

## **SUPPLEMENT NO. 2 TO THE REPORT OF THE LEGAL OPINIONS COMMITTEE REGARDING LEGAL OPINIONS IN BUSINESS TRANSACTIONS**

**By David R. Keyes and Gail Merel\***

### **TABLE OF CONTENTS**

INTRODUCTION .....	2
NEW SUBPART "F" TO PART IX OF THE TEXAS REPORT – OPINIONS AS TO SECURITIES AND OTHER INVESTMENT PROPERTY.....	4
1.    Determinations and Assumptions Relating to Governing Law .....	4
2.    Other Common Opinion Assumptions and Qualifications .....	6
3.    Certificated Securities (Perfection by Control).....	8
4.    Uncertificated Securities (Perfection by Control).....	9
5.    Security Entitlements and Securities Accounts (Perfection by Control).....	11
6.    Partnership and Limited Liability Company Interests .....	15
7.    Other Financial Assets .....	17
8.    Priority .....	17

### **ATTACHMENTS: ILLUSTRATIVE OPINION LETTERS**

A.    On Security Interests in Investment Property (and certain other assets) .....	A-1
B.    On Security Interests in Certificated Securities .....	B-1
C.    On Security Interests in Uncertificated Securities .....	C-1
D.    On Security Interests in Securities Accounts.....	D-1

---

\*As Co-Chairmen of the Subcommittee on Legal Opinions Regarding Investment Property Collateral. See footnote 1 *infra*.

---

## **SUPPLEMENT NO. 2 TO THE REPORT OF THE LEGAL OPINIONS COMMITTEE REGARDING LEGAL OPINIONS IN BUSINESS TRANSACTIONS<sup>1</sup>**

Since publication of the Business Law Section's *Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions* (June 1, 1992),<sup>2</sup> by the Legal Opinions Committee of the Business Law Section (the "Committee") of the State Bar of Texas, Articles 8 and 9 of the Texas Uniform Commercial Code (the "Texas UCC"),<sup>3</sup> which deal with security interests in securities and other types of investment property, were amended effective September 1, 1995.<sup>4</sup> The 1995 amendments introduced a number of new defined terms including the following new definition of investment property:<sup>5</sup>

"Investment property" means:

- (A) a security, whether certificated or uncertificated;
- (B) a security entitlement;
- (C) a securities account;
- (D) a commodity contract; or
- (E) a commodity account.

Accordingly, those portions of the Texas Report relating to security interests in securities under the old Article 8 are no longer accurate.

In addition, further amendments to the Texas UCC have been adopted effective July 1, 2001 (as so amended, the "Revised Texas UCC").<sup>6</sup> Because the amendments made to Article 8

---

<sup>1</sup> This Supplement was prepared by David R. Keyes and Gail Merel as Co-Chairmen of the Subcommittee on Legal Opinions Regarding Investment Property Collateral (with substantial input from Terry A. Yates) and was approved by the Legal Opinions Committee of the Business Law Section of the State Bar of Texas on January 10, 2001. Supplement No. 1 to the Texas Report prepared by the Subcommittee on Legal Opinions Regarding Usury appeared in the *Bulletin of the Business Law Section of the State Bar of Texas*, Vol. 31, No. 4 (December 1994), also now available at the website of the Business Law Section of the State Bar of Texas at [www.texasbusinesslaw.org/00601997.html](http://www.texasbusinesslaw.org/00601997.html).

<sup>2</sup> *Bulletin of the Business Law Section of the State Bar of Texas*, Vol. 29, Nos. 2 and 3 (June - September 1992) [the "Texas Report"], available electronically at the website referred to in footnote 1 *supra*, and currently also available in printed form from the Committee.

<sup>3</sup> The Texas UCC is codified in the Texas Business and Commerce Code. References in this Supplement to "Articles" 8 and 9 of the Texas UCC refer to the respective provisions of the Texas UCC as codified in Chapters 8 and 9 of the Texas Business and Commerce Code; and references in this Supplement to "Part 5" of Article 8 are to the provisions as codified in Subchapter E of Chapter 8. Some publications and commentators cited herein, when referring to the Texas UCC in the context of the September 1, 1995 amendments (which were then new) used the term "revised" to refer to such amendments. With that exception, references in this Supplement to the Revised Texas UCC or to "revised" Articles 8 and 9 are to the amendments that will be effective July 1, 2001.

<sup>4</sup> Except as otherwise noted, all references to Articles or Chapters 8 and 9 and to parts or sections thereof are to the Texas UCC as amended September 1, 1995 (which is in effect as of the date of this Supplement).

<sup>5</sup> Texas UCC § 9.115(a)(6) [Revised Texas UCC § 9.102(a)(49)].

<sup>6</sup> The Revised Texas UCC was adopted by Acts 1999, 76th Leg., ch. 414 (the "Texas UCC Amendment Statute"). Article 3 of the Texas UCC Amendment Statute contains the effective date provisions, as well as

in the Revised Texas UCC are not extensive,<sup>7</sup> the discussion and recommendations of the Legal Opinions Committee contained in this Supplement will, for the most part, continue to apply even after the July 1, 2001 amendments become effective. Unlike those relating to Article 8, the amendments to Article 9 in the Revised Texas UCC are extensive and, among other things, relocate the various rules relating to investment property from their previous sections to their logical places in the structure of the revised Article 9. Generally, however, except as noted herein, Article 9 of the Revised Texas UCC continues the rules adopted for investment property in 1995 insofar as such rules are discussed in this Supplement.<sup>8</sup> Accordingly, this supplement is intended primarily to address the substantial changes made to the Texas UCC regarding investment property as amended September 1, 1995, and in effect prior to July 1, 2001. However, where citations are made in this Supplement to sections of the Texas UCC, citations in footnotes or in brackets are also provided to the corresponding sections under the Revised Texas UCC (together, in some instances, with the Committee's comments regarding the substantive changes made by the Revised Texas UCC to the cited sections of the current Texas UCC).

The purpose of this Supplement is to provide guidance as to the delivery of legal opinions regarding investment property collateral under Articles 8 and 9 of the Texas UCC. This Supplement deals with the perfection and priority of security interests in the first three categories of investment property listed in the definition quoted above, *i.e.*, certificated and uncertificated securities, security entitlements and securities accounts. This Supplement does not deal with security interests in commodity contracts or commodity accounts, nor does it cover security interests granted by commodity intermediaries, brokers or securities intermediaries, for which there are special rules provided in Articles 8 and 9.<sup>9</sup>

This Supplement should be read in conjunction with its four attachments. They are illustrative legal opinion letters regarding various types of investment property collateral and include explanatory footnotes.<sup>10</sup> The attachments are more detailed than this Supplement, which is intended as a more general treatment of the subject.

---

transition provisions between the Texas UCC as in effect prior to July 1, 2001, and the Revised Texas UCC. As this Supplement was going to publication in the spring of 2001, S.B. 433 was passed by the Texas Legislature and sent to the Governor which would contain further modifications to Article 9 and also move the transition provisions to Subchapter G, Chapter 9, Tex. Bus. & Com. Code (§§ 9.701 *et seq.*).

<sup>7</sup> Changes to Chapter 8 in the Revised Texas UCC include §§ 8.106(d)(3) (control of a security entitlement); 8.110(e) (securities intermediary's jurisdiction); 8.301(a)(3) (delivery to a securities intermediary); and 8.302(a) and 8.510 (rights of a purchaser).

<sup>8</sup> See, *e.g.*, Comment 4 to Revised Texas UCC § 9.101, which, among other things, states that the perfection requirements for investment property "remain substantially unchanged." It may be expected, however, that the Revised Texas UCC will result in some changes in practice relating to the language of opinions regarding investment property collateral, as it will regarding other types of collateral where the amendments under the Revised Texas UCC are more extensive. In addition to changing the categories and definitions of types of collateral (such as payment intangibles, accounts, and letter of credit rights) and bringing new types of collateral (such as deposit accounts) under the UCC, the Revised Texas UCC amends and restates provisions regarding attachment, enforceability, perfection, priority, third-party rights, financing statements and filings, remedies, and the governing law regarding perfection and priority.

<sup>9</sup> See, *e.g.*, Texas UCC § 9.115(d)(3) and (4) [Revised Texas UCC § 9.309(10) and (11)].

<sup>10</sup> For comparison purposes to other types of collateral, Attachment A also covers certain non-investment property collateral.

The following supersedes the second paragraph of Subpart C.3 of Part IX of the Texas Report, and other parts of the Texas Report dealing with pledged securities under the old UCC (including in footnote 326 and in Subpart E.6.(a) of Part IX), and the corresponding portions of the illustrative form of opinion letter set forth in Exhibit “B” to the Texas Report (including Section 5.(b)(ii) of such Exhibit), and is intended to be added as a new Subpart F to Part IX.<sup>11</sup>

F. Opinions as to Securities and Other Investment Property.

1. Determinations and Assumptions Relating to Governing Law.

Under Section 9.115(d)(1) and (2) of the Texas UCC,<sup>12</sup> perfection of a security interest in investment property generally may be accomplished by either control or filing. Since control gives a secured party greater priority than does the filing of a financing statement, most secured lenders will likely try to obtain control while still filing a financing statement solely as a precautionary measure.

The choice of law rules vary depending upon whether perfection is obtained by filing or control. Section 9.103(f) of the Texas UCC<sup>13</sup> sets out the rules as to which jurisdiction’s law governs the perfection and priority of security interests in investment property. Section 9.103(f)(6)<sup>14</sup> provides that perfection of a security interest by filing is governed by the local law of the jurisdiction in which the debtor is located.<sup>15</sup> Accordingly, secured parties choosing to perfect by filing, rather than by control, will look to the jurisdiction of the location of the debtor.

For perfection by control:

- (1) for certificated securities, the rule set out in Section 9.103(f)(2)<sup>16</sup> is that, during the period of time the security certificate is located in a jurisdiction, perfection and priority are governed by the local law of that jurisdiction;
- (2) for uncertificated securities, the rule set out in Section 9.103(f)(3)<sup>17</sup> is that perfection and priority are governed by the local law of the issuer’s jurisdiction as specified in Section 8.110(d); and

---

<sup>11</sup> Although the following text is substituted into the Texas Report, the footnotes refer to the corresponding provisions of this Supplement, and terms used in the substituted text which are defined in this Supplement have the meanings noted herein. Accordingly, the substituted text should be read in conjunction with this Supplement, as well as the remainder of the Texas Report.

<sup>12</sup> Revised Texas UCC §§ 9.312(a) and 9.314(a).

<sup>13</sup> Revised Texas UCC § 9.305.

<sup>14</sup> Revised Texas UCC § 9.305(c).

