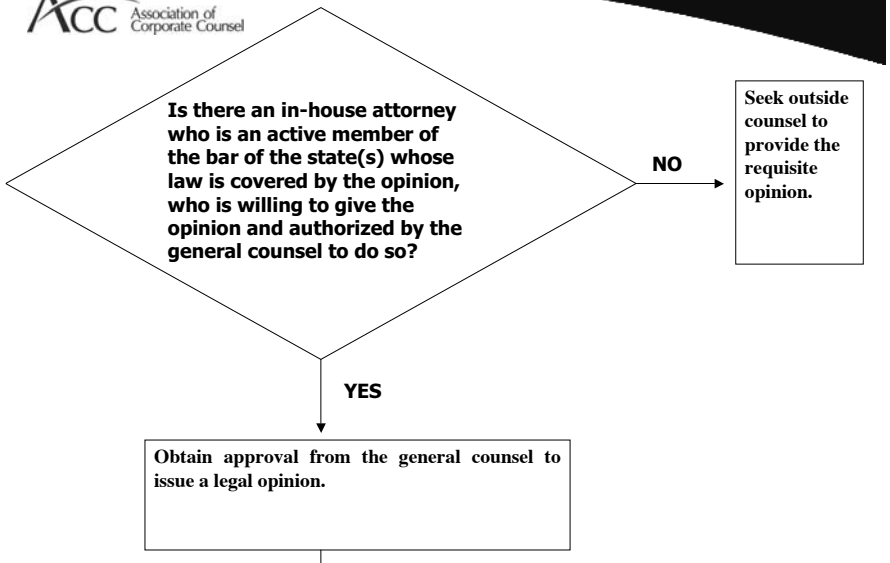

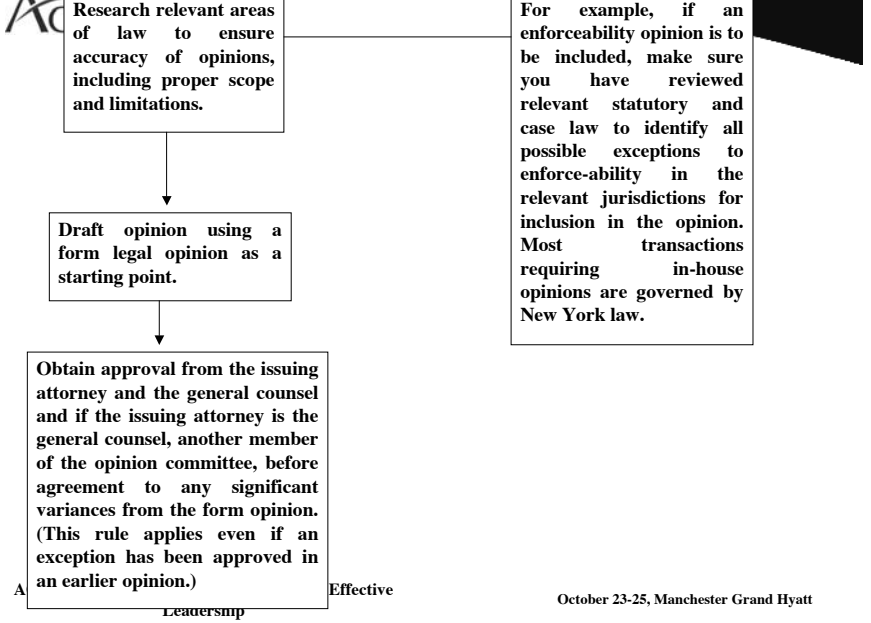

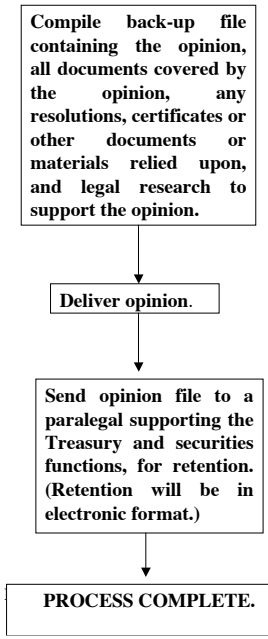

Example Guidelines

Review by opinion committee:

- ✓ General Counsel
- ✓ Associate General Counsel for the Corporate Group
- ✓ Corporate Secretary
- ✓ Senior Attorneys supporting the Treasury Department

Example Guidelines

- Often requested for credit agreements and securities issuances.
- Form opinion letters used; general counsel must approve any significant variances from forms.

Example Guidelines

- Examples of form opinion letters are in your materials.
- Forms based upon experience of committee, standards published by the Business Law Section of the American Bar Association and the Tri Bar Opinion Committee, and other published legal opinion material.

