IN OUR OPINION

THE NEWSLETTER OF THE LEGAL OPINIONS COMMITTEE

ABA BUSINESS LAW SECTION

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FROM THE CHAIR

I strongly recommend to all of you an excellent article in this issue on "Securities Act Legend Removal Requests in PIPE Transactions," by Jim Matarese, Ettore Santucci and Mark Burnett of Goodwin Procter. The article focuses on how law firms are responding to recent pressure to provide earlier legend removal advice to transfer agents, an action that could expose issuers to some risk that the private placement exemption used for the PIPEs offering could be lost. The article is extraordinarily timely, and its presence here is an example of the value of this publication as a forum to inform practitioners on important current issues in areas affecting opinion practices.

Also noteworthy are Stan Keller's article on developments in Delaware related to duly authorized opinions and the article on "Closing Opinions for Business Trusts." The latter provides useful insights for opinions on three different types of business trusts: Massachusetts business trusts, Delaware statutory trusts and New York common law trusts. Business trusts are a common form of non-corporate entity that we sometimes encounter in transactions where closing opinions are given.

As usual, the Legal Opinions Committee has a full schedule of activities planned for the upcoming ABA Business Law Section 2023 Fall Meeting, to be held in Chicago on September 7-9. As part of that meeting, we have a terrific CLE session planned for Friday morning, September 8 from 10:00-11:30 a.m. (Central Time), titled "Seeking Order from Chaos Again: A New Approach to Intellectual Property Opinions to Underwriters in IPOs." There has been a steady increase over many years in IPOs by companies in the life sciences, technology, luxury brands, digital media and other industries where IP assets account for a material portion, often the lion's share, of enterprise value. It is settled market practice for underwriters to require a third-party legal opinion covering IP matters specifically, but there is little to no consensus as to what IP opinions should be requested by and given to underwriters. This program will discuss guidance for IP, corporate/securities and capital markets lawyers on the appropriate scope of those opinions and ways to reduce friction and cost in giving them.

Our main committee meeting will take place on Friday, September 8 from 2:30-4:00 p.m. (Central Time). For this meeting we are going to try and take a different approach from prior meetings by making the meeting more substantive and issue focused. Rather than having reports on sub-committee and task force work (given that those groups will have their own meetings, which I urge you to attend if you are interested), the full committee meeting will focus on the following issues: (1) how to expand adoption of cross-border principles and develop practical, market-facing guidance, (2) how customary diligence and usage apply to IP third-party opinion preparers providing knowledge-based factual confirmations to underwriters, (3) how to get lenders to consider foregoing enforceability opinions from borrower's counsel in certain situations or rewording the traditional opinion to more precisely identify provisions covered, (4) why law firms have, for the most part, resisted investor pressure to authorize removal of legends absent a contemporaneous sale of securities, and (5) what the "delivery" concept in opinion practice means in an electronic age. It promises to be a different, engaging and rewarding meeting that you don't want to miss.

There will be working meetings of three of our Committee's Task Forces in Chicago. The Cross Border Opinions Task Force will meet on Thursday, at 8:00-10:00 a.m.; the Enforceability Opinions Task Force on Friday at 9:00-10:00 a.m.; and the Intellectual Property Opinions Task Force on Friday at 1:30-2:30 p.m. (all Central Time).

In addition, we are co-sponsoring an important CLE program in the ethics field with the Corporate Counsel Committee, on the extremely interesting topic of "Ethics and Privilege Issues That Confront Inside and Outside Counsel in the Post-Pandemic Era." That program will be Friday afternoon at 4:00-5:30 p.m.

One indication of the strength of the Legal Opinions Committee has been the number, breadth and depth of its ongoing activities, as well as its extensive interaction with other bar groups. We have more than 1,200 members, and a great proportion of those members are regular participants in one or more of our many activities, as well as in state, national and international bar organizations where opinion issues are discussed.

We are always looking to do more. I strongly encourage anyone who has an idea for a new project that the Committee could support to reach out to me.

All the best.

- Arthur Cohen, Chair
  Haynes and Boone LLP
  arthur.cohen@haynesboone.com

FUTURE MEETINGS

ABA Business Law Section
2023 Fall Meeting
September 7-September 9, 2023
Chicago, Illinois
Sheraton Grand Chicago and Online

What follows are the presently scheduled times of meetings and programs of the 2023 Fall Meeting that may be of interest to members of the Legal Opinions Committee. All meetings and programs will be conducted and presented in person and virtually. For links to the meetings and programs, go to the Business Law Section's 2023 Fall Meeting webpage, accessible to members of the Business Law Section here.* **All times are listed in Central Time Zone.**

Legal Opinions Committee

Thursday, September 7, 2023

Cross-Border Opinions Task Force Meeting
8:00 a.m. – 9:00 a.m.

Friday, September 8, 2023

Enforceability Opinion Task Force Meeting
9:00 a.m. – 10:00 a.m.

Program: Seeking Order from Chaos Again:
A New Approach to Intellectual Property
Opinions to Underwriters in IPO's
10:00 a.m. – 11:30 a.m.

*The URL is https://web.cvent.com/event/33e496ca-c32b-4d84-b4e7-063ff3d2af3e/summary.

Legal Opinions Committee (continued)

Intellectual Property Opinions Joint Task Force Meeting
1:30 p.m. – 2:30 p.m.

Committee Meeting
2:30 p.m. – 4:00 p.m.

Program: Ethics and Privilege Issues That Confront Inside and Outside Corporate Counsel in the Post-Pandemic Era (Co-Sponsored with the Corporate Counsel Committee)
4:00 p.m. – 5:30 p.m.

Law and Accounting Committee

Saturday, September 9, 2023

Committee Meeting:
10:00 a.m. – 11:30 a.m.

Securities Law Opinions Subcommittee, Federal Regulation of Securities Committee

Thursday, September 7, 2023

Subcommittee Meeting
11:00 a.m. – 12:00 p.m.

Federal Regulation of Securities Committee
2023 Meeting
December 6-December 7, 2023
Washington, D.C.
Grand Hyatt Washington

The Legal Opinions Committee will meet concurrently with the 2023 Meeting of the Federal Regulation of Securities Committee. More information will be shared regarding schedule of meetings and programs, including meetings of certain task forces of the Legal Opinions Committee, when information is available. It is expected that meetings will be conducted in person and virtually.

ABA Business Law Section
2024 Spring Meeting
April 4-April 6, 2024
Orlando, Florida
Hyatt Regency Orlando and Online

BUSINESS LAW SECTION 2023 HYBRID SPRING MEETING

The Business Law Section held its 2023 Hybrid Spring Meeting in Seattle, Washington (and virtually) on April 27 to April 29, 2023. The Section had a full complement of meetings and programs. The following are reports on meetings held in the Spring Meeting that may be of interest to members of the Legal Opinions Committee.

Legal Opinions Committee

The Legal Opinions Committee met on Friday, April 28, 2023. Members of the Committee attended in person and virtually. The Chair of the Committee, Arthur Cohen (Haynes and Boone LLP) presided at the meeting.

Website Report

Arthur reported that the ABA recently rolled out a new website for the Business Law Section. He explained that there was no advance warning to committee leadership and little opportunity for input. Arthur reported that the website can be difficult to use and asked that Committee members provide him with feedback. Arthur has and will continue to give comments to the Section on difficulties with the website, noting as a particular concern the difficulty of accessing past issues of the Committee's newsletter. Arthur also reported that he and Stan Keller (Locke Lord LLP) have worked with the Section to try to restore access to and the usefulness of the Legal Opinions Resource Center, which is a highlight of our Committee's website and frequently used by Committee members and others. According to Arthur, the Legal Opinions Resource Center is again operational and is not behind the ABA's paywall.

Membership Report

Natalie Lederman (Sullivan & Worcester LLP) is the Committee's Membership, Diversity and Inclusion Director. In Natalie's absence, Arthur reported that membership in the Business Law Section (approximately 32,000) seems stable, but it is supported by an increase in student membership (aided by the fact that student membership is free). It is concerning that more than 60% of the Section's membership has been out of law school for 20 years or more. Arthur reported that our Committee's membership is holding stable at approximately 1,250, although it is important to encourage more member activity and greater attendance at meetings. Of the 50 committees in the Business Law Section, the Legal Opinions Committee is the tenth largest. The three committees with the largest membership are the M&A Committee, the Corporate Governance Committee and the Private Equity and Venture Capital Committee. Arthur observed that a challenge for our Committee is to attract and engage more younger members.

Task Forces and Subcommittee Reports

Intellectual Property Opinions Task Force. Ettore Santucci (Goodwin Procter LLP), Chair of the Intellectual Property Opinions Task Force, reported on the status of the Task Force's Report on Third Party Legal Opinions and Negative Assurance Letters Covering Intellectual Property Issues (the "IP Opinions Report"). The IP Opinions Report is intended to address third-party legal opinions and negative assurance letters to underwriters covering intellectual property issues in public offerings of securities. The report will also address the role of IP lawyers in the offering process; customary practice as it applies to IP opinions; knowledge-based confirmations regarding an issuer's IP portfolio; negative assurance letters addressing IP disclosure; and IP law issues typically covered in closing opinions to underwriters.