<sup>15</sup> Note that § 9.307 of the Revised Texas UCC contains substantial changes in the rules on where a debtor is “located.” For example, a corporation is a “registered organization” and will be deemed located in its state of incorporation under § 9.307(e) of the Revised Texas UCC.

<sup>16</sup> Revised Texas UCC § 9.305(a)(1).

- (3) for security entitlements or securities accounts, the rule set out in Section 9.103(f)(4)<sup>18</sup> is that the governing law is the local law of the security intermediary's jurisdiction as specified in Section 8.110(e).

Accordingly, perfection and priority opinions under Texas law for investment property should generally only be relevant if one of the foregoing rules directs a secured party to the law of Texas as the appropriate local law governing the matter.

In the case of opinions on security interests in uncertificated securities to be perfected by control, Section 8.110(d) provides that the "issuer's jurisdiction" means the jurisdiction under which the issuer of the security is organized or, if permitted by the law of that jurisdiction, the law of another jurisdiction specified by the issuer. Accordingly, an Opinion Giver under Texas law would want to make the assumptions or determinations regarding uncertificated securities necessary to establish, based on the criteria specified in Section 8.110(d) of the Texas UCC, that the State of Texas is the issuer's jurisdiction such that the local law of Texas governs perfection and priority.<sup>19</sup>

In the case of opinions on security interests in security entitlements or securities accounts to be perfected by control, the rules set forth in Section 8.110(e) of the Texas UCC as to the "securities intermediary's jurisdiction" are as follows:

- (1) Section 8.110(e)(1) states that if an agreement between the securities intermediary and the entitlement holder specifies that it is governed by the law of a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction;
- (2) Section 8.110(e)(2) states that if an agreement between the securities intermediary and the entitlement holder does not specify a governing law as provided in Section 8.110(e)(1), but expressly specifies that the securities account is maintained at an office in a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction;
- (3) Section 8.110(e)(3) states that if an agreement between the securities intermediary and the entitlement holder does not specify a jurisdiction as provided in Section 8.110(e)(1) or (2), the securities intermediary's jurisdiction is the jurisdiction in which is located the office identified in an account statement as the office serving the entitlement holder's account; and
- (4) Section 8.110(e)(4) states that if an agreement between the securities intermediary and the entitlement holder does not specify a jurisdiction as provided in Section 8.110(e)(1) or (2) and an account statement does not identify an office serving the entitlement holder's account as provided in Section 8.110(e)(3), the securities

---

<sup>17</sup> Revised Texas UCC § 9.305(a)(2).

<sup>18</sup> Revised Texas UCC § 9.305(a)(3).

<sup>19</sup> See the illustrative opinion letters in Attachments A and C for examples of relevant assumptions.

intermediary's jurisdiction is the jurisdiction in which the securities intermediary's chief executive office is located.<sup>20</sup>

Accordingly, an Opinion Giver under Texas law would want to make the assumptions or determinations regarding security entitlements or securities accounts necessary to establish, based on the criteria specified in Section 8.110(e) of the Texas UCC, that the State of Texas is the securities intermediary's jurisdiction such that the local law of Texas governs perfection and priority.<sup>21</sup>

## 2. Other Common Opinion Assumptions and Qualifications.

Certain of the requirements for the perfection of security interests in collateral of the type included in the term "investment property" were not changed by the 1995 amendments to the Texas UCC, such as the need for the debtor to have rights in the collateral and for value to be given for a security interest to attach. Such requirements (and assumptions in legal opinions or provisions in transaction documents necessary to establish such requirements) are not limited to investment property, but are common to all collateral.<sup>22</sup> Similarly, the Opinion Giver will continue to want to examine the sufficiency of any description of the collateral in the security agreement.<sup>23</sup>

If perfection of a security interest in investment property is to be accomplished by filing, many of the assumptions Opinion Givers have typically used with respect to filing, such as due filing and the accuracy of information contained in the financing statements, apply and should

---

<sup>20</sup> Note that under the Texas UCC as currently in effect, and also under the Revised Texas UCC, the alternative rules for a securities intermediary's jurisdiction are ordered in a "waterfall" test such that the determinative factor as to the jurisdiction of the securities intermediary may depend as much on the absence as on the existence of various facts. Under the Revised Texas UCC, Subsections (e)(1), (e)(2), (e)(3), and (e)(4) of § 8.110 will be renumbered as Subsections (e)(2), (e)(3), (e)(4) and (e)(5), respectively, of § 8.110. The Revised Texas UCC § 8.110(e)(1) adds a new first test to the waterfall, *i.e.*, if an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that a particular jurisdiction is the "securities intermediary's jurisdiction" for purposes of Chapter 8 of the Revised Texas UCC (or Subchapter A of Chapter 8 of Title 1 of the Texas Business and Commerce Code), that jurisdiction is the securities intermediary's jurisdiction. Thus, the rules stated in the text above will, under the Revised Texas UCC, be applicable only if the agreement governing the securities account does not expressly specify the securities intermediary's jurisdiction for purposes of Chapter 8 of the Revised Texas UCC (or Subchapter A of Chapter 8 of Title 1 of the Texas Business and Commerce Code).

<sup>21</sup> See the illustrative opinion letters in Attachments A and D for examples of relevant assumptions.

<sup>22</sup> Under the Revised Texas UCC, investment property collateral will continue to have certain common requirements and assumptions with other types of collateral. However, opinions regarding attachment, enforceability of security interests, and perfection will take as a starting point of analysis Revised Texas UCC §§ 9.203 (attachment and enforceability) and 9.308 (perfection), as well as Revised Texas UCC § 9.301 (governing law).

<sup>23</sup> § 9.115(c) of the Texas UCC. [Description requirements have been revised in § 9.108 of the Revised Texas UCC.] Note also § 9.203(a) of the Texas UCC that provides a special rule for certificated securities in the possession of the secured party. [Compare § 9.203(b)(3)(C) of the Revised Texas UCC that dispenses with the requirement of an authenticated record for such collateral.]

continue to apply with respect to the Revised Texas UCC.<sup>24</sup> Opinions as to varying forms of investment property collateral may also refer to common rules regarding proceeds of collateral.<sup>25</sup>

Accordingly, in the case of all types of investment property collateral, an Opinion Giver would generally make the following assumptions:

- (1) **the debtor has rights in the security,**
- (2) **value has been given,<sup>26</sup> and**
- (3) **(for perfection solely by filing) the due filing of the financing statement in the appropriate filing office(s) and the accuracy of the names and addresses of the parties named in the financing statement that are not the Opinion Giver's clients,**

and take the following qualifications:

- (1) **we express no opinion as to (i) the title to or value of any property or (ii) the debtor's having any rights in any property,<sup>27</sup> and**
- (2) **the creation and perfection of any security interest in proceeds will be limited to the extent provided in Section 9.306 of the Texas UCC.<sup>28</sup>**

---

<sup>24</sup> As to perfection by filing and by control and their relative priorities, *see* § 9.115 of the Texas UCC [Revised Texas UCC §§ 9.312(a), 9.313(a) and 9.314(a)].

<sup>25</sup> *See* § 9.306 of the Texas UCC. Proceeds are covered by Revised Texas UCC §§ 9.203(f)(attachment) and 9.315(perfection). Under the Revised Texas UCC, generally a security interest in collateral automatically attaches in proceeds, and such security interest in proceeds is automatically perfected but will become unperfected unless certain other requirements are satisfied. Note also that the definition of "proceeds" has been expanded in Revised Texas UCC § 9.102(a)(65).

<sup>26</sup> The Opinion Giver may be able to determine from the transaction or from representations in the transaction documents that value has been given, in which case the assumption would not be necessary or might be established by an assumption that representations in the transaction documents are accurate. Although the assumption of value is contained in the text above and in the illustrative opinion letter in Exhibit "B" to the Texas Report, the reader should consult Subpart C.3 of Part 9 of the Texas Report for further comment on the matter. *See also*, footnote 35 to the illustrative opinion letter in Attachment A.

<sup>27</sup> There are other qualifications in the Texas Report which the Opinion Giver may want to include if the security agreement contains provisions to which such qualifications would be relevant. For example: "*We express no opinion as to the perfection or priority of the security interest in any collateral to the extent the secured party has consented to any security interest in favor of any other party or has authorized the disposition of any collateral or released or subordinated its security interest therein.*" *See* the Texas Report, Part IX, Subpart E.6.(k) and the corresponding form of the illustrative opinion letter set forth in Exhibit "B" to the Texas Report, at paragraph 6.(k). *Compare* § 9.306(b) of the Texas UCC (security interest continues unless secured party has authorized disposition of the collateral) with § 9.315(a)(1) of the Revised Texas UCC (security interest continues unless secured party has authorized disposition of the collateral "free of the security interest").

<sup>28</sup> *See* footnote 25 *supra* as to the treatment of proceeds under the Revised Texas UCC.

In addition, the following sections discuss additional assumptions that would apply to opinions as to perfection by control depending on the type of investment property involved. Some of the following discussion is also relevant to legal opinions regarding perfection of investment property solely by filing (rather than by control). For example, with regard to security entitlements and securities accounts discussed below in section 5 of this Supplement, it is necessary to determine the basis for the establishment and maintenance of the securities accounts and the security entitlements carried therein, even if the Opinion Giver only addresses perfection by filing.<sup>29</sup>

### 3. Certificated Securities (Perfection by Control).

Under Section 8.106(a) of the Texas UCC, a secured party has control of a certificated security *in bearer form* if the certificated security is delivered to the secured party. Under Section 8.106(b), a secured party has control of a certificated security *in registered form* if:

(1) the certificated security is delivered to the secured party; and

(2) either

the certificate is indorsed to the secured party or in blank by an effective indorsement;

or

the certificate is registered in the name of the secured party on original issue or registration of transfer by the issuer.

“Delivery” for purposes of certificated securities in both bearer and registered form is defined in Section 8.301(a), which states that delivery of a certificated security occurs when (1) the secured party obtains possession of the security certificate, or (2) when another person (other than a securities intermediary)<sup>30</sup> either acquires possession of the security certificate on behalf of the secured party or, having previously acquired possession of the security certificate, acknowledges that it holds for the secured party. If delivery occurs pursuant to Section 8.301(a)(2), the other person holding on behalf of the secured party cannot be the debtor or its agent.

---

<sup>29</sup> See the last sentence of footnote 46 *infra*.