ACC's 2006 Annual Meeting: The Road to Effective Leadership

October 23-25, Manchester Grand Hyatt

Example Guidelines

- These forms are "issuer-friendly"
- It is customary in opinion practice to require no more broad or narrow an opinion than one is willing to deliver or accept (the "golden rule")

Example Guidelines

- Opinions may only be given by attorneys who are active members of the bar of the state whose law is the subject of the opinion.
- Some opinions do not reference the law of any state, but refer only to "The General Corporation Law of the State of Delaware", "the Laws of the United States of America", etc.
- Such opinions can be given by attorneys with the requisite knowledge.
- Don't assume that the laws of the state whose law is the subject of the opinion are same as law of state where opinion-giver is admitted.

ACC's 2006 Annual Meeting: The Road to Effective Leadership October 23-25, Manchester Grand Hyatt

Example Guidelines

- May refer to states in which opinion-giver is not admitted to practice, in reliance on review by other attorneys admitted to practice in such states.

Example Guidelines

- Only deliver one signed original opinion letter for each addressee.

AND

- The attorney should sign the opinion in his or her own name and not in the name of the Legal Department.

ACC Association of Corporate Counsel

Example Guidelines

- Duty of care, competence, and diligence based on customary practice.
- Conduct investigation; supporting material kept in physical and electronic backup files.

ACC Association of Corporate Counsel

COMMON IN-HOUSE OPINIONS AND ASSOCIATED DILIGENCE

Organizational Matters

- Due Organization
- Valid Existence
- Good Standing
- Purpose: demonstrate that client is an existing entity that can enter into binding contracts.

Due Incorporation or Organization

- Refers to lawful creation of entity
- Determination of proper filing and acceptance of articles, certificates, or other instruments of incorporation or organization in accordance with laws applicable at the time of filing.

Due Incorporation or Organization

- May also cover adoption of initial by-laws, appointment of initial directors, and proper issuance of initial stock for lawful consideration.
- Due incorporation is the preferred formulation.
- Obtain copy of original articles and all subsequent amendments, review for conformity with applicable legal requirements.
- Preferred approach: rely on a good standing certificate from Secretary of State of state of formation.

Valid Existence and Good Standing

- Valid existence= absence of permanent cessation of entity's existence.
- Good standing= absence of temporary but curable suspension of existence or power to act

ACC Association of Corporate Counsel

Valid Existence and Good Standing

They depend upon the absence of the following:

- The limitation on life of entity in its charter documents;
- Dissolution or actions leading to dissolution;
- Merger in which entity does not survive;
- Proceedings by governmental officials to revoke chartering authority; and
- Failure to pay franchise or similar taxes or take other actions such that suspension results.

Preferred approach: include a qualification in the opinion that it is based solely upon certificate from the Secretary of State.

ACC Association of Corporate Counsel

Due Qualification and Good Standing

- Purpose: to confirm ability of corporation to conduct business, own property, and enter into contractual obligations in jurisdictions other than jurisdiction of incorporation.
- Rely solely on advice of governmental officials in relevant jurisdiction; opinion letter indicates that reliance.

Corporate Power

-
- Purpose: address ultra vires.

Due Authorization, Execution, and Delivery

- Addresses propriety of actions taken by entity to comply with governance procedures in undertaking obligations under transaction documents, and signing of those documents.
  - Determine required authorizing acts under entity's governing instruments and enabling legislation; and
  - Review actions taken for conformity (usually involves actions taken by directors at a meeting or by consent.)

Also verify:

- requisite numbers of directors acted;
- directors properly elected;
- action taken upon required formalities (e.g. quorum and notice); and
- actions are broad and unambiguous to cover the matter requiring approval.

Could rely upon a Secretary's Certificate.

Due Execution and Delivery

- Person who has been authorized to do so in fact signed the transaction documents on the entity's behalf.
- Confirm that the individual signing was among those indicated by name or position.
- Could rely upon a Secretary's Certificate.

Binding Effect (a/k/a "Enforceability", a/k/a "Remedies")

- Includes not only corporate power and due authorization, but also:
- The recognition by a court that documents impose obligations reflected in documents;
- The availability of remedy for failure to meet obligations; and
- The absence of terms or provisions which applicable law would render per se illegal, void, voidable, or unenforceable.

Absence of Needed Consents

- Governmental consents needed to assure the ability of the entity to create a legal obligation;
- Governmental consents which if not obtained could result in disability on entity's activities or monetary penalty; and
- Private party consents which, if not obtained, could result in monetary consequences, or subject to claims of interference with contracts.

No Conflicts (a/k/a "Noncontravention")

- Ensure that transaction will not create defaults under the agreements to which entity is a party, and not contrary to restrictions in entity's organizing documents.
- Review the specified contracts and interpret their terms.