According to Ettore, significant progress has been made on the draft report, although there

is still more to do. He welcomed others who might be interested in helping with the draft and invited comments on the draft, which has been circulated. Ettore reported that the drafting team had a productive meeting earlier in the day and that the group is finding increasing consensus in several areas. He anticipates turning another draft before the fall meeting in Chicago. Arthur applauded the thoughtful work of the team and Ettore's leadership. He expressed his hope that the IP Opinions Report will offer clearer direction for opinion givers in an area that often lacks consensus and consistency.

Cross-Border Opinions Task Force. Ettore Santucci and Truman Bidwell (Sullivan & Worcester LLP) are the Co-Chairs of the Cross-Border Opinions Task Force. Ettore reported that the Good Practice Principles for Cross-Border Closing Opinions (the "Principles"), approved by the Committee at the 2022 Spring Meeting, are progressing towards approval by the International Bar Association. Ettore characterized what he would consider successfully putting the Principles to work. At a minimum, practitioners would become aware of the Principles and move towards greater consistency in cross-border practice. A greater level of success would be indicated by formal acceptance of the Principles by various bar groups, particularly outside the United States, similar to the approval by the IBA and the ABA. The hope is for greater acceptance by bar groups in numerous countries. According to Ettore, the highest level of success would be to move towards creation of a cross-border committee or group that could accomplish for cross-border opinion practice what groups like the Committee, Tri-Bar and WGLO have accomplished for U.S. opinion practice. Ettore emphasized that the goal is not to export U.S. opinion practice to lawyers outside the U.S. where it is not as common for lawyers to provide third-party opinions. Rather the goal is to promote consistency in cross-border practice.

Ettore encouraged members to share the Principles with those lawyers in their firms with cross-border practice and to invite colleagues to promote discussion of the topic. Arthur Cohen observed that, assuming that the IBA will approve the Principles, it is important to drive more education on the topic. He observed that the Task Force is a joint effort of the Committee with the Legal Practice Division of the IBA. The Task Force will continue working to create awareness of the Principles at the bar group level. Stan Keller offered to have the Principles posted on the Legal Opinions Resource Center. He stated that it might be appropriate to create a section of the LORC for cross-border issues. Stan also asked whether the Principles should be published in *The Business Lawyer*. Arthur and Ettore agreed that publication would be an appropriate next step. Ettore also reported that he and Truman have prepared a form email for conveying the Principles to various bar groups and asking them to consider it. Arthur encouraged Ettore to consider a program on the Principles for the fall meeting in Chicago and to consider how the ABA could assist with any outreach to share the Principles with bar groups outside the United States.

Opinions in Commercial Finance Subcommittee. Arthur reported that Kim Desmarais (Jones Day) was unable to attend. In Kim's absence, Arthur reported that this subcommittee of the Commercial Finance Committee is working on a CLE program that would address legal opinions in loan transactions to limited liability companies. One of the issues for discussion would be whether and to what extent an opinion giver must confirm authorization taken up the chain of ownership of the borrower. Arthur pointed out that various bar groups and firms follow different approaches and the topic merits attention.

Local Counsel Opinion Project. Frank Garcia (Norton Rose Fulbright US LLP) reported on the status of the Local Counsel Opinion Project, which is a joint effort of the Committee and WGLO. Frank reported that the drafting committee has shared a draft with the larger steering committee overseeing the project and that they have worked through several subsequent drafts. The steering committee's goal is to present a draft to the Committee and

WGLO later this year. The report will provide guidance to lawyers who are asked to provide local counsel opinions and who may not otherwise be familiar with opinion giving practice. The report will discuss the characteristics that are unique to local counsel opinions, with examples and guidance. The report is not intended to provide analysis of substantive opinions that are addressed by various state bar reports. Frank reported that an exposure draft should be ready to be shared in the fall, although it is unlikely to be available by the Committee's meeting in Chicago.

Other Opinion Groups

TriBar Opinion Committee. Arthur noted that at prior meetings, the Committee has talked about whether TriBar is likely to do an addition to its limited partnership and limited liability company opinion reports to cover enforceability opinions on LP and LLC partnership/operating agreements. Arthur reported that TriBar has put the project on hold, because there is no strong consensus that such a report is necessary. TriBar has determined to spend its time and energy on other projects.

Steve Tarry (Vinson & Elkins LLP) reported that TriBar is moving forward with a proposed report on follow-on opinions, including opinions on the enforceability of amendments to loan agreements. In addition to Steve, there are several other members of TriBar experienced in loan transactions who are members of the drafting group for the proposed report. Steve stated that amendments in commercial loan transactions have not been addressed in prior reports and will be a focus of this effort. There is no consensus as to what is meant by an opinion regarding enforceability of an amendment. If the opinion is limited to the enforceability of the amendment alone, there is no clarity as to what that means. For instance, should there be an assumption that the original agreement is enforceable. Steve reported that there is a long way to go before a report will be ready. Arthur emphasized the importance of a report on this topic, observing that there is disagreement between opinion givers and recipients as to what the opinion means and what is reasonable to request.

WGLO

Tim Hoxie (Jones Day), President of the Working Group on Legal Opinions Foundation, discussed briefly the origins and purpose of WGLO. Tim explained that the group is dedicated to bringing together people involved in opinion practice and providing a forum to share ideas and practices. The group is intended to move opinion givers and recipients to a national practice standard. WGLO's members include the Committee, TriBar, numerous law firms that give opinions and that represent opinion recipients, and various state bar groups. Members are invited to two seminars a year. WGLO also holds virtual meetings of its various "affinity groups" from time to time throughout the year for one hour sessions focused on more specialized opinion issues. There are currently six affinity groups, consisting of capital markets/public securities, corporations & alternate entities, cross-border transactions, real estate, commercial law & finance and private equity/venture capital. WGLO members also have access to materials prepared for seminars and affinity group meetings. Member firms may send one representative to the seminars and may make the affinity group virtual meetings available to other lawyers in the firm. Tim reported that the next seminar would be in New York on May 2, 2023.

Tim reported that an effort is underway at WGLO to explore ways in which WGLO and the Committee could build on the Statement of Opinion Practices (74 *BUS. LAW.* 807 (2019)). Andy Kaufman (Kirkland & Ellis LLP) will lead that effort beginning this summer. The hope is that Andy will report back in the fall with initial thoughts on things that the Committee and WGLO might do to further establish a national third-party opinion practice.

Stan Keller reported that an additional project of WGLO is to create a program on third-party opinions for WGLO member firm opinion committee members and general counsel

office personnel. The intent is to prepare something similar to the Bootcamp program held several years ago, except that this program would be done remotely and divided into several sessions. Arthur Field and Stan are formulating the program, which would focus on the opinion process within firms and risk mitigation and less on the substance of particular opinions. They hope to have a program to offer next year.

Recent Developments

Steve Weise (Proskauer Rose LLP) reported on a recent California case applying the Restatement (Second) of Conflict of Laws § 187(2) test to a contractual choice of law provision. The court stated that usury is a fundamental policy of California, illustrating why it is wise to carve out fundamental policies of any jurisdiction when giving a choice of law opinion. *G Companies Management, LLC v. LREP Arizona LLC*, 304 Cal. Rptr. 3d 651 (Cal. Ct. App. 2023).

Steve reported on a California forum selection case. The parties to a contract had selected the courts of the Cook Islands as the forum in which to resolve disputes. A California federal district court upheld the selection saying it was "not unconscionable." That is different from the more traditional view of courts to respect choice of forum unless it would be unfair or unreasonable. Steve observed how differently courts might consider the issue and why the forum selection clause of contracts is best avoided in opinion-giving. *Rostami v. Hypernet Inc.*, 2023 WL 2717262 (N.D. Calif. March 29, 2023).

Steve discussed two additional areas where the effects of undertaking transactions by electronic transmission might affect opinions on contract law. With respect to contract formation, Steve referred to a case in New York where the court is considering whether a thumbs-up emoji in a text message is sufficient to indicate contractual agreement. *Lightsone Re LLC v. Zinntex LLC*, 2022 WL 3757585 (N.Y. Sup. Ct. Aug. 25, 2022). Steve also pointed to the developing law around consumer contracts that could impact contract law generally. The recently approved Restatement of the Law Consumer Contracts, § 2 will impact how online contracts are formed and the terms of the contract. Historically courts have often used the UCC Article 1 definition of "conspicuous," with its emphasis on bold capital letters, large font set off from surrounding text, and the like. Now, in light of the Restatement of the Law Consumer Contracts, courts are beginning to consider the totality of the circumstances based on the Section 2(a) notions of "reasonable notice" of the contract term, the parties' intent in including the term and whether there was a "reasonable opportunity to review" the term.

Don Glazer (Goodwin Procter LLP) reported that TriBar is taking on as a new project a review of its 1998 report Third-Party "Closing" Opinions (53 *BUS. LAW*. 592 (1998)) for any necessary updating. Don reported that there is no intent to rewrite the entire report, but to consider whether an update would be appropriate. Each of the major statements in the report will be reviewed to consider whether changes have occurred in opinion practice such that the content requires revision and update. According to Don, it is not yet clear where the project will lead.