<sup>30</sup> § 8.301(a)(3) provides that if a securities intermediary acting on behalf of a purchaser (including a secured party) acquires possession of a security certificate, delivery occurs only if the certificate is in registered form and has been specially indorsed to the *purchaser* by an effective endorsement. Perfection effected through delivery under § 8.301(a)(3) constitutes perfection under the direct holding system of Article 8, and not under the indirect holding system of Part 5 of Article 8. The last sentence of Comment 2 to § 8.301 of the Texas UCC states: “Subsection (a)(3) specifies the limited circumstances in which delivery of security certificates to a securities intermediary is treated as a delivery to the customer.” [§ 8.301(a)(3) of the Revised Texas UCC adds to the methods of delivery, in the case of possession of a certificated security by a securities intermediary. Delivery under § 8.301(a) of the Revised Texas UCC will occur if the certificate is in registered form and is (i) registered in the name of the purchaser, (ii) payable to the order of the purchaser, or (iii) specially indorsed to the purchaser by an effective indorsement and has not been indorsed to the securities intermediary or in blank.]

Accordingly, an Opinion Giver would want to make the additional assumptions or determinations<sup>31</sup> necessary to establish the pertinent criteria regarding certificated securities discussed above (including, if perfection is achieved by a person's holding a security certificate on behalf of the secured party, the validity and enforceability of such person's agreement or acknowledgement to so hold such certificate) as a basis for delivering an opinion on perfection by control of certificated securities. Based on such assumptions or determinations, the opinion might read as follows:

**With respect to the security interest of the secured party in the debtor's right, title and interest in and to the certificated securities, based on the secured party's [or the secured party's agent's] having acquired possession in the State of Texas [on behalf of the secured party] of the certificates representing such securities, indorsed to the secured party or in blank, under Texas law such security interest granted pursuant to the security agreement, and securing the obligations purported to be secured thereby, is perfected by "control" (within the meaning of Section 8.106 of the Texas UCC).**

The reader should consult Attachments A and B hereto for a more detailed discussion and analysis of Chapters 8 and 9 of the Texas UCC insofar as they relate to legal opinions on security interests in certificated securities.<sup>32</sup>

#### 4. Uncertificated Securities (Perfection by Control).

Under Section 8.106(c) of the Texas UCC, a secured party has control of an uncertificated security if either:

- (1) the uncertificated security is delivered to the secured party; or
- (2) the issuer has agreed to comply with the instructions of the secured party, without further consent by the registered owner.

Section 8.301(b) provides that "delivery" to a purchaser (here, the secured party) of an uncertificated security occurs when (a) the issuer registers the secured party as the registered owner (on original issue or registration of transfer), or (b) another person (other than a securities intermediary) becomes the registered owner of the uncertificated security on behalf of the secured party or, having previously become the registered owner, acknowledges that it holds for

---

<sup>31</sup> References are made herein to various "assumptions or determinations" because in an actual transaction certain of the components of an opinion may, in appropriate circumstances, be determinable by the Opinion Giver without need for the taking of an assumption. The appropriateness of an Opinion Giver's undertaking to determine certain matters, as opposed to covering the same matters by assumption, will depend on the facts and circumstances of the particular transaction. *See* footnote 46 *infra*.

<sup>32</sup> Please note that, for purposes of explanation and analysis, the illustrative opinions contained in the Attachments to this Supplement are more detailed than may be needed for many transactions. *See, e.g.*, footnotes 15 and 16 to Attachment A. In those transactions where the Opinion Giver will be able to rely on compliance with the provisions of the transaction documents or on officer's certificates with respect to some or all of the matters treated as assumptions in the illustrative opinion letters attached hereto, less detailed assumptions might also be appropriate.

the secured party. If delivery occurs pursuant to clause (b) of the preceding sentence, the other person which, as registered owner, holds on behalf of the secured party cannot be the debtor or its agent. In most transactions, it is likely that the secured party (or a person acting on its behalf) will not become the registered owner and that the debtor will be the registered owner; in such case, control will be obtained by the issuer's agreement to comply with the secured party's instructions without further consent of the registered owner.

Accordingly, an Opinion Giver would want to make the additional assumptions or determinations necessary to establish the pertinent criteria regarding uncertificated securities discussed above (including, if applicable, the validity and enforceability of the agreement of the issuer to comply with instructions of the secured party without further consent of the registered owner and the validity and enforceability of the agreement or acknowledgement of a person as registered owner to hold on behalf of the secured party) as a basis for rendering an opinion on perfection by control of a security interest in uncertificated securities.<sup>33</sup> Based on such assumptions or determinations, the opinion might read as follows:

**With respect to the security interest of the secured party in the right, title and interest of the debtor in the uncertificated securities, based on the agreement of the issuer of the uncertificated securities to comply with instructions originated by the secured party without further consent of the registered owner, such security interest granted pursuant to the security agreement, and securing the obligations purported to be secured thereby, is perfected by "control" (within the meaning of Section 8.106 of the Texas UCC).**

Transactions may arise where a person that is not the registered owner of an uncertificated security has rights in the uncertificated security, such as the rights of a secured party to repledge its security interest in the uncertificated security to a third party. Since the assumptions and qualifications discussed herein and in the various illustrative opinion letters provided in the Attachments assume that the pledgor is also the owner of the collateral, any departure from this assumption would necessitate appropriate modifications to the opinion letter. In this regard, if the secured party (or person holding on its behalf) does not become the registered owner of the uncertificated security, Section 8.106(g) of the Texas UCC would always require the consent of the registered owner (whether or not the registered owner is the pledgor) in order for an issuer to agree to comply with instructions originated by a secured party without further consent of the registered owner.

The reader should consult Attachments A and C hereto for a more detailed discussion of Chapters 8 and 9 of the Texas UCC insofar as they relate to legal opinions on security interests in uncertificated securities.<sup>34</sup>

---

<sup>33</sup> See the illustrative opinion letter in Attachment C.

<sup>34</sup> See footnote 32 *supra*.

## 5. Security Entitlements and Securities Accounts (Perfection by Control).

In addition to the concept of “investment property,” Articles 8 and 9 have introduced the terms “security entitlement,” “financial asset,” and “securities account.” A “security entitlement” means “the rights and property interest of an entitlement holder with respect to a financial asset.”<sup>35</sup> The definition of “financial asset” in Section 8.102 of the Texas UCC is as follows:

- (9) “Financial asset,” except as otherwise provided in Section 8.103,<sup>36</sup> means:
  - (A) a security;
  - (B) an obligation of a person or a share, participation, or other interest in a person or in property or an enterprise of a person that is, or is of a type, dealt in or traded on financial markets or that is recognized in any area in which it is issued or dealt in as a medium for investment; or
  - (C) any property that is held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under this chapter.

As context requires, the term [*i.e.*, “financial asset”] means either the interest itself or the means by which a person’s claim to it is evidenced, including a certificated or uncertificated security, a security certificate, or a security entitlement.<sup>37</sup>

Section 8.501(a) of the Texas UCC provides that a “securities account” means:

an account to which a financial asset is or may be credited in accordance with an agreement under which the person maintaining the account undertakes to treat the person for whom the account is maintained as entitled to exercise the rights that comprise the financial asset.<sup>38</sup>

---

<sup>35</sup> Texas UCC § 8.102(a)(17).

<sup>36</sup> § 8.103 of the Texas UCC supplements the definitions of “financial asset” and “security” in § 8.102 of the Texas UCC and provides guidance as to whether (or under what circumstances) certain specific investment properties (*e.g.*, shares issued by corporations or business trusts, investment company securities, interests in limited partnerships or limited liability companies, negotiable instruments and options or similar obligations issued by a clearing corporation to its participants) constitute securities or financial assets under Article 8.

<sup>37</sup> Texas UCC § 8.102(a)(9).

<sup>38</sup> The Opinion Giver should avoid giving opinions as to specific financial assets credited to a securities account (as opposed to security entitlements carried in a securities account with respect to such financial assets), which are subject to the indirect holding system provisions of Part 5 of Article 8 of the Texas UCC. The rights of the parties with respect to securities accounts and with respect to security entitlements carried therein are subject to a complex set of provisions in Part 5 of Article 8, and an opinion letter covering such collateral should refer to these. *See*, as an example, qualification (j) in the illustrative opinion letter in Attachment A hereto. Comment 1 to § 8.501 provides that the question of whether an arrangement is a securities account “should be decided not by dictionary analysis of the words of the definition taken out of context, but by considering whether the arrangement promotes

Subsection (d) of Section 8.106 specifies the means by which a secured party can obtain control over a security entitlement. Under Section 8.106(d)(1), a secured party has control if:

- (1) the secured party becomes the entitlement holder, or
- (2) the securities intermediary has agreed to act on entitlement orders originated by the secured party, without further consent by the entitlement holder.<sup>39</sup>

It should be noted that if a securities intermediary holds a financial asset for another person, and the financial asset is registered in the name of, payable to the order of, or specially indorsed to such other person and has not been indorsed to the securities intermediary or in blank, then Section 8.501(d) states that such other person is treated as holding the financial asset directly, rather than as having a security entitlement with respect to the financial asset.

If the collateral is a securities account (rather than covering only certain security entitlements within such account), then the collateral includes all security entitlements in the account, as well as all of the debtor's other rights against the securities intermediary arising out of the securities account. For example, the security interest would include credit balances owing to the debtor from the securities intermediary, whether or not they are the proceeds of a security entitlement. Describing the collateral as the securities account avoids the necessity of describing each security entitlement or other right therein. See Section 9.115(b) of the Texas UCC and Comment 4 to Section 9.115.<sup>40</sup> However, Section 9.115(a)(5)<sup>41</sup> provides that a secured party has

---

the objectives of Article 8.” Comment 1 goes on to state that “[t]he effect of concluding that an arrangement is a securities account is that the rules of Part 5 apply. Accordingly, the definition of ‘securities account’ must be interpreted in light of the substantive provisions in Part 5, which describe the core features of the type of relationship for which the commercial law rules of Revised Article 8 concerning security entitlements were designed.” Comment 1 clarifies that the term “securities accounts” does not include the relationship between a bank and its depositors (e.g., a bank deposit account) or the relationship between a trustee and the beneficiary of an ordinary trust, because “those are not relationships in which the holder of a financial asset has undertaken to treat the other as entitled to exercise the rights that comprise the financial asset.” *See also, generally, Prefatory Note, Uniform Commercial Code, The American Law Institute and National Conference of Commissioners on Uniform State Laws, Revised Article 8 (1994 Revision), Investment Securities, reprinted at Uniform Commercial Code, 2000 ed., West Pub. Co., Part II.C., at 664-74.* With respect to transactions after July 1, 2001, Opinion Givers should be aware that Chapter 9 of the Revised Texas UCC will cover deposit accounts. *See* Revised Texas UCC §§ 9.102(a)(29), 9.304, 9.312(b), 9.314 and 9.327. However, the distinction between deposit accounts and securities accounts will remain applicable.

