

**BBA Streamlined Form of Closing Opinion (2019 Update)**  
[For use when acting as Borrower’s Counsel for an Unsecured Loan]

[Date]

To each Lender party to the  
Credit Agreement referred to below

We are furnishing this opinion letter<sup>1</sup> to you pursuant to Section \_\_\_ of the Credit Agreement dated as of \_\_\_\_\_ (the “Credit Agreement”) among OpCo., Inc., a Massachusetts corporation (the “Company”), HoldCo., Inc., a Delaware corporation of which the Company is a wholly owned subsidiary (“Holdings”), and the Lenders party thereto.<sup>2</sup> Capitalized terms defined in the Credit Agreement and not otherwise defined in this opinion letter are used in this opinion letter as so defined.<sup>3</sup>

We have acted as counsel to Holdings, the Company and Delaware Sub, Inc., a Delaware corporation and wholly owned subsidiary of the Company (“Delaware Sub”), in connection with the preparation of the Credit Agreement, the Holdings Guaranty, the Subsidiary Guaranty and the Notes being delivered by the Company today under the Credit Agreement (which agreements and instruments are referred to collectively in this opinion letter as the “Credit Documents”). The Company and Delaware Sub are referred to collectively as the “Subsidiaries.”

We have reviewed such documents and made such examination of law as we have deemed appropriate to give the opinions set forth below. We have relied, without independent verification, on certificates of public officials and, as to matters of fact material to our opinions, on representations made in the Credit Documents and certificates and other inquiries of officers of Holdings and the Subsidiaries [and others].<sup>4</sup>

The opinions set forth below are limited to the internal law of Massachusetts, the Delaware General Corporation Law and the federal law of the United States.<sup>5</sup> [We note that the

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<sup>1</sup> The opinion letter delivered to a third party in connection with the closing of a transaction also is often referred to as a “closing opinion.”

<sup>2</sup> This form is based on an entirely domestic United States transaction. For a discussion of opinions in cross border transactions, *see* Legal Ops. Comm. of the Bus. Law Section of the Am. Bar Ass’n, *Cross-Border Opinions of U.S. Counsel*, 71 BUS. LAW. 139 (2015–2016).

<sup>3</sup> This form assumes that some of the terms used without definition are defined in the Credit Agreement. When incorporating definitions by reference, opinion preparers should consider the appropriateness of each definition.

<sup>4</sup> The statements in this paragraph are understood as a matter of customary practice to apply without being stated. However, they are usually included for clarity.

<sup>5</sup> Many non-Delaware lawyers are comfortable giving routine status, power, and authorization opinions on Delaware corporations because of their familiarity with Delaware corporation law. If a party to the transaction is not formed in Massachusetts or Delaware (or another state on whose law the opinion preparers are prepared to give those opinions), local counsel normally will be brought in to give the status, power, and authorization opinions with respect to that party. When local counsel gives those opinions, the practice today ordinarily is for lead counsel not to repeat them in its opinion letter but instead to assume expressly local counsel’s legal conclusions to the extent necessary to support lead counsel’s opinions.

An alternative approach, which is less common today, is for lead counsel to repeat local counsel’s opinions and to state that in giving those opinions it is relying on the opinions of local counsel. If an opinion is based on an opinion

Credit Documents provide that they are to be governed by New York law. The opinion in paragraph 3 below is given as if each of the Credit Documents were governed by the internal law of Massachusetts.]<sup>6</sup>

Based upon the foregoing and subject to the additional qualifications set forth below, we are of the opinion that<sup>7</sup>:

1. Each of Holdings and Delaware Sub is validly existing as a corporation<sup>8</sup> and in good standing under Delaware law and has the corporate power to execute and deliver the Credit Documents to which it is a party and to perform its obligations thereunder.