Securities Law Opinions Subcommittee, Federal Regulation of Securities Committee.

Stan Keller reported that the Subcommittee continues to consider a report on opinions to underwriters in capital markets transactions with emphasis on opinions that are unique to those transactions. The Subcommittee is working on a report on opinions to an issuer's transfer agent in connection with removal of the legend on shares that were formerly restricted under Rule 144. Delegending opinions regarding issuers that were formerly shell companies prior to a de-SPAC transaction, including shares issued in PIPEs, present challenges that will be considered. The report will also consider the differences between shares that can be freely resold by non-affiliates and the more difficult analysis for shares intended to be sold by affiliates under Rule 144. By way of example of

the challenges presented with post-SPAC companies, Stan referred to the requirement that an issuer that was a shell company has made all required periodic report filings for the 12 months preceding a sale under Rule 144. That can preclude giving a delegending opinion until the shares are actually sold.

Enforceability Opinions Task Force. Jim Smith (Foley Hoag LLP) reported for the Task Force that is examining the allocation of responsibility for giving enforceability opinions on loan agreements. The Task Force is co-chaired by Jim, Don Glazer and Anna Mills (Wells Fargo). The Task Force is considering whether, when lender's counsel drafts a loan agreement on a form that is a standard form of the lender, an enforceability opinion from borrower's counsel provides value to the lender when the opinion is subject to extensive qualifications and exclusions. Jim reported that the Task Force is achieving some consensus around a couple of concepts. For example, where documents are on the lender's form, prepared by the lender's counsel and where there has been very little negotiation and revision of the terms, the cost of an enforceability opinion from borrower's counsel is often not justified. Also, it is recognized that an enforceability opinion could be more precisely focused on specific issues of importance to the lender, rather than a general enforceability opinion with lengthy exceptions, and the cost would be justifiable. The Task Force is working on a draft white paper with a goal to present a draft to the Committee in the fall.

Next Meeting.

Arthur pointed out that the next meeting of the Committee will be held during the Business Law Section is 2023 Fall Meeting on September 7 to September 9 in Chicago. Stan Keller asked whether a decision had been made on the Committee participating in the Federal Regulation of Securities Committee meeting to be held in late fall in Washington, D.C. Stan observed that other committees joined in that meeting over the years. Several members expressed a view that participation (without any CLE programming) would still be valuable.

- J.W. Thompson Webb
  Miles & Stockbridge P.C.
  twebb@milesstockbridge.com

Securities Law Opinions Subcommittee, Federal Regulation of Securities Committee

The meeting was held in person and virtually on April 27, 2023 and was well attended. Rob Evans (Locke Lord LLP), Chair, and Eric Juergens (Debevoise & Plimpton, LLP), Vice Chair, led the meeting. The meeting focused on the following four topics:

(1) Update and General

The proposed Report on Opinions to Underwriters has been stalled since the Subcommittee's last meeting. It remains a current focus for the Subcommittee.

Suggestions of new members and ideas of how best to grow the Subcommittee's membership would be welcome.

(2) Current Status of Opinions to Underwriters in DeSPAC Transactions

There was discussion of changes in practice since the SEC's March 30, 2022 Release, which broadly interprets who may be an "underwriter" with underwriter liability in the context of deSPAC transactions. The consensus seemed to be that this is less urgent than it was last year – the deals that were ongoing at the time the Release was issued have all been sorted out and closed, market participants have more experience and there are fewer deals in the market.

Bulge bracket banks have become less likely to underwrite SPACs and have in some cases withdrawn participation when existing SPACs they underwrote do deSPAC transactions, often waiving their deferred fees.

In cases where they are involved, they hire their own counsel to do due diligence and expect negative assurance letters from the target and SPAC lawyers covering all of the disclosure. They are also getting comfort letters from the accountants. Some smaller deals are still done without negative assurance letters.

Projections have been dramatically cut back from those used in 2020 and 2021.

The Subcommittee discussed various aspects of deSPAC transactions, including bring down diligence and opinions and situations in which law firms try to focus their negative assurance letters only on the SPAC or the target company, depending on who they represent, and pushback from the banks on that approach.

(3) Draft Outline of Report on Rule 144 Opinions

Eric Juergens led a discussion of the Draft Outline (he is the principal draftsperson). The discussion included how to keep the report targeted and useful. It was noted that the report can be kept concise by referring to other reports and the discussion of the indicia of affiliate status can be kept brief. The group talked about Rule 144(i) applicable to former shell companies (like SPACs) and about the condition of a required Form 144 filing. The report will cover some of the difficult determinations required and contrast factual confirmations with giving an opinion.

(4) Discussion of Delegending Opinions for PIPEs Offerings [Editor's Note: An article on this topic, Securities Act Legend Removal Requests on PIPE Transactions, appears below in this issue.]

There was a wide-ranging discussion of the pressure on law firms to provide legend removal advice to issuers and opinions to transfer agents and others. As a Securities Act of 1933 matter, PIPEs shares are "restricted securities" that are not freely tradable. This is so even when a resale shelf registration statement goes effective in the absence of a sale under the registration statement. Therefore, delegending the shares can expose the issuer to the risk that the private placement exemption used for the PIPEs offering could be lost if an investor distributed the delegended shares apart from the registration statement as though they were freely tradable. Unlike with a typical company where legends would normally be removed for a non-affiliate investor after a one-year holding period, deSPAC companies typically are subject to Rule 144(i), which means the Rule 144 current information requirement continues to apply (unlike the case for typical companies that were never a shell). A comment was made that the SEC staff does not apply Rule 144(i) to deSPAC structures where a new company is the registrant (*e.g.*, the target or a new holding company as opposed to the SPAC).

The consensus seemed to be that issuers and their counsel should be careful about allowing legend removal. Also discussed was the possibility of brokers agreeing to hold restricted securities that had been delegended in a separate account and agreeing to limit trades in a way that would permit the issuer to police its private placement exemption. There have been discussions about this with several brokers that are ongoing.

- Robert Evans, III
Locke Lord LLP
robert.evans@lockelord.com

Law and Accounting Committee

The Committee met on Saturday, April 29, via a hybrid meeting. Alan J. Wilson (Wilmer Cutler Pickering Hale and Dorr LLP), Chair of the Committee, led the meeting. Mr. Wilson recapped for the Committee the Committee's March 6, 2023 comment letter on the Public Company Accounting Oversight Board's ("PCAOB") Release No. 2022-006, *A Firm's System of Quality Control and Other Proposed Amendments to PCAOB Standards,*

Rules, and Forms.[1] He also led a discussion of selected PCAOB, SEC and FASB developments, including the PCAOB's prioritization of fraud in 2023 inspections, spotlight with respect to SEC developments on professional competence and skepticism in audits, and inspections of China-based firms. The Committee also discussed PCAOB Release 2023-001, *Proposed Auditing Standard – General Responsibilities of the Auditor in Conducting an Audit and Proposed Amendments to PCAOB Standards*,[2] which addresses the general responsibilities of the auditor, such as due professional care and professional skepticism. The Committee discussed potential areas for comment on the proposal and formed a working group to prepare and submit a comment letter on the proposal.[3]

On SEC matters, the Committee discussed a recent non-GAAP enforcement action and potential considerations for non-GAAP disclosure policies.[4] The Committee also discussed the status of the SEC's proposed climate disclosure rules, an enforcement action involving ESG-related disclosures,[5] and a COSO report on internal control over sustainability reporting.[6] Other topics of discussion included trends in the basis of accounting selected by private companies (GAAP versus tax basis), as well as developments in the regional banking sector, including the role of the auditor and critical audit matters disclosures.

The Committee turned to a discussion about audit response letters, including trends in audit response letters over the past season. The Committee discussed an SEC enforcement action against executives and a director for lying to auditors.[7] The Committee briefly discussed issues that arise in considering materiality thresholds in audit responses, with Mr. Wilson citing to a prior discussion led by Stan Keller and summarized in the Fall/Winter 2022 issue of *In Our Opinion*.[8] The Committee concluded by discussing potential projects for the Committee, including a survey of audit response letter practices, an update to the ABA Bus. Law Section Audit Responses Committee's Auditor's Letter Handbook (2d. ed. 2013), and sponsoring an accounting for lawyers CLE event.

- Alan J. Wilson
  Wilmer Cutler Pickering Hale and Dorr LLP
  alan.wilson@wilmerhale.com

[1] Available at https://assets.pcaobus.org/pcaob-dev/docs/default-source/rulemaking/docket046/43_aba.pdf?sfvrsn=25a489be_4.

[2] Available at https://assets.pcaobus.org/pcaob-dev/docs/default-source/rulemaking/docket-049/pcaob-release-no.-2023-001-as-1000---proposed.pdf?sfvrsn=28304d26_2.

[3] A comment letter was submitted by the Committee on June 29, 2023. It is available at https://assets.pcaobus.org/pcaob-dev/docs/default-source/rulemaking/docket-049/27_aba.pdf?sfvrsn=32389e83_4.

