

PRESENTED AT

49th Annual William W. Gibson, Jr.
Mortgage Lending Institute

September 17-18, 2015
Austin, Texas

November 5-6, 2015
Dallas, Texas

**The Troublesome Opinion Request:
Dealing With It**

Stephen C. Tarry

Stephen C. Tarry
Vinson & Elkins L.L.P.
Houston, Texas
starry@velaw.com
713.758.2336

THE TROUBLESOME OPINION REQUEST: DEALING WITH IT

**Stephen C. Tarry
Vinson & Elkins L.L.P.**

I. Scope of Paper

In connection with the closing of a business transaction, a law firm that represents one of the parties (*e.g.*, a borrower in a loan transaction) may be called upon to render a legal opinion to another party to the transaction (*e.g.*, a lender in a loan transaction) that is not a client of the law firm. This paper addresses troublesome or inappropriate legal opinion requests made in connection with such third-party legal opinions. This paper does not address legal opinions rendered by a law firm to its own client, nor does it address opinion practices regarding certain specialized types of legal opinions (such as tax opinions).

II. Typical Opinion Requests in a Secured Loan Transaction

In a secured loan transaction in which the Borrower is organized in Texas and in which the loan documents are governed by Texas law, the Lender would typically request that the legal opinion to be rendered by the Borrower's counsel address some or all of the matters set forth on Annex A to this paper.

III. Troublesome or Inappropriate Opinion Requests

A. Corporate Status Opinions

Third-party legal opinions rendered in many Texas business transactions frequently address the status of the client as a corporation, limited liability company or limited partnership (each, a “*Texas Entity*”) under the law of its jurisdiction of organization; in addition to covering the legal existence of the client, status opinions are also building blocks for other opinions that are commonly rendered. Opinion practice has developed so that in many transactions and other circumstances, opinion recipients are now willing to accept opinions as to the valid existence and good standing of a Texas Entity in lieu of opinions that the Texas Entity has been duly incorporated (or duly formed) or duly organized, which are rarely given. Unless there is a compelling reason for the rendering of a due incorporation (or due formation) opinion or a due organization opinion, many law firms now decline requests to render these opinions because of the cost of the due diligence required to render them.¹

1. Valid Existence

A valid existence and good standing opinion would typically read as follows:

The Borrower is a [corporation] [limited liability company] [limited partnership]
validly existing and in good standing under the laws of the State of Texas.

¹ See *infra* Part III.A.3.

A valid existence opinion means that on the date of the opinion letter, a Texas Entity legally exists as a corporation, limited liability company, or limited partnership under the Texas Business Organizations Code (the “**TBOC**”). In connection with the valid existence of a Texas Entity, Section 3.001(d) of the TBOC provides as follows:

Except in a proceeding by the state to terminate the existence of a filing entity, an acknowledgment of the filing of the certificate of formation issued by the filing officer [*i.e.*, the Texas Secretary of State] is conclusive evidence of:

- (1) the formation and existence of the filing entity;
- (2) the satisfaction of all conditions precedent to the formation of the filing entity; and
- (3) the authority of the filing entity to transact business in this state.²

In light of the provisions of Section 3.001(d) of the TBOC and the practice that has developed, an opinion that a Texas Entity validly exists may be based on the following due diligence:

(a) The opinion preparer should obtain a certified copy of the certificate of formation (and all amendments thereto) for the Entity obtained from the Texas Secretary of State, which should be reviewed to confirm that the Entity covered by the opinion is the Entity to which the certificate of formation relates and that the certificate of formation does not contain a provision (such as a limitation on the Entity’s existence to a term of years³) that has resulted in the termination of the Entity’s existence.

² TEX. BUS. ORGS. CODE ANN. § 3.001(d).

Effective as of January 1, 2010, the TBOC mandatorily became applicable to certain entities formed under certain predecessor statutes to the TBOC (including the Texas Business Corporations Act). For a discussion of entity status, power and authority opinions under the TBOC regarding these pre-code entities, see Legal Op. Comm. of the Bus. Law Section of the State Bar of Tex., *Supplement No. 5 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions: Statement on Entity, Status, Power and Authority Opinions Regarding Pre-Code Texas Entities and Pre-Code Registered Foreign Entities under the Texas Business Organizations Code*, 45 TEX. J. BUS L. 1 (2012) [hereinafter *Texas Supplement No. 5*]. *Texas Supplement No. 5* supplements the 1992 Texas Legal Opinion Report. *Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions*, 29 BULL. OF THE STATE BAR OF TEX. BUS. L. SEC. 1 (State Bar of Tex. Bus. Law Section Legal Op. Comm.), June 1, 1992, at 81 [hereinafter *1992 Texas Report*]. The *1992 Texas Report* and all of the Supplements thereto can be found on the website of the Business Law Section of the State Bar of Texas: <http://www.texasbusinesslaw.org/committees/legal-opinions>.

³ Under the TBOC, a domestic entity exists perpetually unless otherwise provided in the governing documents of the entity. TEX. BUS. ORGS. CODE ANN. § 3.003.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: The Troublesome Opinion Request: Dealing with It

Also available as part of the eCourse

[Commercial Lending: From Letters of Credit to Closing Protection](#)

First appeared as part of the conference materials for the
49th Annual William W. Gibson, Jr. Mortgage Lending Institute session
"The Troublesome Opinion Requests: Dealing with It"