2. The Company is validly existing as a corporation<sup>9</sup> and in good standing under Massachusetts law<sup>10</sup> and has the corporate power to execute and deliver the Credit Documents to which it is a party and to perform its obligations thereunder.<sup>11</sup>

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of local counsel, it should be made subject to the same stated limitations, if any, to which local counsel's opinion is subject. By stating reliance on other counsel's opinions, the opinion giver is indicating that it is satisfied as to the competence of the other counsel and the coverage of its opinion. Language such as "you are justified in relying" or "the opinion is satisfactory in form and scope" does not add to the opinion giver's responsibility. By contrast, statements of concurrence or that "the opinion is satisfactory in form and substance" are understood to go further and to change the opinion giver's responsibilities. Those statements are not normally included in closing opinions.

<sup>6</sup> The enforceability of an agreement is usually governed by the law chosen in that agreement (*see infra* note 17). When the law chosen is not the law of Massachusetts (or another state on whose law the opinion preparers are in a position to give an enforceability opinion), an opinion on the enforceability of the agreement "as if" Massachusetts law (or such other state's law) were the governing law might be given. In that case, the bracketed material should be included.

<sup>7</sup> The opinions in this form are not intended to be exclusive. Depending on the circumstances, an opinion recipient may request additional opinions (e.g., that the Company is not an investment company; that the transaction complies with margin rules).

In addition, in some transactions, such as the sale by the Company of its stock, opinions on the Company's capitalization and the stock being sold typically would be included. Forms of opinions on the sale of convertible preferred stock are included in Attachment A.

<sup>8</sup> This form is based on each of the entities being a corporation. Increasingly, non-corporate entities, such as limited liability companies, are being used for business transactions. For a discussion of opinions on these entities, *see* TriBar Opinion Comm., *Third-Party Closing Opinions: Limited Liability Companies*, 61 BUS. LAW. 679 (2006); *Supplemental TriBar LLC Opinion Report: Opinions on LLC Membership Interests*, 66 BUS. LAW. 1065 (2011); *see also* TriBar Opinion Comm., *Third-Party Closing Opinions: Limited Partnerships*, 73 BUS. LAW. 1107 (2018).

<sup>9</sup> Opinion recipients sometimes request an opinion that the Company is "duly incorporated." This opinion may require the opinion preparers to conduct an inquiry into the past that, at least in the loan context, often is not cost justified. Ordinarily, an opinion that a Company has been "duly organized" should be avoided because of uncertainty as to what additional matters, if any, it covers.

<sup>10</sup> In the past, the practice in Massachusetts was to limit the opinion to "good standing with the Secretary of the Commonwealth" or "good standing on the records of the Secretary of the Commonwealth" because of concern that the opinion might otherwise be understood to cover tax good standing. This is no longer a concern, but some Massachusetts lawyers continue to use an earlier formulation. These formulations and the formulation used in this form have the same meaning.

<sup>11</sup> Opinion recipients sometimes request that this opinion also cover the Company's corporate power to own its properties and conduct its business. If given, this broader opinion typically is based on a description of the Company's properties and business, usually in a disclosure document or an officer's certificate.

3. Each of Holdings, the Company and Delaware Sub has duly authorized, executed and delivered the Credit Documents to which it is a party, and such Credit Documents constitute its valid and binding obligations enforceable against it in accordance with their terms.<sup>12</sup>

4. The execution and delivery by each of Holdings, the Company and Delaware Sub of the Credit Documents to which it is a party do not and the performance by it of its obligations thereunder will not (i) result in a violation by it of any federal or Massachusetts statute or any rule or regulation under such a statute, (ii) result in a violation by it of any court order, judgment or decree [listed in Schedule \_\_\_ to the Credit Agreement] [applicable to it and known to us],<sup>13</sup> (iii) result in a breach of, or constitute a default under, or result in the creation of a Lien or a right of acceleration under,<sup>14</sup> any agreement or instrument [listed in Schedule \_\_ to the Credit Agreement][to which it is a party and known to us]<sup>15</sup> or (iv) violate its charter or by-laws.

