

*[Working Draft dated [                    ], 2018. This document has not been approved by the Joint Committee on Statement of Opinion Practices or its sponsoring organizations, the Board of the Working Group on Legal Opinions Foundation and the Legal Opinions Committee of the Business Law Section of the American Bar Association]*

## STATEMENT OF OPINION PRACTICES<sup>1</sup>

### 1 INTRODUCTION

Third-party legal opinion letters (“closing opinions”)<sup>2</sup> are delivered at the closing of a business transaction by counsel for one party (the “opinion giver”) to another party (the “opinion recipient”) to satisfy a condition to the opinion recipient’s obligation to close. A closing opinion includes opinions on specific legal matters (“opinions”) and, in so doing, serves as a part of the diligence of the opinion recipient.<sup>3</sup>

This Statement of Opinion Practices (this “*Statement*”) provides guidance regarding selected aspects of customary practice and other practices generally followed throughout the United States in the giving and receiving of closing opinions.<sup>4</sup>

### 2 CUSTOMARY PRACTICE

Closing opinions and the opinions included in them are prepared and understood in accordance with the customary practice of lawyers who regularly give those opinions and lawyers who regularly review them for opinion

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<sup>1</sup> This *Statement* has been published in *The Business Lawyer* [cite]. At the time of its publication, this *Statement* was approved by the bar associations and other lawyer groups identified in **Schedule I** (the “Schedule of Approving Organizations”). A current Schedule of Approving Organizations can be found at [URL]. Approval of this *Statement* by a bar association or other lawyer group does not necessarily represent approval by individual members of that association or group.

<sup>2</sup> The terms “opinion letters” and “closing opinions” are commonly used to refer to third-party legal opinion letters, defined in this *Statement* as “closing opinions.”

<sup>3</sup> References in this *Statement* to an opinion recipient mean the addressee of a closing opinion and any other person the opinion giver expressly authorizes to rely on the closing opinion.

<sup>4</sup> This *Statement* is drawn principally from: Comm. on Legal Op. of the Section of Bus. Law of the Am. Bar Ass’n, *Legal Opinion Principles*, 53 BUS. LAW. 831 (May 1998), and Comm. on Legal Op., *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875 (Feb. 2002). It updates the *Principles* in its entirety and selected provisions of the *Guidelines*. The other provisions of the *Guidelines* are unaffected, and no inference should be drawn from omissions from the *Guidelines* in this *Statement*. Each provision of this *Statement* should be read and understood together with the other provisions of this *Statement*.

recipients.<sup>5</sup> The phrase “customary practice” refers principally to the work lawyers are expected to perform to give opinions (“customary diligence”) and the way certain words and phrases commonly used in closing opinions are understood (“customary usage”). Customary practice applies to a closing opinion whether or not the closing opinion refers to it or to this *Statement*.<sup>6</sup>

### 3 LEGAL OBLIGATIONS AND RULES OF PROFESSIONAL CONDUCT

When giving closing opinions, lawyers are subject to generally applicable legal obligations and to the rules governing the professional conduct of lawyers.<sup>7</sup>

#### 4 GENERAL

##### 4.1 Expression of Professional Judgment

An opinion expresses the professional judgment of the opinion giver regarding the legal issues the opinion addresses. It is not a guarantee that a court will reach any particular result.

##### 4.2 Bankruptcy Exception and Equitable Principles Limitation

The bankruptcy exception and equitable principles limitation apply to opinions even if they are not expressly stated.

##### 4.3 Cost and Benefit

The benefit to the recipient of a closing opinion and of any particular opinion should warrant the time and expense required to give them.

##### 4.4 Golden Rule

Opinion givers and counsel for opinion recipients should be guided by a sense of professionalism and not treat closing opinions as if they were part of a business negotiation. An opinion giver should not be expected to give an opinion that counsel for the opinion recipient would not give in similar circumstances if that counsel were the opinion giver and had the requisite

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<sup>5</sup> See *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 BUS. LAW. 1277 (Aug. 2008) (the “*Customary Practice Statement*”), which has been approved by the bar associations and other lawyer groups listed at the end of that Statement and by additional groups following publication that can be found at [URL].

<sup>6</sup> See *infra* Section 10 (*Varying Customary Practice*).

<sup>7</sup> These include the duties opinion givers have to their own clients. Counsel to opinion recipients also have duties to their clients, including duties relating to closing opinions.

competence to give the opinion. Correspondingly, before declining to give an opinion it is competent to give, an opinion giver should consider whether a lawyer in similar circumstances would ordinarily give the opinion.