<sup>39</sup> In some secured financings, the debtor will be the entitlement holder and may not want to permit the secured party to become the entitlement holder prior to default; in such cases, perfection by control will be based on the alternative described in clause (2) in the text above. Note that § 8.106(g) of the Texas UCC provides that a securities intermediary may not enter into an agreement of the kind described in clause (2) in the text above without the consent of the entitlement holder. The Revised Texas UCC adds a third method of control by adding § 8.106(d)(3), which provides that “control” by a person will also exist if “another person has control of the security entitlement on behalf of the purchaser or, having previously acquired control of the security entitlement, acknowledges that it has control on behalf of the purchaser.”

<sup>40</sup> The Revised Texas UCC contains new rules for the description of collateral. *See* Revised Texas UCC § 9.108(d) regarding the sufficiency of descriptions of investment property in security agreements, and Revised Texas UCC § 9.504(b) regarding the sufficiency of descriptions in financing statements.

control over a securities account if it has control over all security entitlements carried in the securities account.

Accordingly, the perfection by control of a security interest in security entitlements carried in a securities account requires the following elements (in addition to the basic elements for attachment of a security interest under Section 9.203 of the Texas UCC<sup>42</sup>), and the perfection by control of a security interest in a securities account requires the following elements for all security entitlements carried in such securities account:

- (1) a “securities account” (within the meaning of Section 8.501(a) of the Texas UCC);<sup>43</sup>
- (2) a person acting in the capacity of a “securities intermediary” (within the meaning of Section 8.102(a)(14) of the Texas UCC) in performing the functions contemplated by Section 8.501(b) of the Texas UCC with regard to the securities account and “financial assets” (within the meaning of Section 8.102(a)(9) or Section 8.103 of the Texas UCC);
- (3) with respect to each security entitlement included in the collateral and carried in the securities account (or, in the case of a security interest in a securities account, with respect to all security entitlements carried in the securities account), the securities intermediary will, as required for the acquisition of a security entitlement in each relevant financial asset under Section 8.501(b) of the Texas UCC, (a) indicate by book entry that such financial asset has been credited to the securities account, (b) receive or acquire such financial asset for the debtor (or the secured party if it is the entitlement holder) and accept it for credit to the securities account, or (c) become legally obligated to credit such financial asset to the securities account;
- (4) one of the following: either

the debtor is the entitlement holder, and the securities intermediary, the debtor and the secured party have agreed that the securities intermediary shall comply with all entitlement orders originated by the secured party, without further consent by the entitlement holder,<sup>44</sup>

---

<sup>41</sup> Revised Texas UCC § 9.106(c).

<sup>42</sup> Note that Revised Texas UCC § 9.203 amends the rules for the attachment of a security interest.

<sup>43</sup> See footnote 38 *supra* and accompanying text.

<sup>44</sup> It should be noted that § 8.106(f) of the Texas UCC provides that if a purchaser (here the secured party) that is not the entitlement holder has control of a security entitlement through this type of agreement, such purchaser has “control” even if the debtor as entitlement holder retains the right to make substitutions for the security entitlement, to originate entitlement orders to the securities intermediary, or otherwise to deal with the security entitlement. In transactions where the debtor is the entitlement holder, control agreements or security agreements will often provide that (a) the debtor can deliver entitlement orders to the securities intermediary until the secured party instructs the securities intermediary no longer to accept entitlement orders from the debtor, (b) following the delivery of such an instruction by the secured party, the securities intermediary will accept and comply with

or

the secured party is the entitlement holder;

(5) one of the following: either

such security entitlements (or in the case of a security interest in a securities account, all security entitlements in such account) are with respect to financial assets of the types referred to in items (A) or (B) of the definition of “financial asset” in Section 8.102(a)(9) of the Texas UCC, or with respect to interests in partnerships or limited liability companies, or in negotiable instruments or in certain options as contemplated by Sections 8.103(c), (d) and (e) of the Texas UCC,

or

the securities intermediary has agreed to hold and treat all property subject to such security entitlements (or in the case of a security interest in a securities account, all property credited to such account) as financial assets to the extent such agreement to such treatment is required by Section 8.102(b)(9)(C) of the Texas UCC, and such agreement is the legal, valid and binding agreement of the securities intermediary, enforceable against the securities intermediary in accordance with its terms;<sup>45</sup> and

(6) if any financial asset which is to be the subject of such security entitlements (or in the case of a security interest in a securities account, which is to be credited to such securities account) is registered in the name of, payable to the order of, or specially indorsed to any person other than the securities intermediary, such financial asset must be registered in the name of, payable to the order of, or specially indorsed to the securities intermediary or in blank, so as to permit the debtor’s interest therein to be treated as a security entitlement under Section 8.501 of the Texas UCC.

Accordingly, an Opinion Giver would want to make the additional assumptions or determinations necessary to establish the pertinent criteria regarding security entitlements or securities accounts discussed above (including compliance by the securities intermediary with its agreements and obligations under the transaction documents and the validity and enforceability

---

entitlement orders only from the secured party, and (c) prior to the delivery by the secured party of such an instruction described in the preceding clause (a), the securities intermediary will also comply with entitlement orders given by the secured party, and if an entitlement order given by the debtor conflicts with an entitlement order given by the secured party, the securities intermediary will comply with the entitlement order of the secured party.

<sup>45</sup> In the experience of some members of the Committee, it is common in security agreements covering securities accounts, or in related control or other agreements, for the securities intermediary to agree to treat all assets credited to the securities account as “financial assets” for the purposes of Article 8, in which event the Opinion Giver then commonly assumes that all assets in the securities account constitute financial assets.

of such agreements and obligations) as a basis for rendering an opinion on perfection by control of a security interest in security entitlements or a securities account.<sup>46</sup> Based on such assumptions or determinations, the opinion might read as follows:

**With respect to the security interest of the secured party in the right, title and interest of the debtor in the securities account [or the specified security entitlements], based on the security intermediary's agreement with the debtor and the secured party to comply with all entitlement orders originated by the secured party, without further consent of the debtor, with respect to all securities entitlements carried in such securities account [or with respect to such securities entitlements], such security interest granted pursuant to the security agreement, and securing the obligations purported to be secured thereby, is perfected by control (within the meaning of Section 8.106 of the Texas UCC) under Texas law.**

The reader should consult Attachments A and D hereto for a more detailed discussion of Chapters 8 and 9 of the Texas UCC insofar as they relate to legal opinions on security interests in security entitlements and securities accounts.<sup>47</sup>

## 6. Partnership and Limited Liability Company Interests.

Under the prior version of Article 8 of the Texas UCC, it was unclear whether a limited partnership interest or a limited liability company interest was a “security” to be perfected under Article 8 or a “general intangible” to be perfected under Article 9. This issue has been clarified by Section 8.103(c) of the Texas UCC, which provides that an interest in a partnership or limited liability company is not a “security” under Article 8 (and, therefore, is not investment property

---

<sup>46</sup> For the purpose of determining and documenting the criteria for attachment and perfection by control of a security interest in a security entitlement or a securities account, or to substantiate the basis for assumptions regarding such criteria, the Opinion Giver should ordinarily expect the security agreement or control agreement or other transaction documents to contain sufficient representations and undertakings of the debtor and the securities intermediary, as respectively applicable, to meet all requisite criteria related to such perfection and control. These would include the requirements of §§ 8.102(a)(9) and 8.103 (regarding financial assets); § 8.102(a)(7) (regarding the entitlement holder); § 8.102(a)(14) (regarding the securities intermediary); § 8.501 (regarding the establishment and maintenance of the securities account and each relevant security entitlement therein, or all security entitlements therein if the security interest covers the securities account); and §§ 8.106(d) and 9.115(a)(5) of the Texas UCC (regarding control). In the same manner, other relevant matters addressed by the Opinion Giver, such as § 9.203 (attachment), 9.115(b) (attachment and perfection) and 9.103(f) (governing law) should ordinarily be supported by the documents. With regard to securities accounts, *see also* footnote 38 *supra*. Note that § 9.106 of the Revised Texas UCC replaces § 9.115(a)(5) as to control of securities accounts and security entitlements; §§ 9.203(h) and 9.308(f) of the Revised Texas UCC replace § 9.115(b) as to attachment and perfection in securities accounts and security entitlements; and § 9.305 of the Revised Texas UCC replaces § 9.103(f) as to governing law. Footnotes 15 and 16 of the illustrative opinion letter in Attachment A, *infra*, contain a related discussion regarding the importance of the transaction documents with regard to the legal opinion and the matters referred to in this footnote. As stated in those footnotes, the Opinion Giver might want, in drafting the opinion letter, to replace certain express assumptions or statements of fact upon which the opinion is based, by stating reliance on the accuracy of representations, or assuming compliance with agreements, contained in the transaction documents or in related certificates. Even if the Opinion Giver only addresses perfection of security entitlements or securities accounts by the filing of a financing statement, rather than by control, all the foregoing criteria, except those applicable only to the secured party's obtaining control (*see* item (4) of the text preceding footnote 44 above), would be relevant.

<sup>47</sup> *See* footnote 32 *supra*.

under Article 9) unless (a) it is in fact traded or dealt in on securities exchanges or in securities markets, (b) its terms expressly provide that it is a security governed by Article 8, or (c) it is an “investment company security” as defined in Section 8.103(b) (*i.e.*, a security issued by an investment company registered under the Investment Company Act of 1940).<sup>48</sup> However, even if an interest in a partnership or limited liability company is not a security under any of the foregoing tests of Section 8.103(c), Section 8.103(c) goes on to provide that such an interest would constitute a “financial asset” if held in a securities account. As a financial asset held in a securities account, a partnership interest or a limited liability company interest would be subject to the perfection and priority rules for investment property held through a security entitlement in a securities account. Thus, a partnership interest or limited liability company interest credited to a securities account maintained by a securities intermediary is a financial asset and can be held in the indirect holding system of Article 8 (and perfection of a security interest can be effected in a security entitlement with respect thereto), whether or not such partnership or limited liability company interest is a security under Article 8. A partnership interest or limited liability company interest that is not held in a securities account and that is not a security under Section 8.103(c) would be a “general intangible,” which would be subject to the rules of perfection and priority for general intangibles contained in Article 9.

With respect to an interest in a limited partnership or limited liability company credited to a securities account maintained by a securities intermediary, an Opinion Giver would make the same assumptions or determinations, as applicable, for perfection by control of a security entitlement with respect to such interest as discussed in section 5 above, after giving particular consideration to the status of the limited partnership interest or limited liability company interest as a financial asset under Sections 8.102(a)(9) and 8.103(c) of the Texas UCC and the treatment of the interest as a financial asset under Section 8.501 of the Texas UCC.