5. No consent, approval, license or exemption by, order or authorization of, or filing, recording or registration with any federal or Massachusetts governmental authority is required to be obtained or made by Holdings, the Company or Delaware Sub in connection with its execution and delivery of, or the performance by it of its obligations under, the Credit Documents to which it is a party [other than those that have been obtained or made].<sup>16</sup>

[6. The choice of New York law as the governing law in the Credit Documents will be given effect under Massachusetts law.]<sup>17, 18</sup>

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<sup>12</sup> A necessary element of an opinion that a note or credit agreement is a valid and binding obligation under Massachusetts law is that the loan not violate, and not be subject to avoidance under, the Massachusetts criminal usury statute, MASS. GEN. LAWS, ch. 271 § 49 (2018). Therefore, when the rate of interest is a fixed rate above 20 percent or sufficiently close to 20 percent that the addition of expenses might bring it over 20 percent, or when the interest rate floats and is not subject to a 20 percent cap, an opinion giver might consider adding the following assumption:

For purposes of our opinion in paragraph 3, we have assumed that each Lender has complied with, or is exempt from, the notice requirements of Massachusetts General Laws Chapter 271, Section 49.

This assumption would not be necessary if the Lender or Lenders are all identified and they (and permitted assignees under the Credit Documents) are clearly banks or other lenders exempt from the filing requirements of the criminal usury statute.

<sup>13</sup> The bracketed material provides alternative approaches. The first alternative, which is more commonly used, contemplates that a list of court orders, judgments, and decrees is available. This form refers to a schedule to the Credit Agreement. If none of the entities covered are subject to any court order, judgment or decree, this part of the opinion should be omitted. A list prepared for purposes of the opinion also could be used. The second alternative is less commonly used; if it is used, *see infra* note 22 regarding a definition of “knowledge.”

<sup>14</sup> Depending on the circumstances, this clause could be expanded to cover other adverse consequences, such as changes in terms or creation of put rights or rights of termination.

<sup>15</sup> The bracketed material provides alternative approaches. The first alternative, which is more commonly used, specifies the documents covered by the opinion by referring to a list or schedule. This form refers to a schedule to the Credit Agreement. A list prepared for purposes of the opinion also could be used (this approach is particularly helpful when the opinion preparers cannot be sure that no changes will be made in the schedule after they have reviewed it). In the case of public companies, the reference could be to the exhibits in an SEC filing. The second alternative is less commonly used; if it is used, *see infra* note 22 regarding a definition of “knowledge.”

<sup>16</sup> Although a filing by a lender could be required (*see supra* note 12), for most borrowers an unsecured loan will not require that they obtain any governmental approvals or make any filings.

<sup>17</sup> This opinion is sometimes requested when the Credit Documents choose as their governing law the law of a state on which the opinion giver is not giving an enforceability opinion. When given, this opinion provides comfort to the

[ \_\_<sup>19</sup> [Except as disclosed in Schedule \_\_ to the Credit Agreement,] we are not representing Holdings or either of the Subsidiaries in any pending litigation<sup>20</sup> in which it is a named defendant [, or in any litigation that is overtly threatened in writing against it by a

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opinion recipient that the chosen law will be applied if it brings an action against the Company in the Company's own state (assumed to be Massachusetts in this form). This opinion is not necessary when the opinion letter covers the law chosen as the governing law in the Credit Documents and an opinion is being given on the enforceability of the Credit Documents under that law because the opinion on the enforceability of the Credit Documents covers the governing law provision.

Often, this opinion is not given alone but is accompanied by an opinion on the enforceability of the agreements as if the law covered generally by the opinion letter (Massachusetts in this form) governed the agreements (see bracketed material in text at *supra* note 6). Sometimes, the two opinions are combined by adding the following at the end of the choice-of-law opinion: "but if the internal law of Massachusetts were nevertheless held to be applicable, the Credit Documents to which each of Holdings, the Company and Delaware Sub is a party would constitute its valid and binding obligations enforceable against it in accordance with their terms under Massachusetts law."