#### 4.5 Reliance by Recipients

An opinion recipient is entitled to rely on an opinion, without taking any action to verify the opinion, unless it knows that the opinion is incorrect or unless its reliance on the opinion is otherwise unreasonable under the circumstances. An opinion recipient is entitled to expect an opinion giver, in giving an opinion, to exercise the diligence customarily exercised by lawyers who regularly give that opinion.<sup>8</sup>

#### 4.6 Good Faith

An opinion giver and an opinion recipient and its counsel are each entitled to presume that the other is acting in good faith with respect to a closing opinion.

### 5 FACTS AND ASSUMPTIONS

#### 5.1 Reliance on Factual Information and Use of Assumptions

Because the lawyers preparing a closing opinion (the “opinion preparers”) typically will not have personal knowledge of all the facts they need to support the opinions being given, an opinion giver ordinarily is entitled to base those opinions on factual information provided by others, including its client, and on factual assumptions.

#### 5.2 Reliance on Facts Provided by Others

An opinion giver is entitled to rely on factual information from an appropriate source unless the opinion preparers know that the information being relied on is incorrect or know of facts that they recognize make reliance under the circumstances otherwise unwarranted.

#### 5.3 Scope of Inquiry Regarding Factual Matters

Opinion preparers are not expected to conduct an inquiry of other lawyers in their law firm or a review of the firm’s records to ascertain factual matters, except to the extent they recognize that a particular lawyer is reasona-

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<sup>8</sup> See the *Customary Practice Statement*. See also *infra* Section 10 *Varying Customary Practice*.

bly likely to have or a particular record is reasonably likely to contain information not otherwise known to them that they need to give an opinion.<sup>9</sup>

#### 5.4 Reliance on Representations That Are Legal Conclusions

An opinion giver should not base an opinion on a representation that is tantamount to the legal conclusion the opinion expresses. An opinion giver may, however, rely on a legal conclusion in a certificate of an appropriate government official.

#### 5.5 Factual Assumptions

Some factual assumptions on which opinions are based need to be stated expressly; others do not. Factual assumptions that ordinarily do not need to be stated expressly include assumptions of general application that apply regardless of the type of transaction or the nature of the parties. Examples are assumptions that (i) the documents reviewed are accurate, complete and authentic, (ii) copies are identical to the originals, (iii) signatures are genuine, (iv) the parties to the transaction other than the opinion giver's client (or a non-client whose obligations are covered by the opinion) have the power and have taken the necessary action to enter into the transaction, and (v) the agreements those parties have entered into with the opinion giver's client (or the non-client) are enforceable against them. An opinion should not be based on an unstated assumption if the opinion preparers know that the assumption is incorrect or know of facts that they recognize make their reliance under the circumstances otherwise unwarranted. A stated assumption is not subject to this limitation because stating the assumption puts the opinion recipient on notice of the particular matters being assumed.<sup>10</sup> Stating expressly a particular assumption that could have been unstated does not imply the absence of other unstated assumptions.

#### 5.6 Limited Factual Confirmations and Negative Assurance<sup>11</sup>

An opinion giver ordinarily should not be asked to confirm factual matters, even if the confirmation is limited to the knowledge of the opinion prepar-

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<sup>9</sup> References in this *Statement* to a law firm also apply to a law department of an organization.

<sup>10</sup> Basing an opinion on a stated assumption is subject to the generally applicable limitation described in Section 12 (*No Opinion That Will Mislead Recipient*). Even if a stated assumption (for example, one that is contrary to fact) will not mislead the opinion recipient, an opinion giver may decide not to give an opinion based on that assumption.

<sup>11</sup> This *Statement* also applies, when appropriate in the context, to confirmations.

ers.<sup>12</sup> A confirmation of factual matters, for example, the accuracy of the representations and warranties in an agreement, does not involve the exercise of professional judgment by lawyers and therefore is not a proper subject for an opinion even when limited by a broadly-worded disclaimer. This limitation does not apply to negative assurance regarding disclosures in a prospectus or other disclosure document given to assist a recipient in establishing a due diligence defense or similar defense in connection with a securities offering.

## 6 LAW

### 6.1 Covered Law

When a closing opinion states that an opinion covers the law of a specific jurisdiction or particular laws, the opinion covers no other law or laws.