If the partnership interest or limited liability company interest is, instead, to be perfected as a “general intangible,” the Opinion Giver would need to assume or determine the criteria necessary to establish that such interest is a general intangible, namely that (a) the terms of the partnership interest or limited liability company interest do not expressly provide that it is a security governed by Article 8 of the Texas UCC, (b) such interest is not dealt in or traded on securities exchanges or in securities markets, (c) such interest is not an investment company security (within the meaning of Section 8.103(b) of the Texas UCC), and (d) such interest is not held in a securities account.

The reader should consult Attachment A hereto for illustrative opinions on security interests in a partnership interest where such interest constitutes a general intangible.<sup>49</sup>

---

<sup>48</sup> Note that § 8.103(c) addresses only partnerships and limited liability companies. Shares or similar equity interests issued by corporations, business trusts, joint stock companies or similar entities constitute securities under § 8.103(a). Other interests may constitute securities in accordance with the basic definitional requirements for a “security” contained in § 8.102(a)(15) and, accordingly, would be subject to the perfection and priority rules applicable to investment property, rather than to those applicable to general intangibles.

<sup>49</sup> See also the discussion in footnote 10 to Attachment A, *infra*.

## 7. Other Financial Assets.

In addition to partnership interests and limited liability company interests mentioned in the preceding section 6, other types of property, if held by a securities intermediary as a financial asset in a securities account, may be “financial assets” in which a security entitlement would be subject to the perfection and priority rules for “investment property.” The assumptions and opinions with regard to such security entitlements in such financial assets would be similar to the examples given in sections 5 and 6 above.

Money market instruments, such as commercial paper and bankers acceptances, would not ordinarily meet the definition of an Article 8 “security.” However, if held in a securities account, such assets could be “financial assets” subject to the rules for perfection of a security entitlement therein as investment property.<sup>50</sup>

## 8. Priority.

While there may be circumstances in which it is appropriate to request an Opinion Giver to give a priority opinion, it continues to be the Committee’s view that it is rarely appropriate to request a priority opinion. It also continues to be the Committee’s view that in those limited circumstances where a priority opinion is requested, the secured party should request only a limited priority opinion addressing collateral subject to perfection under Articles 8 and 9 of the Texas UCC. In the case of all types of investment property, where no opinion is rendered as to priority, an Opinion Giver would generally want to include the following statement in the opinion letter:

**We express no opinion as to the priority or ranking of any security interest or other lien.**

For those limited circumstances in which an opinion on the priority of security interests in investment property is appropriate (such as in a large, negotiated transaction where significant legal expenses are expected by the clients and the Opinion Giver’s client so authorizes), the attached illustrative opinion letters contain samples of such opinions, together with related assumptions as to priority as well as perfection. The priority rules for investment property are contained in Sections 9.115(e) and (f) of the Texas UCC.<sup>51</sup> Generally, a secured party that has perfected by control has priority over a secured party that has perfected by filing a financing statement. Conflicting security interests perfected by control rank equally under the current

---

<sup>50</sup> See §§ 8.103(d) and (e) of the Texas UCC, which provide that negotiable instruments if held in a securities account and options or similar obligations issued by a clearing corporation are financial assets.

<sup>51</sup> Revised Texas UCC § 9.328.

Texas UCC, but will rank in order of time of perfection under the Revised Texas UCC,<sup>52</sup> except that (in each case) security interests in favor of a securities intermediary have priority.<sup>53</sup>

The attached forms of illustrative opinion letters<sup>54</sup> serve as examples of how to treat investment property in opinions dealing with the attachment, perfection and priority of security interests in investment property. Emphasis has been given in this Supplement to the principal requirements for perfection opinions as to each of the main categories of investment property collateral (other than commodity contracts and commodity accounts). While the wording may differ in some instances, the substance of the opinions and assumptions in the illustrative opinion letters as to the attachment and perfection of security interests is intended to be the same as discussed herein. The illustrative opinion letters also address priority issues, which for the reasons stated in section 8 above, have been addressed only briefly in this Supplement.

---

<sup>52</sup> Texas UCC § 9.115(e)(2) provides, with certain exceptions, that secured interests in investment property perfected by control rank equally. § 9.328(2) of the Revised Texas UCC ranks such security interests in order of the time of obtaining control.

<sup>53</sup> See Texas UCC § 9.115(e)(3) and Revised Texas UCC § 9.328(3). For a more complete statement of the rules of perfection and priority under the Texas UCC, see D. Keyes & T. Yates, *Revised Articles 8 and 9 of the Uniform Commercial Code: Securities and Other Investment Property*, Texas J. Bus. Law, Vol. 32, No. 4, 1-33 (Winter 1994).

<sup>54</sup> The attached forms of illustrative opinion letters are prepared under the Texas UCC as it exists on the date of adoption of this Supplement. As noted in footnote 10 *supra*, the opinion letter in Attachment A deals not only with investment property but also, for comparison purposes, with certain other forms of property. Please note that such other forms of property will be affected by the Revised Texas UCC in ways not addressed comprehensively by this Supplement or by the illustrative opinion letter in Attachment A (or by the other illustrative opinion letters in Attachments B, C and D, which are modeled on the relevant portions of the longer illustrative opinion letter in Attachment A). Although none of the illustrative opinion letters include opinions given under the Revised Texas UCC, footnotes to the illustrative opinion letters do provide relevant section references to the Revised Texas UCC as well as noting certain material changes in opinion practice that the Revised Texas UCC will require.

Attachments:

- A Illustrative Opinion Letter on Security Interests in Investment Property (and, for comparison, certain other assets)
- B Illustrative Opinion Letter on Security Interests in Certificated Securities
- C Illustrative Opinion Letter on Security Interests in Uncertificated Securities
- D Illustrative Opinion Letter on Security Interests in Securities Accounts

ATTACHMENT A TO SUPPLEMENT NO. 2<sup>1</sup>

**Illustrative Opinion Letter on Security Interests in Investment Property  
(and, for comparison, certain other assets)**

[LETTERHEAD OF OPINION GIVER]

Each of the Addressees Listed in  
the Attached Schedule I hereto

Ladies and Gentlemen:

We have acted as special Texas counsel to Borrowing Corporation, a Texas corporation<sup>2</sup> (the “Pledgor”), in connection with certain aspects of the transactions described in the documents listed in Schedule II hereto (the “Transaction Documents”). This opinion letter is being delivered to you pursuant to Section \_\_\_\_ of the Loan Agreement, dated \_\_\_\_\_ (the “Loan Agreement”), among the Pledgor, the Agent Bank, as agent for the Lenders under the Loan Agreement (the “Agent”), and the Lenders party thereto. All capitalized terms used herein, but not defined herein, shall have the respective meanings given to such terms in the Loan Agreement. Other terms that are defined in the Uniform Commercial Code as currently in effect in the State of Texas (the “Texas UCC”) have the same meanings when used herein unless otherwise indicated by the context in which such terms are so used.

In rendering the opinions expressed below, we have examined:

(a) executed counterparts of the Transaction Documents;

---

<sup>1</sup> This is an attachment to Supplement No. 2 (the “Supplement”) to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions cited in footnote 2 of the Supplement (the “Texas Report”). This illustrative opinion letter is drafted with reference to Texas law as in effect on the date of adoption of the Supplement. While certain notations or bracketed references are made to corresponding provisions of the Texas UCC as amended by the amendments effective July 1, 2001, cited in footnote 6 of the Supplement (the “Revised Texas UCC”), revisions to this illustrative opinion letter will likely be required under the Revised Texas UCC, especially in regard to non-investment property collateral. The reader should consult the Supplement for additional commentary on the effect of the Revised Texas UCC. Further, while illustrative opinions as to priority have been included in this illustrative opinion letter, they are bracketed for the reasons stated in Part 8 of the Supplement.

<sup>2</sup> In this illustrative opinion letter, the Pledgor is “located” in Texas within the meaning of § 9.103(c)(4) of the Texas UCC [Revised Texas UCC § 9.307 (although it should be noted that the rules regarding “location” of the debtor will change under such revised section; *see* footnote 11 *infra*)], the certificated security is located in Texas under § 9.103(f)(2) of the Texas UCC [Revised Texas UCC § 9.305(a)(1)], the jurisdiction of the issuer of the uncertificated security is Texas within the meaning of § 8.110(d) of the Texas UCC, to which § 9.103(f)(3) refers [Revised Texas UCC §§ 8.110(d) and 9.305(a)(2)], and the securities intermediary’s jurisdiction is Texas within the meaning of § 8.110(e) of the Texas UCC, to which § 9.103(f)(4) refers. [Revised Texas UCC §§ 8.110(e) and 9.305(a)(3)].

- (b) a copy of the UCC-1 financing statement (the “Financing Statement”) naming the Pledgor as debtor and the Agent as secured party, which Financing Statement is related to the Collateral (as defined below) and is to be filed in the Uniform Commercial Code Section of the Office (the “Office”) of the Secretary of State of the State of Texas pursuant to the Loan Agreement;
- [ (c) the Texas UCC search report described in Schedule III hereto (the “UCC Search Report”) dated \_\_\_\_\_ and showing the results of a search performed in the Office of the Secretary of State of the State of Texas through \_\_\_\_\_ (the “Certification Date”);]
- [ (d) copies of all available documents filed in the Office of the Secretary of State of the State of Texas that are identified by the UCC Search Report;] and
- (e) such other documents and certificates as we have deemed necessary as a basis for the opinions expressed below.

As to any facts material to our opinions, we have made no independent investigation of such facts and have relied solely on certificates and statements of public officials and officers or other representatives of the parties to the Transaction Documents and on the representations and warranties set forth in the Transaction Documents.