An opinion giver's ability to give a choice-of-law opinion will depend on the law it covers and the factual context. Massachusetts follows the Restatement approach of applying the law chosen to govern the agreement if (i) the state whose law is chosen has a reasonable relationship to the transaction or the parties, (ii) applying that state's law would not violate a fundamental policy of a state whose law would apply in the absence of an effective governing law provision, and (iii) that other state has a materially greater interest in the issue. To give the choice-of-law opinion included in this form, the opinion preparers must be satisfied that New York has a reasonable relationship to the transaction or the parties (e.g., the lenders are located in New York) and that the Credit Documents, as interpreted under Massachusetts law, do not violate a fundamental policy of Massachusetts (assuming for this purpose that Massachusetts law would apply in the absence of an effective governing law provision and that Massachusetts has a materially greater interest in the issue). Some opinion preparers choose to state expressly in their opinion letters that the opinion in paragraph 6 "is based on the assumption that Massachusetts law would apply in the absence of a governing law clause in the Credit Documents and that Massachusetts would have a materially greater interest than any other state in any issue relating to the enforceability of the Credit Documents." Other lawyers believe that this assumption does not need to be stated expressly on the grounds that it is well understood that they are only addressing Massachusetts law and not the law or policies of any other state and are not in a position to determine whether another state has a materially greater interest in an issue than Massachusetts. Choice-of-law opinions are discussed at length in TriBar Opinion Comm., *Supplemental Report: Opinions on Chosen-Law Provisions Under the Restatement of Conflicts of Law*, 68 BUS. LAW. 1161 (2013).

<sup>18</sup> In cross-border transactions, when the Credit Documents include a provision naming the courts of a jurisdiction other than those of the state whose law is covered generally by the opinion letter (Massachusetts in this form) as a (or the) forum in which disputes under those documents are to be resolved, opinion recipients sometimes request an opinion on the enforceability of that provision. See Legal Ops. Comm. of the Bus. Law Section of the Am. Bar Ass'n, *Cross-Border Opinions of U.S. Counsel*, 71 BUS. LAW. 139, 167–185 (2015–2016).

<sup>19</sup> Some opinion preparers do not number this paragraph so as to emphasize that, unlike the paragraphs that precede it, it is not an opinion but rather a factual confirmation.

In view of the expansion of law firm size and geographic diversity, the limited nature of many client relationships and other factors, many firms question whether a no-litigation confirmation is justified today. This paragraph is included in brackets to make clear that firms using this form may properly choose not to include it.

If included, this paragraph, by focusing on matters that the firm is handling for the Company and that bear directly on the transaction, covers what a firm might realistically be asked to address. Sometimes, opinion recipients also may ask counsel to cover material litigation that could adversely affect the Company. Even firms that are willing to address litigation affecting the transaction may well decline such a request. If, however, a firm decides to expand the confirmation to cover litigation adversely affecting the Company, the opinion preparers should carefully consider the internal review procedures they will follow and the wording of the confirmation.

<sup>20</sup> Opinion preparers sometimes are asked to refer to "action, suit or proceeding" instead of simply "litigation."

potential claimant,<sup>21]</sup> that challenges the validity or enforceability of, or seeks to enjoin the performance of, the Credit Documents.<sup>22]</sup>

Our opinions above are subject to bankruptcy, insolvency, fraudulent transfer, reorganization, moratorium and other similar laws of general application affecting the rights and remedies of creditors and to general principles of equity.<sup>23</sup>

We express no opinion as to . . . .<sup>24</sup>

[This opinion letter shall be interpreted in accordance with the Core Opinion Principles as published in 74 *The Business Lawyer* 815 (2019).]<sup>25</sup>

This opinion letter is being furnished only to you for your use solely in connection with the transaction described above and may not be relied on without our prior written consent for any other purpose or by anyone else other than an assignee of the Notes permitted by the Credit Agreement [provided that their right to rely is subject to the condition and understanding that (i) any such reliance must be actual and reasonable under the circumstances existing at the time such person becomes a permitted assignee, including any circumstances relating to changes in law, facts or other developments known to or reasonably knowable by such person at such time, (ii) our consent to such reliance shall not constitute a reissuance of the opinions expressed herein or otherwise extend any statute of limitations period applicable hereto on the date hereof, and

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<sup>21</sup> When this phrase is used, it is understood to mean that a potential claimant has manifested in writing to the Company its intention to assert a claim against the Company that could reasonably be expected to result in litigation.