[4] In the Matter of DXC Technology Company, Admin. Proceeding No. 3-21342 (Mar. 14, 2023), https://www.sec.gov/files/litigation/admin/2023/33-11166.pdf.

[5] Sec. and Exch. Comm'n, Press Release No. 2023-63, *Brazilian Mining Company to Pay $55.9 Million to Settle Charges Related to Misleading Disclosures Prior to Deadly Dam Collapse* (Mar. 28, 2023), https://www.sec.gov/news/press-release/2023-63.

[6] COSO, *Achieving Effective Internal Control Over Sustainability Reporting (ICSR)* (2023), https://www.coso.org/Shared%20Documents/COSO-ICSR-Report.pdf.

[7] Sec. and Exch. Comm'n, Lit. Release No. 25517, *SEC Charges Executives and Director with Lying to Auditors* (Sept. 23, 2022), https://www.sec.gov/litigation/litreleases/lr-25517.

[8] Audit Responses Committee, IN OUR OPINION (ABA BUS. LAW SECTION LEGAL OPS. COMM.), Fall/Winter 2022, at 9-10.

ARTICLES

Securities Act Legend Removal Requests in PIPE Transactions

Public companies often issue and sell securities in so-called private investment in public equity (PIPE) transactions, which are private offerings exempt from the registration requirements of the Securities Act of 1933 (the "Securities Act") in reliance on Section 4(a)(2) of the Securities Act. One condition to the availability of that exemption is that the securities sold (so-called "restricted securities") not be distributed (*i.e.*, resold publicly) without registration before they have been held for a sufficient period. This period is effectively one year under Rule 144 of the Securities Act, a rule adopted by the Securities and Exchange Commission (the "SEC") to provide a safe harbor for resales of restricted securities. To prevent the unregistered and non-exempt resale of restricted securities, issuers place legends on the securities prohibiting their resale in transactions that could violate the Securities Act and jeopardize the availability of the Section 4(a)(2) exemption. This article addresses concerns law firms have in authorizing on behalf of their issuer clients the removal of legends on securities issued in PIPE transactions before investors resell the securities under a resale registration statement and before Rule 144 becomes available.

Procedures for removing Securities Act legends from restricted securities generally are well-established. Before they will remove legends from restricted securities, transfer agents require written authorization to do so from the issuer's counsel on behalf of its client, which may be in the form of an instruction or opinion letter. As a general matter, most law firms will deliver that letter only in connection with either (i) the actual and contemporaneous resale of the securities in a registered or exempt transaction or (ii) in the absence of a resale, after satisfaction of the Rule 144 holding period.[9] To support removal of the legends when the holder sells under a registration statement or pursuant to an exemption from registration, issuers and their counsel typically obtain representations from the holder that it complied with the plan of distribution under the registration statement or the requirements for an exemption from registration.

Investors in PIPE transactions, including in de-SPAC and other business combination transactions and equity lines of credit, typically obtain an agreement from the issuer to register the resale of the acquired securities soon after their investment and before Rule 144 becomes available. Recently, some of these investors have requested removal of Securities Act legends when the registration statement covering the resale of their securities becomes effective even though they have no current intention to resell those securities. These investors argue for legend removal to avoid potential delays in the settlement of future resales or to facilitate hedging strategies.

Informal surveys at recent bar group meetings have indicated that law firms have, for the most part, resisted investor pressure to authorize removal of legends when a resale registration statement becomes effective absent

[9] See Securities Act Release No. 33-8869 (2007), fn. 65; Smith Barney, Harris Upham & Co. Inc., SEC No-Action Letter (Sept. 16, 1988). Law firm practices vary for removing legends in the absence of the actual and contemporaneous resale of the securities following satisfaction of the Rule 144 holding period. Some firms will deliver the instruction or opinion letter for securities held by both non-affiliates and affiliates who have held restricted securities for at least one year upon receipt of various representations from the holder and/or the holder's broker, including that the holder has fully paid for and held the securities for the entire one-year period. This article does not address the treatment of securities subject to Rule 144(i), which is applicable to former shell companies, such as special purpose acquisition companies ("SPACs").

an actual and contemporaneous sale of the securities by the investor. Law firms have been concerned that an effective registration statement does not alter the status of the securities covered by the registration statement – *i.e.*, they continue to be "restricted securities" until sold in a transaction that changes that status. Law firms are mindful that the SEC consistently has taken the positions that (i) placing legends on restricted securities restricting their transfer has proven in many cases to be an effective means of preventing illegal distributions,[10] and (ii) assurances from an investor that it will resell the securities in compliance with the Securities Act without more are not necessarily sufficient to protect the Section 4(a)(2) exemption for the original issuance.[11]

Many large securities brokers have internal controls and procedures that differentiate between "restricted securities," "control shares" and securities acquired in Rule 145 transactions. Like law firms, those brokers have expressed concerns about removing Securities Act legends other than in connection with the resale of the securities because of the risk that those securities will enter the general pool of fungible, freely tradable securities and be resold in a potentially illegal distribution. Those brokers also have concerns that they will be unable to properly categorize unlegended securities for purposes of their internal controls. These brokers have emphasized that the sophistication of the investor is not relevant to addressing their concerns.[12]

Where does that leave us? On the one hand, law firms representing issuers want to ensure that clients do not jeopardize their Section 4(a)(2) exemption by prematurely removing Securities Act legends and thereby facilitating an illegal distribution. At the same time, issuers want to raise capital as cost-effectively as possible, investors want liquidity and the ability to engage in hedging strategies, and brokers and transfer agents, as intermediaries, want to avoid being involved in an illegal distribution. To accommodate all of these objectives, several large securities brokers have established or are developing internal controls (such as holding securities in separate accounts) that will permit them to hold unlegended, restricted securities while still allowing them to satisfy internal compliance policies and track the restricted status of those securities, thus preventing their illegal resale. To support the removal of Securities Act legends before the securities are resold, some brokers have expressed a willingness to make representations to, and agreements with, the issuer and its counsel that are intended to provide assurances that resales of the securities will comply with the Securities Act.

Whether the internal controls and procedures brokers establish, and the representations and agreements they are willing to make to issuers and their counsel, will be sufficient to enable law firms to authorize the removal of Securities Act legends from restricted securities apart from their actual and contemporaneous resale and before Rule 144 becomes available remains to be seen. For now, some law firms and brokers are developing

[10] See, e.g., Securities Act Release Nos. 33-4552 (1962), 33-5121 (1970) and 33-6339 (1981).

[11] See Securities Act Release No. 33-4552 (1962) ("[a] statement by the initial purchaser, at the time of his acquisition that the securities are taken for investment and not for distribution is necessarily self-serving and not conclusive as to his actual intent"). Although Rule 502(d) provides that the criteria cited for an issuer to demonstrate the exercise of reasonable care to assure that the purchasers of the securities are not statutory underwriters are not exclusive, absent from the criteria is the issuer's ability to rely on an agreement from the purchasers that they will only transfer the securities in registered or exempt transactions (which had been included as criteria in the rule replaced by Rule 502(d)).

[12] Some brokers on occasion have accepted unlegended, restricted securities and placed them in a separate account to prevent them from being commingled with non-restricted securities of the same class. However, this is a manual process requiring special efforts by, and increased costs for, the broker and is not a standard practice among brokers.

procedures to address the concerns. However, until satisfactory controls and procedures and representations and agreements that enable the removal of legends are agreed upon, law firms can be expected to continue resisting requests that legends be removed from restricted securities before their actual resale or satisfaction of Rule 144 requirements.

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- James A. Matarese
  Goodwin Procter LLP
  jmatarese@goodwinlaw.com

- Ettore A. Santucci
  Goodwin Procter LLP
  esantucci@goodwinlaw.com

- Mark H. Burnett
  Goodwin Procter LLP
  mburnett@goodwinlaw.com

More on Duly Authorized Opinions under Delaware Law

In the Spring 2023 issue of *In Our Opinion* I wrote about the relevance of the *Boxed* decision[13] and the related judicial validation proceedings for duly authorized opinions.[14] Since then there have been several developments worth noting.

First, legislation is in process in Delaware that would amend section 242 of the Delaware General Corporation Law ("DGCL") to address the situation involved in *Boxed* and similar matters by adding a new section 242(d) that would eliminate or reduce the stockholder vote otherwise required by section 242(b). In addition to adding section 242(d)(1) to eliminate the need for stockholder approval of certain stock splits that could include an increase in the authorized shares, the amendment would add section 242(d)(2) to permit a certificate of incorporation of a listed company to be amended to increase or decrease the authorized shares of a class of stock, or to effect a reverse split, if the votes of stockholders in favor exceed the votes against, including of the affected class (unless the corporation had opted out of the need for a class vote), thereby eliminating abstentions and non-votes from having the effect of votes against.