\* \* \* [Appropriate assumptions dealing with the legal capacity of all natural Persons, the genuineness of all signatures, the authority of all Persons signing each of the Transaction Documents on behalf of the parties to such documents, the authenticity of all documents submitted as originals, and the conformity to authentic original documents of all documents submitted as copies, and other customary matters are omitted from this illustrative opinion letter on security interests.] \* \* \*

[In our examination of the UCC Search Report, we have assumed the following (as to matters stated herein where perfection or priority is dependent, in whole or part, on the filing of financing statements): (i) that all documents (including, without limitation, all financing statements, statements of assignment, amendments, continuations or partial releases, federal tax liens and utility security instruments) in which the Pledgor is named as debtor have been properly filed and indexed<sup>3</sup> in the Office of the Secretary of State of the State of Texas, (ii) that the UCC Search Report is accurate and complete, (iii) that the Agent and the Lenders have no

---

<sup>3</sup> Compare §§ 9.401 and 9.403 of the Texas UCC with §§ 9.516 and 9.517 of the Revised Texas UCC and note especially the new provision of Revised Texas UCC § 9.517 which places the risk of filing office error on those who search the files rather than on those who file. Texas UCC search reports generally provide information on the various filings referred to in clause (i) of the text above, including utility security instruments filed under Chapter 35 of the Texas Business and Commerce Code. While it is beyond the scope of this illustrative opinion letter and the Supplement to describe the rules pertaining to the perfection of security interests granted by utilities in Texas, the reader should *see* Chapter 35 of the Texas Business and Commerce Code (which continues in effect on and after the effective date of the Revised Texas UCC) for special Texas rules permitting a utility (as defined in that Chapter) to elect a single central filing as to collateral that would otherwise require local filings. *See also* Revised Texas UCC § 9.102(a)(81), which provides a new definition of “transmitting utility” that is somewhat different from the definition of “utility” in Chapter 35.

knowledge of the contents of any other financing statement covering any of the Collateral or the existence of other security interests (perfected or unperfected) in any of the Collateral, and (iv) that existing financing statements, if any, relating to the Pledgor have been filed under the correct legal name of the Pledgor.] [Our opinion as to priority of security interests (where perfection or priority is dependent, in whole or part, on the filing of financing statements) does not apply to adverse claims resulting from security interests in the Collateral created by the Pledgor and perfected by the filing of financing statements under any name other than the present correct legal name of the Pledgor or in any filing office other than a Uniform Commercial Code filing office in the State of Texas.]

Based on the foregoing, and subject to the assumptions, qualifications, exceptions and limitations set forth herein, we are of the following opinions:

1. \* \* \* [Portions of the opinion letter dealing with corporate power, authorization, execution and delivery, non-contravention of laws, governmental approvals, enforceability, choice-of-law<sup>4</sup> and other customary matters are omitted from this illustrative opinion letter on security interests.] \* \* \*

8. The Security Agreement creates valid security interests under the Texas UCC in favor of the Agent for the benefit of the Lenders in the Pledgor's right, title and interest in and to the following "Pledged Collateral" (as defined in the Security Agreement)<sup>5</sup> to secure the Obligations, [to the extent that Chapters 8 and 9 of the Texas UCC are applicable]:<sup>6</sup>

- (a) the Pledged Contract;
- (b) the Swap Agreement;
- (c) the Partnership Interest;

---

<sup>4</sup> Any choice-of-law opinion may require an exception to the effect of, "except to the extent mandatory provisions of Texas law regarding the perfection and priority of security interests granted pursuant to the Security Agreement require the application of the law of another jurisdiction." In this illustrative opinion letter, the Transaction Documents have selected Texas law, and all contacts related to the perfection and priority of liens under §§ 8.110 and 9.103 of the Texas UCC [§§ 8.110 and 9.301 *et seq.* of the Revised Texas UCC] point to Texas as the place for determining perfection and the effect of perfection or non-perfection. *See* assumption (H) of this Attachment.

<sup>5</sup> The opinion should ordinarily be limited to the listed collateral, rather than covering all "Pledged Collateral" or other defined term as typically included in a security agreement. The defined term ordinarily contains catch-all language including, among other things, each financial asset and permitted investment (which in any event may be required to be credited to a securities account and be perfected as a security entitlement). Note that a security entitlement includes rights of an entitlement holder with respect to a financial asset credited to a securities account (§§ 8.102(a)(17) and 8.501(b) of the Texas UCC), but does not include the financial asset itself. Perfection by control of securities pursuant to the direct holding system of Article 8 (as distinct from control of a security entitlement) requires different steps under §§ 9.115(d) and 8.106 of the Texas UCC [§§ 9.314, 9.106 and 8.106 of the Revised Texas UCC] than the steps required thereunder for perfection by control of security entitlements.

<sup>6</sup> It is not necessary to include the bracketed language if the scope of the opinion is limited by qualification (m) of this Attachment. If Federal Book-Entry Regulations are covered by the opinion (*see* footnotes 15 and 45 *infra*), the bracketed language, if included, will have to be appropriately modified.

- (d) the Instrument Promissory Note;
- (e) the Brokerage Account (including, without limitation, the Pledgor's security entitlement to the Chattel Paper, which Investment Banking Company has agreed to treat as a "financial asset" therein, and the negotiable Financial Asset Note);<sup>7</sup>
- (f) the Interest Account;
- (g) the Proceeds Account;<sup>8</sup>

---

<sup>7</sup> The Chattel Paper has been included as a financial asset credited to a securities account solely for purposes of illustration that a "financial asset" as defined in § 8.102(a)(9)(C) may include not only securities but also other property held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under Chapter 8. Chattel paper would more commonly be perfected as chattel paper (rather than as investment property) by filing or possession under Chapter 9. *See* §§ 9.304(a) and 9.305 of the Texas UCC [Revised Texas UCC §§ 9.312(a) and 9.313(a); electronic chattel paper may be perfected by control under Revised Texas UCC § 9.314(a)].

A similar example to perfection of the Chattel Paper as a financial asset credited to a securities account would be a non-negotiable certificate of deposit likewise so credited. § 8.103(d) specifies that a negotiable instrument under Chapter 3 is a financial asset if it is held in a securities account. But if the certificate of deposit is not negotiable under the provisions of Chapter 3, it could nevertheless (as with the Chattel Paper example in the text of this Attachment) be a financial asset, pursuant to § 8.102(a)(9)(C), if held in a securities account for another person and the securities intermediary has expressly agreed with the other person that it is to be treated as a financial asset under Chapter 8. § 9.105(a)(9) of the Texas UCC defines an "instrument" for purposes of Chapter 9 to include a nonnegotiable certificate of deposit. As an instrument, it could be perfected in accordance with §§ 9.304 and 9.305 if not held by a securities intermediary in a securities account. Although under § 9.105(a)(9) of the Texas UCC the term "instrument" *includes* a nonnegotiable certificate of deposit, under the Revised Texas UCC a nonnegotiable certificate of deposit is treated like a deposit account and is not an instrument. *See* Revised Texas UCC §§ 9.102(a)(29) and 9.102(a)(47). Therefore, under the Revised Texas UCC, a nonnegotiable certificate of deposit (as a "deposit account") would be perfected by control rather than by possession of an instrument. *See* Revised Texas UCC §§ 9.104, 9.312(b)(1) and 9.314. A "nonnegotiable certificate of deposit" is defined for purposes of Article 9 in § 9.105(a)(14) of the Texas UCC and in § 9.102(a)(59) of the Revised Texas UCC.

The Financial Asset Note has been included to illustrate that, under §§ 8.103(c), (d) and (e), "financial assets" also include negotiable instruments, partnership interests and interests in limited liability companies held in a securities account and certain options or similar obligations issued by a clearing corporation. With respect to these additional financial assets mentioned in § 8.103, it is not necessary to obtain the express agreement of the securities intermediary to treat them as financial assets in order for them to constitute financial assets; rather, it is enough if the securities intermediary has agreed to hold them in the securities account. However, in the experience of some members of the Committee, security agreements or control agreements generally provide that the securities intermediary will treat all assets held or credited to a securities account as financial assets. In actual transactions, a promissory note would most likely not be held in a securities account, but instead would be held by the secured party as an instrument to be perfected by possession under § 9.305 in the manner referred to in the illustrative opinion in paragraph 13 of this Attachment, with respect to the Instrument Promissory Note, rather than as part of a security entitlement.

<sup>8</sup> The "Interest Account" and "Proceeds Account" have been included to illustrate that a "securities account" (as defined in § 8.501 of the Texas UCC) may include, among other things, accounts held by securities intermediaries into which required cash payments are made to a securities intermediary and from which accounts permitted investments are made, pending application of the available balances in accordance with the Transaction

- (h) the XYZ Corp. Stock Certificate;
- (i) the ABC Corp. Uncertificated Security; and
- (j) the proceeds of each of the foregoing.

The Pledged Contract and the Swap Agreement are herein collectively called the “Contractual Security.” The accounts specified in clauses (e) through (g) above are herein collectively referred to as the “Securities Accounts.” The XYZ Corp. Stock Certificate and the ABC Corp. Uncertificated Security are herein collectively referred to as the “Directly Held Securities.” The Contractual Security, the Partnership Interest, the Instrument Promissory Note, the Securities Accounts and the Directly Held Securities, and the proceeds of each of the foregoing, are herein collectively referred to as the “Collateral.”

9. The Financing Statement is in appropriate form for filing under the Texas UCC (to the extent that Section 9.103 of the Texas UCC<sup>9</sup> would permit or require filing under the Texas UCC in the State of Texas). The due filing of the Financing Statement in the Office of the Secretary of State of the State of Texas will result in the perfection (within the meaning of the Texas UCC) under Texas law of the security interests described in paragraph 8 above,<sup>10</sup> except as follows:

---

Documents. Note that none of the Securities Accounts are intended to constitute deposit accounts, security interests in which are beyond the scope of this illustrative opinion letter.

<sup>9</sup> See also Revised Texas UCC § 9.301 *et seq.*

<sup>10</sup> A security interest in investment property and in general intangibles (as well as accounts, chattel paper and certain other collateral) may be perfected by the filing of a financing statement. While a security interest in investment property may also be perfected by taking “control” (within the meaning of §§ 8.106 and 9.115 of the Texas UCC) in order to improve priority rights, the security interest in general intangibles may only be perfected by the filing of a financing statement. In this illustrative opinion letter, the Partnership Interest is a “general intangible.” For a partnership interest to be a “security” within the meaning of Chapter 8 (and hence “investment property” within the meaning of Chapter 9) of the Texas UCC, it must in fact be dealt in or traded on securities exchanges or markets, or its terms must expressly provide that it is a security governed by Chapter 8 of the Texas UCC, or the partnership must be an entity registered under the Investment Company Act of 1940. See § 8.103(c) of the Texas UCC. However, under § 8.103(c) a partnership interest (indorsed, if applicable, as required by § 8.501(d)) held in a securities account is a “financial asset,” so that perfection of a security interest with respect thereto would have to be through the indirect holding system of Part 5 of Chapter 8 and would be in a security entitlement to the partnership interest, and perfection of the security interest in the partnership interest would not be achieved by treating it as a “general intangible.” To demonstrate the differences in legal opinion treatment, this illustrative opinion letter treats the Financial Asset Note and the Chattel Paper as “financial assets” held by Investment Banking Company in a securities account (as distinguished from the Instrument Promissory Note which is held by the Agent outside of a securities account), rather than treating the Financial Asset Note and the Chattel Paper as “instruments” and “chattel paper” respectively. Thus, the Pledgor has a security entitlement in the Financial Asset Note and in the Chattel Paper which is “investment property.” See §§ 8.102(a)(9), 8.102(a)(17), 8.103 and 9.115(a)(6) of the Texas UCC. Perfection of instruments is governed by §§ 9.304 and 9.305 of the Texas UCC (requiring possession) [Revised Texas UCC §§ 9.312, 913 (requiring filing or possession)]. See footnote 7 *supra* with regard to the perfection of chattel paper and compare the treatment of an “instrument” (the Instrument Promissory Note) in the opinion in paragraph 13 of this Attachment.