No Conflicts (a/k/a "Noncontravention")

- Scope: Reasonable contracts to be reviewed include:
  - ✓ financing documents, and
  - ✓ capital leases.
- An appropriate standard for determining what "material" agreements means is any agreement required to be filed in accordance with the Securities and Exchange Act of 1934.

Absence of Litigation

Has a "to my knowledge" qualifier.

Review of material regarding litigation as part of preparation for letters to:

- auditors,
- preparation for board of directors meetings
- Poll other attorneys in the Legal Department

Securities

- Shares **"have been duly authorized and validly issued and fully paid and non-assessable."**
- Opinion addresses the concern that the stock will entitle purchasers and anyone to whom they may transfer the shares to all rights of a stockholder under the corporation law under which the company was incorporated and the company's charter and by laws.

Securities

Due diligence review:

- Certificate of Incorporation;
- By-laws; and
- Minute books (to determine whether each change in the company shares were authorized by proper action and to locate any applicable subscription agreements or resolutions).

Securities

Help underwriters and dealer managers meet their due diligence obligations under Section 11 of the Securities Act of 1933.

Securities

The opinion letter covers:

- The adequacy of the disclosure; and
- Binding nature of the underwriting or dealer manager agreement.

Securities

The registration statement opinion has four components:

- Whether registration statement and prospectus comply as to form with the 1933 Act and associated rules and regulations.

- Registration statement has been filed in the correct form,
- but also that the opinion-giver has determined each of the items in the form is responsive
- Compliance with technical requirements

Securities

- "No reason to believe that there is an untrue statement of a material fact or omission of material fact necessary to make the statement not misleading."

  Substantive adequacy of disclosure

Securities

- Statement that opinion-giver does not know of any contract or other documents required to be filed or described.
  - Substantive adequacy of disclosure

Securities

- In regard to the binding nature, the opinion-giver typically will only opine that the agreement has been duly authorized, executed, and delivered by the issuer.

Securities

Negative Assurance "Non-Opinion"

- Helps underwriters establish a due diligence defense under Section 11 and 12(a)(2) of the Securities Act of 1933.
- Not a legal opinion; it is a statement of belief.

Securities

Negative Assurance "Non-Opinion"

- Also requested in some unregistered offerings request negative assurance on the offering documents.
- Even though Section 11 and 12(a)(2) of the 1933 Act do not apply, to establish a defense to possible claims that might be brought pursuant to Rule 10(b)(5) under the Securities and 1934 Act.

Securities

Negative Assurance "Non-Opinion"

- Don't provide to ultimate purchasers of securities; only to the underwriters or dealer managers.
- Not a legal opinion; generally provided in a separate letter or separate unnumbered paragraph.

Opinion Letters—An Insurer's Perspective

- Claim Examples
- Benchmarking: Applications for Employed Lawyers Professional Liability
- Policies Regarding Legal Opinions

Claims Alleged Against Employed Lawyers

- More "severe" than "frequent"
- Often made in combination with a non-malpractice claim against the employer or its directors and officers
- Can be alleged by third parties or by the employer → who relies on the attorney's work product?

Claim Examples: Opinions of In-house Counsel

DESCRIPTION OF EVENT

- The CFO of a large publicly held service company sought the advice of the company's general counsel regarding compliance with certain disclosure requirements of the Sarbanes-Oxley Act of 2002. The advice was incorrect and as a result the CFO was terminated and found personally liable under the provisions of the Act. The CFO then brought suit against the GC, alleging negligence, conflict of interest, and breach of fiduciary duty.

RESOLUTION

- The suit was settled for more than $750,000. The company incurred defense costs of more than $250,000.

Claim Examples: Opinions of In-house Counsel

DESCRIPTION OF EVENT

- A general counsel for a privately owned company participated in the decision to authorize the use of a trademark in certain marketing materials for the company. The alleged owners of the trademark then brought suit against the privately owned company for trademark infringement and sued the general counsel for contributory trademark infringement.

RESOLUTION

- Even if successfully defended, defense expenses could exceed $50,000.

Claim Examples: Opinions of In-house Counsel

DESCRIPTION OF EVENT

- A restaurant chain sold franchises to independent franchisees, and in-house counsel was involved in the negotiation of franchise sales. In one instance, in-house counsel rendered an opinion to the restaurant chain's management that a restaurant could be built on land selected by the franchisee. Relying on this opinion, the franchisee purchased the property and began construction. The opinion rendered by in-house counsel was incorrect and cost the franchisee an additional $310,000. A suit was filed against the attorney and his employer. Allegations against in-house counsel included breach of fiduciary duty, conflict of interest, and negligence in rendering the opinion.

RESOLUTION

- The case settled for more than $250,000 and defense expenses were approximately $75,000.