Next, on March 29, 2023, the Delaware Court of Chancery ruled that a class vote was not required to approve an amendment to a certificate of incorporation to add officer exculpation provisions, rejecting plaintiffs' claim that the amendment adversely affected their rights as stockholders of the class by curtailing their right to sue. *In re Snap Inc. Section 242 Litigation*, 2022-11032-JTL, and *Elec. Workers Pension Fund, Local 103,*

[13] *Garfield v. Boxed, Inc.*, 2022 WL 17959766 (Del. Ch. Dec. 27, 2022).

[14] Stanley Keller, Class Voting and Duly Authorized Opinions, IN OUR OPINION (ABA BUS. LAW SECTION LEGAL OPS. COMM.), Spring 2023 (vol. 22, no.2), at 3-4.

I.B.E.W. v. Fox Corp., 2023 Del. Ch. LEXIS 68* (March 29, 2023). In its transcript ruling, the Court addressed the test for being adversely affected for purposes of the class vote provision of section 242(b)(2) and stated that, based on existing precedent, a class vote is only required where rights expressed in the certificate of incorporation, including rights set forth in the DGCL, are adversely affected. An appeal of the Court's decision is pending in the Delaware Supreme Court and a decision of that Court is needed for definitive guidance.

Finally, on May 22, 2023, the Delaware Court of Chancery, in *Altieri v. Alexy,* 2023 WL 3580852 (Del Ch. May 22, 2023), had to decide whether the sale by a Delaware corporation of an important line of its cybersecurity business involved "substantially all" its assets so as to require stockholder approval under section 271 of the DGCL. In an order notable for its conciseness and efficiency, the Court analyzed Delaware law on the meaning of "substantially all" and applied the quantitative and qualitative tests under *Gimbel v. Signal Companies, Inc.*, 316 A.2d 599 (Del. Ch. 1974). Citing *Hollinger Inc. v. Hollinger International, Inc.*, 858 A.2d 342 (Del. Ch. 2004), in which then Vice Chancellor Strine said in effect that "substantially all means substantially all," the Court determined that, although the line of business sold was important, it did not quantitatively satisfy the substantially all test (noting that the sale price represented 40% of the company's publicly reported total assets), nor did it meet the substantially all test qualitatively because the sale did not affect the existence and purpose of the corporation, which remained a cybersecurity company after the sale, even though the nature of how it operates might change.

- Stanley Keller
  Locke Lord LLP
  stanley.keller@lockelord.com

Closing Opinions for Business Trusts

The Summer 2016 issue of *In Our Opinion* contained an article, "Closing Opinions for Common Law Trusts," by James Gadsden that discussed opinions given when a New York common law trust is a party to a transaction. This article expands and updates that article by discussing opinions given when different types of business trusts, including so-called Massachusetts business trusts, Delaware statutory trusts and New York common law trusts, are the parties to a transaction.[15]

Business trusts are a common form of non-corporate entity used for business purposes, particularly prior to the advent of limited liability companies. They can provide more flexibility than corporations and avoid restrictions that applied to corporate entities under earlier corporate and regulatory statutes. They also can offer some tax advantages. Although business trusts are less commonly formed today, they continue to exist as business entities that participate in transactions, including as mutual funds, real estate investment trusts, other real estate ventures, holding companies that own public utilities and securitization transactions. Therefore, legal opinions continue to be given on business trusts.

Massachusetts

Background. Business trusts were first popular in Massachusetts, in part because they were recognized by the Massachusetts courts as separate entities akin to corporations, and were commonly used by parties in other jurisdictions – hence the name "Massachusetts business trust." The declaration of trust typically states

[15] A breakout session at the Fall 2016 Seminar of the Working Group on Legal Opinions Foundation addressed "Opinions on Business Trusts and Other Trusts, Both Statutory and Common Law" under Massachusetts, New York and Delaware law. This article is based on the discussion at that breakout session and relies heavily on the outline prepared for that session by James Gadsden, Louis Hering and James McDaniel.

that the trust was formed under and governed by the law of Massachusetts. That recitation is considered sufficient to establish the requisite nexus with Massachusetts regardless of whether the trust has operations in Massachusetts, but lawyers often seek for the trust to have other nexus with Massachusetts, such as having a Massachusetts resident as a trustee or having the declaration of trust executed in Massachusetts.[16]

A Massachusetts business trust is a common law trust, as opposed to statutory trust, but it is recognized and to some extent regulated by a statute — Chapter 182 of the Massachusetts General Laws. A "business trust" is defined under the statute as a voluntary association or trust operating "under a written instrument or declaration of trust, the beneficial interest under which is divided into transferable certificates of participation or shares."[17] While the statute requires filing of the declaration of trust and subsequent reporting by a business trust with the Massachusetts Secretary of State, the trust is created under non-statutory law without any filing and its existence and the validity of its declaration of trust is not dependent upon a filing, although there is a penalty for failure to file. The Massachusetts Secretary of State has also adopted regulations that require certain basic information to be included in the declaration of trust (*e.g.*, name of business trust, date of organization, names and addresses of trustees and trust's principal place of business), but the regulations do not contain substantive provisions.[18]

Although formally not an entity apart from its trustees, a Massachusetts business trust is recognized for many purposes by the statute and the courts as a type of business entity similar in many respects to a corporation, and is treated differently in many respects than private or ordinary trusts. As to matters of status, power and shareholder rights, a Massachusetts business is treated much like a corporation. Massachusetts courts often look to the corporation statute and related case law when deciding questions involving business trusts.[19]

Status, Power and Authorization Opinions. The status and power opinions for business trusts often closely resemble the comparable opinions for business corporations. Because of the filing requirements for business trusts, the Massachusetts Secretary of State issues what amounts to a certificate of good standing, which is relied upon to give a status opinion regarding the entity. Because the Rule Against Perpetuities is no longer a concern under the Massachusetts Uniform Probate Code[20] since a Massachusetts business trust does not have unvested interests, declarations of trust usually provide that the life of the trust is without limit. The following are examples of typical forms of status and power opinions for a Massachusetts business trust:

> The Trust is validly existing [and in good standing] as a business trust under Massachusetts law pursuant to the provisions of the Trust Agreement dated _____ __, 20__.
>
> The Trust has the power, acting through the Trustee, as trustee of the Trust, to execute and deliver the [transaction documents] and to perform its obligations thereunder.

[16] Hasan v. CleveTrust Realty Investors, 548 F. Supp. 1146 (N.D. Ohio 1982), vacated on other grounds, 729 F.2d 372 (6th Cir. 1984); Skolnok v. Rose, 434 N.E.2d 251 (N.Y. Ct of App. 1982); Greenspun v. Lindley, 330 N.E.2d 79 (N.Y. 1975).

[17] MASS. GEN. LAWS ch. 182, § 1.

[18] 950 MASS. CODE REGS. ch. 109.

[19] *See* Brigade Leveraged Cap. Structures Fund Ltd. v. Pimco Income Strategy Fund, 995 N.E.2d 64 n. 4 (Mass. 2013); Halebian v. Berv, 931 N.E.2d 986 (Mass. 2010); Gallant v. SSgA Funds, C.A. No. 12-03192-BCS1, n.6 (Mass. Sup. Ct. March 21, 2013) ("correlating the inspection rights of business trust shareholders to those of corporate shareholders makes a good deal of practical sense, given the similarity in character, purpose and regulation of the two entity types").

[20] *See* MASS. GEN. LAWS ch. 190B, § 2-901(a).

With respect to opinions regarding the power and authority of the trust, Massachusetts business trusts do not enjoy the statutory default powers of a business corporation (*e.g.,* MASS. GEN. LAWS ch. 156D, § 3.02), so power and authority must be ascertained from the declaration of trust. With respect to due authorization and execution opinions, the procedures specified in the declaration of trust (and any authorizing resolutions) should similarly be reviewed. Less clear, though, is what the opinion preparer must do to confirm the status, power and authority of a trustee if the trustee is an entity. For example, to what extent is this similar to customary practice for a limited liability company or limited partnership where the managing member or the general partner is itself an entity?[21]

Opinions on Liability of Participants. Regarding matters of liability for participants in the business trust (*i.e.*, holders of beneficial interests in the form of shares ("shareholders"), trustees or officers), a Massachusetts business trust is treated less like a corporation and more like a traditional trust (or even a general partnership). If shareholders exercise too much control over management of the trust, the trust runs the risk of being treated as a general partnership and its shareholders can be liable for the obligations of the trust.[22] To minimize possible shareholder liability, Massachusetts business trusts typically (i) include provisions in their declarations of trust limiting shareholder liability and granting indemnification out of the trust assets and (ii) include on their stationery and in their contracts a statement that the obligations of the trust are binding only on the trust property and not on the shareholders. Similar liability concerns can arise for trustees and officers, so they are often added to the same statement disclaiming liability of the shareholders and protected by indemnification from the trust assets and insurance. While disclaimers of liability can help protect against contractual liabilities, they typically do not protect against tort or other non-contractual liabilities. For this reason, some business trusts, if concerned about potential liability, conduct their operations through corporate subsidiaries.