(a) With respect to the Instrument Promissory Note, the security interest therein is perfected by the Agent's possession thereof as stated in paragraph 13 below;

(b) Chapter 9 of the Texas UCC requires that continuation statements complying with the Texas UCC must be filed with the filing office in which the Financing Statement was filed not more than six months prior to the expiration of a five-year period dating from the date of the original filing (or otherwise within the time permitted by Section 9.403 of the Texas UCC) and subsequent continuation statements must be filed thereafter, in order to maintain the effectiveness of the filing referred to in this paragraph;<sup>11</sup> and

---

In addition to excluding from the opinion in paragraph 9 the perfection of the security interest in the Instrument Promissory Note, the Opinion Giver may wish to exclude from such opinion some of the other Collateral covered by the opinions in paragraphs 11 and 12 of this Attachment, if the parties have determined not to identify any of such other Collateral in the Financing Statement.

<sup>11</sup> In many cases this paragraph will need to be changed in light of the transition rules between the Texas UCC and the Revised Texas UCC. *See Article 3 of the Texas UCC Amendment Statute (supra at footnote 6 of the Supplement and in the indented language below in this footnote 11).* Under the Revised Texas UCC, a continuation statement (as opposed to a new financing statement) will be effective in Texas only if (a) the original financing statement was filed in Texas, (b) the continuation statement is filed in Texas, (c) Texas is the correct state for filing under the Revised Texas UCC, and (d) the description of the collateral continues to identify the collateral correctly under the Revised Texas UCC. Caution is in order. For example, assume that the debtor is a Delaware corporation with its chief executive office in Texas that was "located" in Texas under § 9.103 of the Texas UCC. The same corporation would be "located" in Delaware under § 9.307 of the Revised Texas UCC because of the debtor's incorporation in Delaware. Thus, Delaware would be the proper state to file on collateral requiring or permitting a filing in Delaware (the state where the debtor is located). The original financing statement filed in Texas cannot be "continued" in Texas, and an initial financing statement would need to be filed in Delaware containing all of the information required under the revised Delaware Uniform Commercial Code. In that type of situation, the corresponding exception, qualification or commentary in a legal opinion might look something like this:

Our opinion[s] in paragraph[s] 9 [and 10] above with respect to perfection [and priority] under the Texas UCC is [are] based on the Texas UCC presently in effect. We call to your attention that amendments to the Texas UCC have been adopted by the Texas Legislature effective July 1, 2001 (as so amended, the "Revised Texas UCC"), by Acts 1999, 76th Leg., ch. 414 (the "Texas UCC Amendment Statute"). From and after July 1, 2001 continued perfection under Texas law will be dependent upon the provisions of the Revised Texas UCC and the transition provisions of the Texas UCC Amendment Statute. Under the Revised Texas UCC, perfection of a security interest in the [specified Collateral] will be, in the case of a debtor that is a corporation, governed by the law of the jurisdiction in which the debtor is organized (which in the case of the Pledgor is Delaware; *see* Section 9.307(e) of the Revised Texas UCC). In this regard, we call to your attention that under Section 3.05 of the Texas UCC Amendment Statute, the Financing Statement filed in Texas will continue to be effective until the earlier of (a) the time such Financing Statement would have ceased to be effective under the Texas UCC as in effect prior to July 1, 2001, or (b) June 30, 2006. Under Section 3.05(d) of the Texas UCC Amendment Statute, the filing of a continuation statement in Texas after June 30, 2001 would not continue the effectiveness of the Financing Statement beyond the period stated in the preceding sentence. [The UCC Search Reports include a search in the State of Delaware, and a financing statement in the name of the Pledgor, as debtor, has also been filed in Delaware (and such Search Reports do not reflect any prior financing statements in the name of the Pledgor, as debtor, covering any of the Collateral). The State of Delaware has adopted revisions to the Uniform Commercial Code as in effect in the State of Delaware (the "Delaware UCC"). The form and effectiveness of any

(c) in the case of proceeds, the creation, perfection and continuation of perfection of the Agent's security interests therein will be limited to the extent provided in Section 9.306 of the Texas UCC.<sup>12</sup>

[10. Based solely upon the UCC Search Report, the perfected security interests in the Contractual Security and the Partnership Interest referred to in paragraph 8 above will, upon the due filing of the Financing Statement (including, without limitation, all exhibits or other attachments thereto) in the Office of the Secretary of State of the State of Texas, have priority over<sup>13</sup> any other security interest in such Collateral granted by the Pledgor that is or would be perfected solely by the filing of financing statements in a Uniform Commercial Code recording office in the State of Texas pursuant to the Texas UCC,<sup>14</sup> subject to the qualification that we

---

financing statements filed in Delaware will be determined by the Delaware UCC as to which no opinion is expressed.]

The references in this footnote, including in the indented paragraph above, to the Texas UCC Amendment Statute and to particular sections thereof will change if S.B. 433 passed by the Texas Legislature in its regular session in 2001 is signed by the Governor. See footnote 6 of the Supplement *supra*.

While some Texas attorneys may decide that they can render an opinion under the Delaware UCC (in which case the last sentence of the above-quoted paragraph, and other parts of the opinion letter, would be modified accordingly), the appropriateness of Texas attorneys' rendering such an opinion, and the nature of the legal investigation and diligence that would be required to do so, are beyond the scope of this report. See Special Report by the TriBar Opinion Committee, *U.C.C. Security Interest Opinions*, 49 BUS. LAW. 359 (Nov. 1993) [“TriBar UCC Report”], at 371-72, regarding opinions under the Uniform Commercial Code (“UCC”) of a state other than the one under which the Opinion Giver ordinarily renders opinions.

<sup>12</sup> See § 9.315 of the Revised Texas UCC. Compare the expanded definition of “proceeds” in Revised Texas UCC § 9.102(a)(65) that includes not only what is received on sale, exchange, collection or other disposition of collateral, but also, among other things, other distributions on account of collateral and rights arising out of collateral. With regard to attachment and perfection in proceeds, see footnote 25 of the Supplement, *supra*.

<sup>13</sup> The Committee regards wording that a security interest “has priority over” conflicting security interests as being equivalent to the wording that a security interest is a “first priority security interest” as against conflicting security interests. See Texas Report, at 113, which suggests that a priority opinion might use a “prior to” formulation. § 9.312 of the Texas UCC refers to a security interest having “priority over” conflicting security interests. [Revised Texas UCC § 9.322.] The important point is that the opinion should be limited as to the potentially competing security interests, liens or claims as to which the opinion is given. See footnote 14 of this Attachment.

<sup>14</sup> This limitation of the scope of the opinions to priority solely as against other security interests that could be perfected by the filing of financing statements under the Texas UCC should be an appropriate limitation in most instances. See Texas Report, at 112-13; TriBar UCC Report, at 381-383. We agree with the TriBar UCC Report, at 380 n.64, that an “all-laws” priority opinion “generally resembles a treatise on liens. This is of limited value to the recipient and burdensome to the Opinion Giver, especially when measured against its cost. . . . If the opinion recipient has concerns about the priority of a particular lien arising under a statute other than the U.C.C., it will be more appropriate to request that a specific priority opinion address that lien. For example, lenders sometimes will request specific opinions with respect to federal tax or ERISA liens.” See footnote 23 of this Attachment regarding federal tax liens. The words “in a Uniform Commercial Code recording office in the State of Texas” (appearing in the footnoted clause in the text above) should not be necessary but are intended to make it explicit that a filing in a federal or other office referred to in § 9.302(c) and (d) [Revised Texas UCC § 9.311(a) and (b)] is not a filing within the scope of the opinion, whether or not some reader might deem such filings to be “pursuant to” such Section. Any broader interpretation of the scope of the opinion would also conflict with the opening clause in paragraph 10.

express no opinion as to the priority of such security interests in any Contractual Security or the Partnership Interest as against any security interest resulting from filings made in the Office of the Secretary of State of the State of Texas during the time period beginning with the Certification Date of the UCC Search Report and ending on the day on which the Financing Statement is filed.]

11. With respect to the security interests in the Securities Accounts referred to in paragraph 8 above, based on the agreement of Investment Banking Company (as securities intermediary) with the Pledgor and the Agent in the Control Agreement to act on entitlement orders originated by the Agent with respect to such security entitlements, without further consent of the Pledgor, such security interests are perfected by “control” (within the meaning of Sections 8.106 and 9.115 of the Texas UCC) under Texas law [and under Federal Book-Entry

---

Ordinarily, a priority opinion on collateral of a type which is customarily perfected (or which may only be perfected) by the filing of financing statements should not be required also to cover priority against security interests or liens that may be afforded priority under the UCC other than by virtue of financing statements appearing on the UCC Search Report. *See* Texas Report, at 112-16; TriBar UCC Report, at 380-81. Possible priority contests under the Texas UCC must be considered in light of the particular transaction. If the UCC Search Report discloses a prior financing statement relating to the security interest of a third-party secured creditor, the Opinion Giver should consult, among other possibly relevant sections, § 9.312(f) of the Texas UCC, whereby “a date of filing or perfection as to collateral is also a date of filing or perfection as to proceeds.” [Revised Texas UCC § 9.322(b)(1)]. Such proceeds might be of a type also included in the Collateral in the subject transaction and create a conflict with the third-party creditor who could claim the benefit of its earlier filing date under § 9.312(f). For examples of the types of additional qualifications that may be needed regarding possible priority rules under the Texas UCC, *see* Texas Report, at 112-16; TriBar UCC Report, at 385-87.

Similarly, a priority opinion on collateral perfected under the Texas UCC does not ordinarily attempt to address priority against security interests or other liens that might arise outside of the UCC. *See* Texas Report, at 112-13; TriBar UCC Report, at 368 & 384. Occasionally, one sees opinions that attempt to create a short “laundry list” of excluded, non-UCC security interests, liens or claims that might, under some circumstances, interfere with the Texas UCC priority scheme. For example:

We express no opinion on the priority of any security interests in:

(a) any Collateral as against any claim or lien in favor of the United States or any state thereof or any political subdivision, agency, or instrumentality of either thereof which is afforded priority under applicable law (including, without limitation, federal and state tax liens, liens under Title IV of the Employee Retirement Income Security Act of 1974, and claims of the United States under the Federal Priority Statute, 31 U.S.C. § 3713);

(b) any Collateral (except as otherwise stated herein, in the case of Collateral perfected by the Agent’s possession or control) as against any security interest, lien, charge, or encumbrance which does not require, in order to be enforced against third parties, the filing of a financing statement in the Office of the Secretary of State of the State of Texas naming the Pledgor as debtor; and

(c) any Collateral as against liens which may be granted priority under Section 363, 364(d), 510(c), 552 or 1129(b) of the Bankruptcy Code or the treatment of any security interest under any applicable bankruptcy, insolvency, fraudulent conveyance, fraudulent transfer or other similar types of laws.