ACC's 2006 Annual Meeting: The Road to Effective Leadership October 23-25, Manchester Grand Hyatt

Lessons From A Financing Transaction: Fraud

- Company A sought financing for a project to expand and improve its business. In-house counsel for Company A rendered an opinion regarding the financial status of Company A and its affiliates and also drafted documents outlining how the investors' funds were being used.
- The project was never completed, Company A filed for bankruptcy, and investors made two malpractice claims directly against the GC, in connection with claims against Company A and its directors and officers for misuse of the funds.
- After two years, the claim against the GC settled along with the other claims for an overall seven-figure amount.

Lessons from Google: SEC Liability

- January 2005: Google and its GC accepted a cease and desist order from the SEC to settle allegations that the company, relying on advice from its GC, issued over $80 million worth of stock options to employees without registering the options or providing certain financial disclosures as required by federal securities laws.
- In consultation with other counsel, the GC had advised the company's board that it could continue to issue stock options because he believed exemptions might apply
- SEC conclusion: "By deciding Google could escape its disclosure requirements, and failing to inform the Board of the legal risks of his determination, [the GC] caused the company to run afoul of the federal securities laws."
- Lessons: discussion of alternatives, identification of risks involved

Lessons From Electro Scientific Industries: Gatekeeper Liability

- Sept. 2004: The former GC of ESI consented to an SEC cease and desist order and paid a civil penalty of $50,000.
- Upon request, the GC sought an opinion from outside counsel regarding whether unilateral termination of certain retirement benefits was permissible under applicable Asian law. The GC gave the opinion that the transaction was not proper to the company's CFO, tried to raise the issue at a disclosure meeting prior to the company's financials being reported, and immediately informed the audit committee and outside counsel when he discovered that the financials had been reported with an overstatement.
- The SEC found that the GC did not do enough to prevent the fraud in that he should have spoken up more at the disclosure meeting and informed the Board and auditors.

Lessons From J&G Industries

- 2002 case: Family-owned company in the business of buying and selling used metal working machinery and industrial plants sued its in-house counsel for legal malpractice for approving a $6.2M contract, alleging that the company lost a $1.2M deposit in the deal.
- While summary judgment in favor of the GC on the malpractice count was affirmed on appeal, the litigation lasted over two years.

Benchmarking: Employed Lawyers Professional Liability (ELP) Application

- New business customers from July 2005 through July 2006
- 82% private companies; 18% public
- 88% for-profit companies; 12% not-for-profit
- Average legal dept. size = 2.1 attorneys
- Wide range of industry classes

ELP Application Responses

- Q. 5B) Does any Employed Lawyer issue written opinions to or for the use of
  - The Board of Directors? 37% Yes
  - Entities other than the Company in which the Company has an equity or other interest? 14% Yes
  - Third Parties? 23% Yes
  - Other? 6% Yes

ELP Application Responses

- If "Yes" to any part of this question, please describe the types of opinions issued and the recipients thereof.
  - Financing (lenders), Auditors, Tax
  - Compliance, Regulators
  - Enforceability of contracts
  - Corporate governance
  - Incorporation, Bylaws, Nonprofit status
  - Corporate transactions, Authorization
  - Employment law
  - General legal issues

ELP Application Responses

- Q. 5C) Does any Employed Lawyer prepare, review, comment on, or approve financial statements, proxy statements, prospectuses, registration statements, annual or quarterly reports, or other reports filed with federal or state agencies or released to shareholders or the public regarding the Company? 36.6% Yes
- Applicants responding "No" to all of the previous questions: 33% No

ELP Application Responses

- Q. 7. Does the Company and/or the legal department have written policies or procedures with regard to the following:
  - Preparation and approval of legal opinions to or for the use of entities other than the Company? 9% Yes
  - If "No" to any of the above, please describe any relevant unwritten polices and procedures

Why In-house Departments Lack Written Policies Regarding Third Party Legal Opinions

- I'm the only attorney in the department
- It's a new position/department/company
- Opinions are reviewed by outside counsel
- Opinions are issued by the CLO only
- I only prepare them on a case-by-case basis
- We're a "close" department/we discuss them
- Opinions are minor/informal/limited to matters within the attorney's knowledge
- We only hire experienced attorneys

Policies Regarding Legal Opinions

- Consider the following:
  - The process regarding research, review and approval of opinions
  - The scope of the subjects on which opinions are given (forms library where appropriate)
  - Geographic issues; licensing
  - Reliance on others (outside counsel, other professionals)
  - Authorization to sign opinions

Policies Regarding Legal Opinions

- Consider the following:
  - Delivery of opinions
  - Permissible recipients of opinions
  - Necessity of second (disinterested) review of opinions
  - Selection of outside counsel (opinion/litigation)
  - Updating of opinions
  - Use of disclaimers . . .

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