Opinions regarding the non-assessability of shares of Massachusetts business trusts can be more problematic than their counterparts for corporations. For trusts that are not investment companies and have only basic shareholder voting rights, it is common to see "clean" opinions in a form similar to that for corporations to the effect that the shares when issued will be "validly issued, fully paid and non-assessable."[23] When the declaration of trust includes voting rights mandated by the Investment Company Act of 1940, opinion givers may note that shareholders could, under certain circumstances, be held personally liable for the obligations of the trust, as in the following example:

> When issued in accordance with the Agreement, the Shares will be validly issued, fully paid and, except as noted in

[21] In its recent report on closing opinions for limited partnerships, TriBar has taken the position that when the general partner of a limited partnership is an entity, as a matter of customary practice, lawyers who render due authorization, execution and delivery opinions on behalf of the limited partnership may assume, without so stating, that the general partner (i) is the type of entity it purports to be, (ii) has the entity power and took any internal steps it was required to take to approve the actions covered by the opinion, and (iii) authorized those acting for it to take those actions on its behalf. TriBar Op. Comm., *Third-Party Closing Opinions: Limited Partnerships*, 73 BUS. LAW. 1107, 1120-21 (2018). TriBar has also applied the same principle to entities that are members and managing members of limited liability companies. TriBar Op. Comm., *Third-Party Closing Opinions: Limited Liability Companies (Revised 2021)*, 77 BUS. LAW. 201, 217 (2021-2022).

[22] *See* Frost v. Thompson, 106 N.E. 1009 (Mass. 1914).

[23] The TriBar report on opinions on limited liability companies (see note 5 supra) suggests forms of opinions that do not use the concept of "non-assessable," which is a statutory concept limited to shares of a corporation. That suggestion may be equally applicable to business trusts.

the paragraph below, non-assessable by the Trust.

The Trust is an entity of the type commonly known as a "Massachusetts business trust." Under Massachusetts law, shareholders could, under certain circumstances, be held personally liable for the obligations of the Trust. However, the Declaration of Trust disclaims shareholder liability for acts or obligations of the Trust and requires that notice of such disclaimers be given in each agreement, obligation or instrument entered into or executed by the Trust or its trustees. The Declaration of Trust provides for indemnification out of the property of the Trust for all losses and expenses of any shareholder of the Trust held personally liable solely by reason of his or her having been such a shareholder. Thus, the risk of a shareholder incurring financial losses on account of shareholder liability is limited to circumstances in which the Trust would be unable to meet its obligations.

Delaware

Background. Delaware statutory trusts are formed under the Delaware Statutory Trust Act (the "DSTA")[24] by entering into a written governing instrument and the filing a certificate of trust with the Delaware Secretary of State. The DSTA currently provides that a Delaware statutory trust may opt out of being treated as a separate legal entity by so providing in its certificate of trust and governing instrument.[25] The opt-out provision was added so that practitioners could take advantage of the non-entity element of a common law trust within the framework of the DSTA. Opting out of being a separate entity can preserve the benefit of the broad enabling provisions and limitation on liability contained in the DSTA for both beneficial owners and trustees while addressing concerns that favorable state and federal laws might treat a statutory trust differently than a common law trust.

Formation of a statutory trust has been made flexible by permitting filing of a certificate of trust and entering into a governing instrument to be done in any order (*see* Section 3810(a)(2) of the DSTA). Certain provisions of the DSTA look to corporate concepts, such as Section 3803(a) of the DSTA for the liability of beneficial owners, and the DSTA provides very broad authority to include almost any type of provision in a governing instrument (*see* Section 3806(b) of the DSTA). Due to the flexibility provided by the DSTA in tailoring the affairs of a Delaware statutory trust, an opinion giver must carefully review the governing instrument for purposes of the power and authority opinion. Further, it is important to note, however, that the Delaware trust law is the "gap filler" for the DSTA (*see* Section 3809 of the DSTA), that is, the law that applies if a matter is not addressed by the DSTA or the governing instrument. Importantly, that would include the fiduciary duties owed by common law trustees, unless the governing instrument provides otherwise. It also should be noted that opinion recipients do not typically request limited liability opinions with respect to the beneficial owners. Similar to limited liability companies and limited partnerships, opinions givers obtain a certificate of good standing from the Delaware Secretary of State in connection with the status opinion.

Section 3806(b)(2) of the DSTA provides that a Delaware statutory trust may establish designated series of beneficial interests. Section 3804(a) of the DSTA provides that a Delaware statutory trust that has (1) provided for series, (2) included specific provisions on inter-series limitation on liability in its governing instrument, (3) provided notice of the inter-series limitation on liability in its certificate of trust and (4) maintained certain recordkeeping, will have inter-series limitation on liability so that, unless otherwise agreed, the

[24] DEL. CODE ANN. tit. 12, § 3801 et. seq.

[25] DEL. CODE ANN. tit. 12, §§ 3801(i)(2) and 3810(a)(2) ("[a] statutory trust formed under this chapter, unless otherwise provided in its certificate of trust and in its governing instrument, shall be a separate legal entity").

liabilities of one series cannot be asserted against the assets of another series or of the statutory trust itself.

Delaware statutory trusts are used in a variety of transactions including both closed-end and open-end investment funds. If the shares of such an investment fund are registered under the Securities Act of 1933, the fund will be required to file an opinion with the SEC as to the legality of those shares, which usually takes the form of a typical validly issued opinion. In addition, standard closing opinions are typically required when these funds do financings or other transactions like reorganizations (such as transactions where the assets and liabilities of one or more series or one or more trusts or other entities are combined). The Delaware Division of Corporations reported the formation of 2,498 statutory trusts in 2022, 2,306 in 2021 and 1,956 in 2020.

The DSTA, the governing instrument of the trust and the resolutions, if any, of the trustees will provide the basis for any opinions on a Delaware statutory trust. The statutory default rule for the management of a Delaware statutory trust is management by the trustees, and the governing instrument of a Delaware statutory trust that is a registered mutual fund typically provides for trustee management. Regarding a legality opinion on shares in a Delaware statutory trust, Section 3803(a) of the DSTA provides that, except to the extent otherwise provided in the governing instrument, the beneficial owners shall be entitled to the same limitation of personal liability extended to stockholders of private for-profit Delaware corporations. The governing instrument of a Delaware statutory trust that is operating as open-end investment company typically provides that the trust can issue an unlimited number of shares. The governing instruments for closed-end mutual funds sometimes also take this approach, but at other times may authorize a specific number of authorized shares. The governing instruments for both open-end and closed-end mutual funds organized as Delaware statutory trusts typically include a provision that all shares of the trust when issued in accordance with the governing instrument will be validly issued, fully paid and non-assessable.

Forms of Opinions. The following are typical opinions given with respect to a Delaware statutory trust that is entering into a financing transaction:

> Trust is a duly formed and validly existing statutory trust in good standing under the laws of the State of Delaware.
>
> The Trust has requisite statutory trust power and authority under the certificate of trust of the Trust and the trust agreement of the Trust (collectively, the "Governing Documents") and the Delaware Statutory Trust Act to execute and deliver the Transaction Documents and to perform its obligations under the Transaction Documents.
>
> The Trust has taken all necessary statutory trust action under the laws of the State of Delaware to authorize the execution, delivery and performance of the Transaction Documents
>
> The Transaction Documents have been duly authorized, executed and delivered by the Trust.
>
> The execution and delivery by the Trust of the Transaction Documents, and the performance by the Trust of its obligations under the Transaction Documents, do not violate the Governing Documents or any applicable Delaware statute, rule or regulation.
>
> The execution and delivery by the Trust of the Transaction Documents, and the performance of its obligations under the Transaction Documents, will not require any consent of, notice to or filing with any Delaware Governmental Authority to be obtained or made by or on behalf of the Trust.

Issues for Opinions on Delaware Statutory Trusts.

Opinions on valid existence and power and authority. Section 3807 of the DSTA provides that every Delaware statutory trust, other than a statutory trust that is, becomes or will become (prior to or within 180 days following the first issuance of beneficial interests) a registered investment company, must at all times have at least one trustee which in the case of a natural person is a resident of the State of Delaware or which, in all other cases, has its principal place of business in the State of Delaware. If a Delaware statutory trust does not comply with this requirement, issues arise as to whether it is duly formed and as to what business or other activities it can properly undertake.

Opinions on series interests. While the use of series permits considerable flexibility in the operation of Delaware statutory trusts, they can raise difficult issues. A series of a Delaware statutory trust is not a separate legal entity and cannot (unlike certain series of a Delaware LLC or Delaware limited partnership) contract in its own name or hold title to assets or grant liens and security interests. However, the DSTA does provide that a statutory trust that has established series with inter-series limitation on liability can contract, hold title to assets and grant liens and security interests in the name of a series. These series provisions can raise opinion issues even with regard to usually straight-forward opinions such as power and authority and due authorization. More difficult opinion issues can arise if series are used in connection with secured financings, particularly with regard to how to perfect a security interest in the assets of a series.[26]

New York

Background. Unlike other states like Delaware, New York has no form of statutory trust.[27] New York trusts used for investment or other business purposes are common law trusts. Also, unlike a state like Massachusetts that has a statute regulating non-statutory business trusts, New York does not have such a regulatory statute.