<sup>22</sup> Although this form obviates the need for the phrase “to our knowledge” or a variant of it, an opinion sometimes will include that phrase. When it does, “knowledge” ordinarily should be defined in the opinion letter to avoid any misunderstanding as to its meaning. (*See also* bracketed material in the text at *supra* notes 13 and 15 in paragraph 4.) An example of a definition that is derived from the Core Opinion Principles (and that presumably would apply if no definition were included) is:

When used in this opinion letter, the phrase “to our knowledge” or an equivalent phrase limits the statements it qualifies to the actual knowledge of the lawyers in this firm responsible for preparing this opinion letter after such inquiry as they deemed appropriate.

Some opinion preparers include in the definition in place of “this opinion letter” the phrase “the particular opinion or confirmation containing that reference.” Also, some opinion preparers refer to “conscious awareness” instead of “actual knowledge.”

In preparing a no-litigation confirmation, the opinion preparers normally would conduct an inquiry of those lawyers in their firm whom the opinion preparers recognize as being reasonably likely to have information not otherwise known to them that they need to prepare the confirmation. As a matter of customary practice, the confirmation is understood not to cover information known to any other lawyers in the firm. Depending on the circumstances and the wording of the confirmation, the opinion preparers also might make inquiry of appropriate officials of the Company. In preparing a no litigation confirmation, the opinion preparers are not required as a matter of customary diligence to check court or other public records. Although not necessary, some opinion preparers choose to make this clear, for example, by stating expressly that they did not examine court or other public records.

<sup>23</sup> Although usually stated in the opinion letter, these exceptions are understood to apply whether or not stated.

<sup>24</sup> Include any additional exceptions to the opinions that may be necessary.

<sup>25</sup> Many firms choose to include this paragraph to emphasize the application of the Core Opinion Principles. *The Statement of Opinion Practices*, 74 *BUS. LAW.* 801, 807 (2019), from which the Core Opinion Principles are derived, states in section 2: “Customary practice applies to a closing opinion whether or not the closing opinion refers to it or to this Statement.” The *Statement of Opinion Practices* has been approved by many bar associations and other lawyer groups, including the Boston Bar Association.

(iii) in no event shall any permitted assignee have any greater rights with respect hereto than the original addressees of this opinion letter on the date hereof or its assignor. [Furthermore, all rights hereunder may be asserted only in a single proceeding by and through [the Administrative Agent or the Required Lenders].<sup>26</sup>]]<sup>27</sup>

Very truly yours,

[Law Firm]

### **Attachment A**

\_\_\_ The authorized capital stock of the Company consists of (i) \_\_\_\_\_ shares of Common Stock, \$\_\_\_ par value, of which \_\_\_\_\_ shares are issued and outstanding, and (ii) \_\_\_\_\_ shares of Preferred Stock, \$\_\_\_ par value, of which \_\_\_\_\_ shares have been designated Series A Preferred Stock, \_\_\_\_\_ shares of which are issued and outstanding, and \_\_\_\_\_ shares have been designated Series B Preferred Stock, none of which are issued and outstanding.<sup>28</sup> [All such issued and outstanding shares have been duly authorized and validly issued and are fully paid and nonassessable.]<sup>29</sup>

\_\_\_ The Series B Shares [*shares of Series B Preferred Stock to be issued pursuant to the Purchase Agreement*] have been duly authorized and, when issued, delivered and paid for in accordance with the Purchase Agreement, will be validly issued, fully paid and nonassessable. The Conversion Shares [*shares of Common Stock issuable upon conversion of the Series B*

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<sup>26</sup> This sentence addresses concerns by opinion givers over the possibility of a multiplicity of lawsuits in diverse jurisdictions. It is consistent with the requirement in many credit agreements that actions brought against borrowers on behalf of the lenders be brought only by an agent for the lenders or the lenders as a group.

<sup>27</sup> Opinion preparers should consider whether anyone besides the addressees should be permitted to rely on the opinion letter. When third parties, such as assignees, are permitted to rely, sometimes language such as that in brackets is added to make clear the rights of such parties and the limitations on those rights. This provision is based upon the so-called “Wachovia provision,” which has been generally accepted by opinion recipients.