### 6.2 Applicable Law

An opinion on the law of a jurisdiction covers only the law of that jurisdiction that lawyers practicing in the jurisdiction, exercising customary diligence, would reasonably recognize as being applicable to the client or the transaction that is the subject of the opinion. Even when recognized as being applicable, some laws (for example, securities, tax and insolvency laws) are not covered by a closing opinion. A closing opinion also does not cover municipal and other local law. An opinion may, however, cover law that would not otherwise be covered if the closing opinion does so expressly.<sup>13</sup>

## 7 SCOPE

### 7.1 Matters Addressed

The opinions included in a closing opinion should be limited to reasonably specific and determinable matters of law that involve the exercise of professional judgment. A closing opinion covers only those matters it specifically addresses.

### 7.2 Matters Beyond the Expertise of Lawyers

Opinion givers should not be expected to give opinions on matters that are not within the expertise of lawyers (for example, financial statement analysis, economic forecasting and valuation). When an opinion depends on a

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<sup>12</sup> A confirmation that is sometimes requested and, depending upon the circumstances and its scope, sometimes given relates to legal proceedings against the client.

<sup>13</sup> See *infra* Section 10 (*Varying Customary Practice*).

matter not within the expertise of lawyers, an opinion giver may rely on information from an appropriate source or an express assumption with regard to the matter.

### 7.3 Relevance

Opinion requests should be limited to matters that are reasonably related to the opinion giver's client or the transaction that is the subject of the closing opinion. Depending on the circumstances, limiting assumptions, exceptions and qualifications to those reasonably related to the client, the transaction and the opinions given can facilitate the opinion process.

## 8 PROCESS

### 8.1 Opinion Recipient and Customary Practice

An opinion giver is entitled to presume that the opinion recipient is familiar with, or has obtained advice about, customary practice as it applies to the opinions it is receiving from the opinion giver.

### 8.2 Other Counsel's Opinion

Stating in a closing opinion reliance on an opinion of other counsel does not imply concurrence in the substance of that opinion. An opinion giver should not be expected to express concurrence in the substance of an opinion of other counsel.

### 8.3 Financial Interest in or Other Relationship with Client

Opinion preparers ordinarily do not attempt to determine whether others in their law firm have a financial interest in, or other relationship with, the client. Nor do they ordinarily disclose any such financial interest or other relationship that they or others in their firm have. If the opinion preparers recognize that such a financial interest or relationship exists, they should consider whether, even if disclosed, it will compromise their professional judgment with respect to the opinions being given.

### 8.4 Client Consent and Disclosure of Information

If applicable rules of professional conduct require a client's consent to the delivery of a closing opinion, an opinion giver may infer that consent from a provision in the agreement making delivery a condition to closing or from other circumstances of the transaction. Unless a client gives its informed consent, an opinion giver should not give an opinion that discloses information the opinion preparers know the client would not want to be dis-

closed or as to which the opinion giver is otherwise subject to a duty of non-disclosure under applicable rules of professional conduct.

9 DATE

A closing opinion speaks as of its date. An opinion giver has no obligation to update a closing opinion for events or legal developments occurring after its date.

10 VARYING APPLICATION OF CUSTOMARY PRACTICE

The application of customary practice, including those aspects of customary practice described in this *Statement*, to a closing opinion or any particular opinion may be varied by a statement in the closing opinion or by an understanding with the opinion recipient or its counsel.

11 RELIANCE

A closing opinion may be relied on only by its addressee and any other person the opinion giver expressly authorizes to rely.<sup>14</sup>

12 NO OPINIONS THAT WILL MISLEAD RECIPIENT

An opinion giver should not give an opinion that the opinion preparers recognize will mislead the opinion recipient with regard to a matter the opinion addresses.<sup>15</sup>

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<sup>14</sup> This section does not address the extent, if any, to which anyone else might be permitted to rely as a matter of law. *See also supra* note 3.

<sup>15</sup> An opinion, even if technically correct, can mislead if it will cause the opinion recipient, under the circumstances, to misevaluate the opinion. The risk of misleading an opinion recipient can be avoided by appropriate disclosure. An opinion giver may limit the matters addressed by an opinion through the use of specific language in the closing opinion (including a specific assumption, exception or qualification) so long as the opinion preparers do not recognize that the limitation itself will mislead the recipient. *See supra* Section 10 (*Varying Customary Practice*). Omissions from a closing opinion of information unrelated to the opinions given do not mislead.