As described in the 2016 article, a New York common law trust is not a separate legal

[26] The Delaware Limited Liability Company Act and the Delaware Revised Uniform Limited Partnership Act were each amended to create a new form of series ("registered series") that resolved many of the issues related to perfecting a security interest in assets of a series. The DSTA, however, was not amended to add the new form of "registered series." Therefore many of the complicated issues relating to perfecting a security interest in assets of a series still apply to series of a Delaware statutory trust.

[27] Many states have statutes that, unlike New York, establish a business or statutory trust by the filing of a certificate with a designated office or official of the state. Most of those states explicitly recognize business or statutory trusts as separate entities or specify that they may sue or be sued. Some, like Delaware, authorize the creation of series trusts. A few, like New York, do, however, have statutes that recognize the existence of common law trusts.

entity; rather, it is a "relationship."[28] The trustee, who may be an individual, institution or other entity, holds the trust property in trust for the beneficiaries.

Under New York law, there are four essential elements of a valid common law trust: (1) a designated beneficiary, (2) a designated trustee who is not the beneficiary, (3) a fund or other identifiable property, and (4) the delivery of the fund or other property to the trustee with the intention of passing legal title to the property to the trustee to hold in trust for the beneficiary.[29]

New York common law trusts are used for collateral trusts, for a variety of investment vehicles such as unit investment trusts,[30] tender option bonds and other "repacks."[31] For example, the collateral underlying the SPDR Gold Trust (GLD) is held in a New York common law trust. A typical indenture for debt securities is governed by the same principles.

The characteristics of the transactions and opinions involving common law trusts include the following:

- No written agreement is necessary to create a common law trust.[32]
- Any contract that might be the subject of a closing opinion is entered into not by the trust but by the trustee. The trustee executes the contract it its capacity as trustee (rather than the trust as the contracting entity executing the contact by the trustee as its agent).
- The traditional common law rule is that, in the absence of a limitation in the contract, a trustee[33] is personally liable on contracts entered into as trustee, but is entitled to indemnification from the trust property.[34] To negate the application of this rule, trustees have insisted on the inclusion in contracts to which they are a party as trustee of an explicit statement that the only recourse of the counterparty under the contract is

[28] The United States Supreme Court referred to the "tradition" that "a trust was not considered a distinct legal entity, but a 'fiduciary relationship' between multiple people" in determining that, for purposes of federal court diversity jurisdiction, a Maryland real estate investment trust "possesses the citizenship of all its members". American Realty Trust v. Conagra Foods, Inc., 577 U.S. 378 (2016). The commentary to the Restatement (Third) of Trusts notes the development of the concept that a trust is an entity. American Law Institute, Restatement (Third) of Trusts; —Reporter's Notes to comments and (i) (2006) [hereinafter Restatement (Third) of Trusts]; A. Scott, W. Fratchner and M. Ascher, Scott and Ascher on Trusts §§ 2.1.4., 2.3 (5th ed. 2006) [hereinafter Scott on Trusts].

[29] In re Doman, 68 A.D.3d 862, 863, 890 N.Y.S.2d 632 (N.Y. App. Div. 2009); In re Manarra, 5 Misc.3d 556, 558, 785 N.Y.S.2d 274, 275 (N.Y. Sur. Ct. 2004); In re Fontanella's Estate, 33 A.D.2d 29, 30, 304 N.Y.S.2d 829, 831 (N.Y. App. Div. 1969).

[30] Unit investment trusts hold a portfolio securities and issue certificates to investors who share in the return on the portfolio.

[31] A "repack" is a transaction in which debt securities are issued by a trust organized as a bankruptcy remote special purpose vehicle funded by the cash flow from the debt or equity securities acquired by the trust.

[32] Restatement (Third) of Trusts § 4: subject to any applicable statue of frauds (generally applicable to a trust involving real property) G.C. Bogert and Amy M. Hess: The Law of Trusts and Trustees (3rd Ed.) (2014) [hereinafter Bogert] § 63. New York's Statute of Frauds is found in General Obligations Law § 5-701. An agreement must be in writing and "subscribed by the party to be charged" or his agent if it is not to be performed within a year or completed before the end of a lifetime.

[33] American Law Institute Restatement (Second) of the Law of Trusts [hereinafter Restatement (Second) of Trusts] §§ 262, 263 (1959).

[34] Restatement (Second) of Trusts §§ 105, 106.

to the trust property and not to the assets of the trustee.[35]

- Trustees typically sign agreements and other instruments under signature blocks making clear that they are signing the document as a trustee and not in their individual or entity capacity.[36]
- No public filing is required for creation of a common law trust. In the terms of Article 9 of the Uniform Commercial Code, unlike a statutory trust, a common law trust is not a "registered organization"[37] formed or organized by the filing or issuance of a "public organic record" and, unlike a Massachusetts business trust, it is not subject to a statute of the state governing the business trust that "requires that the business trust's organic record be filed with the state."[38]
- In New York, no certificate is available from a state official to confirm the existence of a common law trust and there is no concept of a common law trust being in good standing.

Forms of Opinion. The following are forms of the status, power and authority opinions for a New York common law trust used as an investment vehicle:

> [The Client] is the trustee of [the Trust] pursuant to the provisions of the Trust Agreement dated _____ ____, 20___.
>
> [The Client], as trustee of the Trust, has the trust power and has taken all action necessary to authorize the execution and delivery of the [transaction documents] and to perform [the Client's][39] obligations thereunder.

The issues to be addressed for closing opinions on New York common law trusts include:

- Whether the trust has been created by a transfer of property to a trustee who has agreed to hold it for the beneficiaries.[40]

[35] The Restatement (Third) of Trusts speaks of replacing this "traditional rule" with a "modern approach" under which "third parties may proceed against the trustee in the trustee's fiduciary capacity with the trustee shielded from personal liability insofar as the trustee acted properly." Section 106 and Introductory Note to Chapter 21, Restatement (Third) of Trusts. In New York, by statute, "[u]nless otherwise provided in the contract, a personal representative is not individually liable on a contract properly entered into in his fiduciary capacity in the course of administration of the estates unless he fails to reveal his representative capacity and identify the estate or trust in the contract." N.Y. Estate, Powers and Trusts Law §11-4.7(a). But the statute does not extend to trusts for which the traditional rule appears to continue to apply. See In re Burke, 129 Misc. 145, 149 – 150, 492 N.Y.S.2d 892 (N.Y. Surr. Ct. 1985).

[36] Bogert § 247 K; 4 Scott on Trusts § 26.1; Restatement (Second) of Trusts § 261.

[37] UCC § 9-102(a)(71) specifically includes a "business trust" if a statute of the state governing business trusts requires the filing of the trust's organic record with the state.

[38] UCC § 9-102(a)(68)(B) (which specifically addresses business trusts). For a comprehensive treatment of the rules concerning filing financing statements under UCC Article 9 where a trust or trustee is the debtor, *see* N. Powell, *Filings Against Trusts and Trustees Under the Proposed 2010 Revisions to Current Article 9—Thirteen Variations*, 42 UCC L.J. 375 (2010).

[39] Note again that the performance is by the trustee, not the trust.

[40] *See* note 6 *supra* and accompanying text.

- The ability of the individual, institution or other entity to act as trustee in New York.[41]
- New York Banking Law § 100 grants fiduciary powers to all institutions chartered as trust companies. If an out of state bank establishes a branch in New York, it has the same powers as a like-type New York banking organization.[42] Out of state banks and trust companies which have fiduciary powers under the laws of their state of incorporation may exercise those powers in New York, if the state of its domicile grants reciprocal rights to New York institutions subject to designating agent for service of process.[43] For federally chartered national associations, the Comptroller of the Currency is authorized to grant the national banks authority to act in a fiduciary capacity in competition with state banks with those powers. [44]
- Opinion preparers may assume, without so stating, that an individual trustee has the requisite capacity to contract and is not subject to a disability, unless they have knowledge to the contrary.[45]
- The permissible activities of the trust are determined by applicable law and the terms of the trust agreement.
- Relevant law may restrict the power of the trustee to take certain action without the consent of the beneficiaries, such as a self-dealing transaction with the trustee or an affiliate. An example is investment in propriety mutual funds sponsored by the trustee institute for which it earns fees.[46]
- The opinion preparer must confirm (or assume) compliance with the steps necessary under the trust agreement or applicable law to authorize the action taken.

New York does recognize business trusts in the General Associations Law:

> "A "business trust" is an association operating a business under a written instrument or declaration of trust, the beneficial interest of which is divided into shares represented by certificates."[47]
>
> A business trust doing business in New York must file a certificate of designation of the Secretary of State as its agent for service of process. An association doing business in New York may not maintain a suit in New York until it complies.[48]

However, the requirement for filing a certificate of designation should not make a business trust a registered organization for the purpose of the Uniform Commercial Code since the trust is not "formed or organized" by the filing of the certificate of designation so the filing is not of the trust's "organic record."[49]

Rule Against Perpetuities. There is a statutory exception in New York to the application of the Rule against Perpetuities to an "investment trust," defined as an unincorporated trust or association managed by trustees not holding any property for sale to customers in the

[41] *See also* 14 C.F.R. § 47.7(c)(2) (If an aircraft is to be titled in an owner trust in a leveraged lease transaction, each trustee must be a U.S. citizen or a resident alien).