<sup>28</sup> The appropriateness of an opinion on the number of outstanding shares will depend on the circumstances. For example, in the case of a public company, the opinion usually adds little to a certificate from the transfer agent and is rarely given. In the case of a private company, the opinion preparers may be able to base the opinion on Company records. Even if they are willing to cover the number of outstanding shares, some law firms will do so only if they also are giving an opinion on the valid issuance of those shares (*see infra* note 29) to avoid any misunderstanding over the meaning of an opinion on the number of outstanding shares.

<sup>29</sup> Whether an opinion on the valid issuance of all the outstanding shares is appropriate will depend on the circumstances. Because the opinion will require a review of each issuance of shares, in many situations it will not be cost justified. *See TriBar Opinion Comm., Third-Party “Closing” Opinions: A Report of The TriBar Opinion Committee*, 53 BUS. LAW. 591, 651–52 (1998).

Opinion recipients sometimes ask for an opinion whether, to the opinion giver’s knowledge, the Company has any outstanding options, warrants, or other rights to acquire stock other than as disclosed in the transaction documents. Many law firms decline to give this opinion because it constitutes negative assurance on a factual matter they rarely are in a position to confirm. If, however, a firm is willing to give the opinion, the opinion letter should describe what the opinion preparers have done to support it.

*Preferred Stock*] have been duly authorized and, [assuming sufficient authorized shares of Common Stock are available for issuance at the time of conversion of the Series B shares,]<sup>30</sup> upon conversion of the Series B Shares and issuance in accordance with the Company's articles of organization, will be validly issued, fully paid and nonassessable. [The issuance and sale of the Series B Shares and the issuance of the Conversion Shares upon conversion of the Series B Shares are not subject to any preemptive rights under Chapter 156D of the Massachusetts General Laws or the Company's articles of organization or bylaws.]<sup>31</sup>

\_\_\_ Assuming the accuracy of the representations and warranties of the [*Purchasers*] in the Purchase Agreement and their compliance with the covenants in the Purchase Agreement, registration of the Series B Shares or the Conversion Shares under the Securities Act of 1933 is not required in connection with the offer, sale and delivery of the Series B Shares to the [*Purchasers*] in accordance with the Purchase Agreement, or the offer, sale and delivery of the Conversion Shares issuable upon conversion of the Series B Shares [(assuming no commission or other remuneration is paid or given directly for soliciting such conversion)].<sup>32</sup>

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<sup>30</sup> This opinion is understood as a matter of customary practice to mean that sufficient authorized shares are available for issuance upon conversion on the date of the opinion letter and not that sufficient authorized shares will be available on a future conversion date. Nevertheless, some law firms include the bracketed assumption regarding the availability of sufficient authorized shares in the future.

<sup>31</sup> Even though a valid issuance opinion could not be given on shares issued in violation of preemptive rights granted by Chapter 156D or a Company's articles of organization or bylaws, opinion recipients sometimes request an opinion that expressly addresses the absence of those rights. Such an opinion is understood as a matter of customary practice not to cover contractual rights unless it does so expressly.

<sup>32</sup> Some firms include the bracketed assumption in view of the condition for availability of the exemption under section 3(a)(9) of the Securities Act of 1933; other firms consider the assumption to be so well understood as to be unnecessary. When shares are issuable upon exercise of warrants, an opinion on the availability of an exemption from registration upon such issuance raises difficult issues because the exemption under section 3(a)(9) would not be available (other than possibly if shares were only issuable on a net exercise basis) and the availability of another exemption, such as the exemption for transactions not involving a public offering, will depend on the facts at the time of exercise. Therefore, some firms decline to give a no-registration opinion with respect to the issuance of shares upon exercise of warrants. Alternatively, some firms give that opinion based on the express assumption that the warrants were exercised by the purchasers to whom the opinion is being given at the time the warrants were issued. See Subcomm. on Sec. Law Ops. of the Fed. Reg. of Sec. Comm. of the Bus. Law Section of the Am. Bar Ass'n, *No Registration Opinions (2015 Update)*, 71 BUS. LAW. 129 (2015–2016).