[42] N.Y. Banking Law § 226.

[43] N.Y. Banking Law §§ 201-b, 131(3), (4)(b).

[44] 12 U.S.C. § 92a.

[45] TriBar Opinion Committee, Third Party "Closing" Opinions § 2.3(a); 53 Bus. Law 591, 615.

[46] Scott on Trusts § 17.214.5; N.Y. Banking Law §§ 100-c, 100-d.

[47] General Associations Law § 2.

[48] But such an association may be sued. General Associations Law § 18. The same rules apply to corporations (Business Corporation Law § 1312(a)) and to limited liability companies (Limited Liability Company Law § 808(a)).

[49] UCC 9-102(a)(71); notes 11 and 12 *supra*.

ordinary course of its trade or business, having transferable shares or certificates of interest offered for sale to the public, if the instrument creating such trust provides that it may be terminated at any time by action of the trustees or by affirmative vote of the beneficiaries having a specified percentage of interest therein.[50]

- Stanley Keller
  Locke Lord LLP
  stanley.keller@lockelord.com

- James Gadsden
  Carter Ledyard & Milburn LLP
  gadsden@clm.com

- Tarik Haskins
  Morris, Nichols, Arsht & Tunnell LLP
  thaskins@morrisnichols.com

[50] N.Y. Estates, Powers and Trusts Law § 9-1.5.

CHART OF LEGAL OPINION REPORTS

[Editor's Note: The chart of published and pending legal opinion reports below has been prepared by John Power, O' Melveny & Myers LLP, Los Angeles, and is current through July 31, 2023.**]**

A. Selected Published Reports Available From the Legal Opinions Resource Center[51]

ABA Business Law Section	2009	Effect of FIN 48 – Audit Responses Committee Negative Assurance – Securities Law Opinions Subcommittee
	2010	Sample Stock Purchase Agreement Opinion – Mergers and Acquisitions Committee
	2011	Delivery of Document Review Reports to Third Parties – Task Force on Delivery of Document Review Reports
	2013	- Survey of Office Practices – Legal Opinions Committee – Legal Opinions in SEC Filings (Update) – Securities Law Opinions Subcommittee
	2014	Updates to Audit Response Letters – Audit Responses Committee
	2015	No Registration Opinions (Update) – Securities Law Opinions Subcommittee
		Cross-Border Closing Opinions of U.S. Counsel – Legal Opinions Committee
	2017	Opinions for Debt Tender Offers — Securities Law Opinions Subcommittee
	2022	Legal Opinions on Section 4(1½) Resale Transactions – Securities Law Opinions Subcommittee
		Report on 2019 Survey of Law Firm Opinion Practices – Legal Opinions Committee

[51]These reports are available in the Legal Opinion Resource Center on the web site of the ABA Legal Opinions Committee, Legal Opinions Resource Center (americanbar.org).

Selected Published Reports Available From the Legal Opinions Resource Center (continued)

ABA Real Property Section (and others)[52]	2012	Real Estate Finance Opinion Report of 2012
	2016	Local Counsel Opinion Letters in Real Estate Financing Transactions
	2018	UCC Opinions in Real Estate Transactions
Arizona	2004	Comprehensive Report
California	2007	Remedies Opinion Report
		Comprehensive Report
	2009	Venture Capital Opinions
	2014	Revised Sample Opinion
	2014	Sample Venture Capital Financing Opinion
	2016	Third-Party Closing Opinions: Limited Liability Companies and Partnerships
	2020	Sample Personal Property Security Interest Opinion
Florida	2011	Comprehensive Report
	2021	First Supplement to Comprehensive Report
Georgia	2009	Real Estate Secured Transactions Opinions Report
City of London	2020	Updated Guide
Maryland	2009	Revised Comprehensive Report
Michigan	2010	Comprehensive Report
Multiple Bar Associations	2008	Customary Practice Statement
	2019	Statement of Opinion Practices and related Core Opinion Principles[53]
Multiple Law Firms	2016	White Paper – Trust Indenture Act §316(b)

[52]These Reports are the product of the Committee on Legal Opinions in Real Estate Transactions of the Section of Real Property, Trust and Estate Law, Attorneys' Opinions Committee of the American College of Real Estate Lawyers, and the Opinions Committee of the American College of Mortgage Attorneys (collectively, the "Real Estate Opinions Committees").

[53]A joint project of the ABA Legal Opinions Committee and the Working Group on Legal Opinions, each of which has approved the documents, along with many other bar and lawyer groups. For a list of the approving groups, see the schedule in the Legal Opinions Resource Center under "Multi-Bar Group Report."

Selected Published Reports Available From the Legal Opinions Resource Center (continued)

National Association of Bond Lawyers	2014	501(c)(3) Opinions
National Venture Capital Association	2013	Model Legal Opinion
New York	2009	Substantive Consolidation – Bar of the City of New York
	2012	Tax Opinions in Registered Offerings – New York State Bar Association Tax Section
North Carolina	2009	Supplement to Comprehensive Report
Pennsylvania	2007	Update
South Carolina	2014	Comprehensive Report
Tennessee	2011	Comprehensive Report
Texas	2006	Supplement Regarding Opinions on Indemnification Provisions
	2009	Supplement Regarding ABA Principles and Guidelines
	2012	Supplement Regarding Entity Status, Power and Authority Opinions
	2013	Supplement Regarding Changes to Good Standing Procedures
Virginia	2018	Comprehensive Report
Washington	2019	Comprehensive Report
TriBar	1998	Third-Party Closing Opinions
	2004	Remedies Opinion
	2008	Preferred Stock
	2011	Secondary Sales of Securities
	2013	Choice of Law
	2018	Opinions on Limited Partnerships
	2020	Comment on Use of Electronic Signatures and Third-Party Opinion Letters
	2022	Opinions on LLCs (Revision)
		Addendum to Limited Partnership Report

B. Pending Reports

ABA Business Law Section[54]	Sample Asset Purchase Agreement Opinion – Mergers and Acquisitions Committee Opinions on Risk Retention Rules (white paper) – Securitization and Structured Finance Committee & Legal Opinions Committee Third-Party Legal Opinions and Negative Assurance Letters to Underwriters Covering Intellectual Property Issues, Legal Opinions Committee Enforceability Opinions White Paper, Legal Opinions Committee
California	Exceptions and Other Qualifications to the Remedies Opinion Update to 2007 Report on Legal Opinions in Business Transactions (Excluding the Remedies Opinion) Addendum re Estate Planning Trusts to Sample Third-Party Opinion Letter for Business Transactions
Florida	Second Supplement to Comprehensive Report
Multiple Bar Associations	Local Counsel Opinions[55] Good Practice Principles for Cross-Border Closing Opinions[56]
Texas	Comprehensive Report Update
TriBar	Report on Enforceability of Risk Allocation Provisions Report on "Follow-on Opinions" (including opinions given when agreements are amended Opinions under 2022 Amendments to the Uniform Commercial Code on Emerging Technologies

[54] See "Multiple Bar Associations."

[55] A joint project of the ABA Legal Opinions Committee and the Working Group on Legal Opinions.

[56] A joint project of the Legal Opinions Committee and the Legal Opinions Subcommittee of the Banking Law Committee of the Legal Practice Division of the International Bar Association.

OUR COMMITTEE

The mission of the Legal Opinions Committee is to deal with legal opinion practice. We seek to foster national standards for legal opinions in business transactions through discussions, programs and reports on issues relevant to opinion practice.

The committee was constituted by the Business Law Section of the American Bar Association in 1988. The following have served as chairs of the committee.

Arthur A. Cohen	2022-present
Richard N. Frasch	2019-2022
Ettore A. Santucci	2016-2019
Timothy G. Hoxie	2013-2016
Stanley Keller	2010-2013
John B. Power	2007-2010
Carolan Berkley	2004-2007
Arthur N. Field	2002-2004
Donald W. Glazer	1998-2002
Thomas L. Ambro	1995-1998
Steven O. Weise	1992-1995
Henry Wheeler	1988-1992

If you are not a member of our committee and would like to join, or you know someone who would like to join the committee and receive our newsletter, *In Our Opinion*, please direct him or her here.[57] If you have not visited the website lately, we recommend you do so. Prior newsletters and numerous opinion resource materials are posted there. The Legal Opinion Resource Center also can be accessed from the Committee's website, as well as directly. For answers to any questions about membership, you should contact our Director of Membership, Diversity and Inclusion, Natalie S. Lederman of Sullivan & Worcester LLP, at nlederman@sullivanlaw.com.

[57] The URL is https://www.americanbar.org/groups/business_law/committees/opinions/

NEXT NEWSLETTER

We expect the next newsletter to be circulated late in 2023. Please forward cases, news and items of interest to Topper Webb (twebb@milesstockbridge.com) or Arthur Cohen (arthur.cohen@haynesboone.com).