*See also* footnote 39 *infra* regarding a bankruptcy-related qualification.

It is beyond the scope of this illustrative opinion letter to cover priority as against non-UCC interests. The priority opinion in paragraph 10 of this Attachment is expressly limited to security interests that may be perfected by filing under the Texas UCC.

Regulations].<sup>15</sup> With respect to proceeds of the Securities Accounts, the creation, perfection and continuation of perfection of the Agent's security interests therein will be limited to the extent provided in Section 9.306 of the Texas UCC. [Assuming Investment Banking Company has not entered into and will not enter into any other control agreements relating to the Securities Accounts, such perfected security interests in the Securities Accounts have priority over<sup>16</sup> any

---

<sup>15</sup> Control of investment property under the Revised Texas UCC will be governed by § 9.106 as well as § 8.106 thereof. The bracketed language is one type of reference to the "control" concept as adopted by "Federal Book-Entry Regulations" (as defined in footnote 45 *infra*). With respect to security entitlements, this bracketed opinion on Federal Book-Entry Regulations contemplates definitions of "Federal Book-Entry Regulations," "Book-Entry Security," "entitlement holder," "securities intermediary," and "security entitlement" (whether such definitions are set forth in the documents granting the security interest or are in the opinion letter) substantially identical, in pertinent part, to the definitions set forth in footnote 45 *infra*. The federal book entry regulations described in clause (a) of the definition of "Federal Book-Entry Regulations" in footnote 45 *infra* relate to U.S. Treasury bonds, notes and bills, and the regulations described in clause (b) of such definition relate to other federal book-entry securities governed by substantially identical regulations. Some language regarding "control" under such Federal Book-Entry Regulations would be appropriate if the opinion is expected to cover security entitlements in specified federal Book-Entry Securities. *See* footnote 45 *infra*.

It should be noted that, for purposes of explanation and analysis, the illustrative opinions in this Attachment are crafted to serve as guidelines to the criteria requisite for perfection (including control) and are therefore in some cases more detailed than need be the case in a particular transaction. With respect to securities accounts and security entitlements, the transaction documents (e.g., a Control Agreement, which may be contained in a security agreement) should contain provisions requisite to effect perfection (including control), including the requisite agreements and representations of the securities intermediary. Consequently, in reliance on the representations and covenants in the transaction documents (*see* footnote 16 *infra*), the Opinion Giver may be able to give a shorter opinion. An example of such an opinion (which contemplates the secured party's being the entitlement holder) is as follows:

Upon the establishment of the Securities Accounts with Investment Banking Company in the name of the Agent, as entitlement holder, in accordance with the Control Agreement, the security interest of the Agent in the right, title and interest of the Pledgor in the Securities Accounts, securing the Obligations, will be perfected by control (within the meaning of Sections 8.106 and 9.115 of the Texas UCC and under Federal Book-Entry Regulations).

Similarly, the reference in the opinion in paragraph 11 of the text above and in other paragraphs of this illustrative opinion letter to § 9.306 [Revised UCC § 9.315], regarding proceeds, might more customarily be combined with other, similar references in the opinions regarding proceeds, and moved to the generic qualifications near the end of the opinion letter.

<sup>16</sup> *See* footnote 13 *supra* regarding the "priority over" language. This illustrative opinion letter assumes that there is a Control Agreement or appropriate language signed by Investment Banking Company in connection with the Security Agreement. In this regard, *see* assumption (F) of this Attachment. The securities intermediary should represent that there are not any other control agreements with respect to the securities account or any security entitlement with respect thereto, and agree not to enter into any other control agreements relating thereto. This illustrative opinion in paragraph 11 of this Attachment is to the effect that the security interest has priority over a security interest perfected by filing (based on the general priority rule of § 9.115(e)(1) that a security interest in investment property perfected by control has priority over one not perfected by control). § 9.115(e)(2) of the Texas UCC states, with certain exceptions, that conflicting security interests in investment property of secured parties each of whom has control rank equally; however, § 9.328 of the Revised Texas UCC will provide (with similar exceptions) that they will rank in order of time of perfection.

As noted in the Supplement (*see* footnote 46 therein and also footnote 15 *supra*), the transaction documents should contain provisions requisite to perfection of the security interest in the Securities Accounts and security entitlements with respect to financial assets credited thereto, including matters requisite to assure that each Securities Account is and will be maintained as a securities account and that control by the secured party will be effected (where perfection is to be achieved by control). Thus, in an actual transaction, the matters assumed in

other security interests in favor of creditors of the Pledgor which may be perfected exclusively under Chapters 8 and 9 of the Texas UCC<sup>17</sup> [, except that we express no opinion with respect to priority as against any claim asserted by Investment Banking Company under Section 9.115 or Section 9.116 of the Texas UCC].<sup>18]</sup>]

12. With respect to the security interests in the Directly Held Securities<sup>19</sup> referred to in paragraph 8 above, based on the Agent's having acquired possession in the State of Texas of the XYZ Corp. Stock Certificate which is indorsed to the Agent or in blank,<sup>20</sup> and the issuer of the ABC Corp. Uncertificated Security having agreed with the Pledgor, as registered owner, and the Agent to comply with instructions originated by the Agent, without further consent of the Pledgor, such security interests are perfected by "control" (within the meaning of Sections 8.106 and 9.115 of the Texas UCC)<sup>21</sup> under Texas law. With respect to proceeds of the Directly Held

---

assumption (F) of this Attachment should be in the transaction documents. In such event, the Opinion Giver may shorten assumption (F) by assuming that the representations of the securities intermediary in the transaction documents are true and correct and that the securities intermediary will comply with its obligations in the transaction documents. Likewise, some of the other assumptions expressly stated in this illustrative opinion letter may be replaced by assuming or relying on the accuracy of representations, or assuming compliance with agreements, contained in the transaction documents or in related certificates of the parties.

<sup>17</sup> See footnote 14 *supra*. The limitation to Chapters 8 and 9 of the Texas UCC will have to be modified if the opinion is expected to cover security entitlements in Book-Entry Securities, such as U.S. treasury bills. See footnote 45 *infra* (including samples of defined terms). In the case where an opinion might cover the priority of security interests in security entitlements in Book-Entry Securities as against claims arising under Federal Book-Entry Regulations, the Opinion Giver should determine whether an exception is appropriate regarding the possible priority of a claim of the United States or a Federal Reserve Bank.

<sup>18</sup> A securities intermediary may at any time automatically acquire control with respect to a security entitlement when an interest in the security entitlement is granted by the entitlement holder to the securities intermediary. See § 8.106(e). A typical example is in connection with a margin loan. Under §§ 9.115 and 9.116 of the Texas UCC, the securities intermediary's security interest has priority over other security interests perfected by control, irrespective of the chronological order in which the security interests were obtained. Under the Revised Texas UCC, see the corresponding provisions in §§ 9.206, 9.309 and 9.328. Therefore, it is necessary to assume that there will not be a security interest granted to the securities intermediary, or to state an exception to the priority opinion (as done in this illustrative opinion letter), or to obtain the securities intermediary's agreement (e.g., in the Control Agreement) not to acquire a security interest and then to assume that the securities intermediary will comply with its agreement, or to gain the securities intermediary's subordination of the priority of any such security interest pursuant to § 9.316 of the Texas UCC [Revised Texas UCC § 9.339]. If the Control Agreement provides for a waiver or subordination of any such security interest or claim in favor of the securities intermediary, the bracketed exception as to one or both of §§ 9.115 and 9.116 may not apply.

<sup>19</sup> This paragraph illustrates the minimal difference in treatment between certificated and uncertificated securities under Chapter 8 of the Texas UCC. The difference relates primarily to how the existence of the security and the manner of its delivery are evidenced. There are differences between the requirement for "delivery" of a certificated security in § 8.301(a) and the requirement for "delivery" of an uncertificated security in § 8.301(b). "Delivery" is critical to perfection and priority of a security interest based on control. See §§ 8.106(a) and (b). Control is also one of the elements necessary under § 8.303 to make a purchaser (including a secured party) a "protected purchaser" who takes free of adverse claims.

<sup>20</sup> The indorsement language assumes that the XYZ Corp. Stock Certificate is in registered and not bearer form. See § 8.106(b) of the Texas UCC for the requirements for the secured party's taking "control" of a certificated security.

<sup>21</sup> As noted in footnote 15 *supra*, § 9.115 of the Texas UCC will be replaced as to control of investment property collateral by § 9.106 of the Revised Texas UCC. "Control" requires, among other things, "delivery." See §§ 8.106 and 8.301. "Delivery" of the XYZ Corp. Stock Certificate occurs when the Agent acquires possession of

Securities, the creation, perfection and continuation of perfection of the Agent's security interests therein will be limited to the extent provided in Section 9.306 of the Texas UCC. [Assuming the Agent acquired its interest in each of the Directly Held Securities for value and without notice of adverse claims as stated in assumption (G) below, the Agent acquired its security interests in the Directly Held Securities free of adverse claims in accordance with Section 8.303 of the Texas UCC.]<sup>22</sup> [Assuming the issuer of the ABC Corp. Uncertificated Security has not agreed, and will

---

it. "Control" also requires, in the case of a certificated security in registered form, that such certificate be indorsed to the Agent or in blank by an effective indorsement. "Delivery" of the ABC Corp. Uncertificated Security would occur under § 8.301(b)(1) if its issuer registers the Agent as the registered owner, and "control" would occur upon such delivery. Alternatively, if the ABC Corp. Uncertificated Security has not been "delivered" to the Agent under § 8.301(b)(1), the Agent would nevertheless acquire "control" of the ABC Corp. Uncertificated Security if its issuer agrees with the Pledgor and the Agent, pursuant to § 8.106(c)(2), that such issuer will comply with instructions originated by the Agent without further consent of the Pledgor.

<sup>22</sup> The term "protected purchaser" replaces the term "bona fide purchaser" under the prior version of Article 8. *See* comment 4 to § 8.303. Under the current § 8.303, a protected purchaser "acquires its interest in the security free of any adverse claim." A purchaser is a "protected purchaser" if, in accordance with § 8.303(a), it "(1) gives value; (2) does not have notice of any adverse claim to the security; and (3) obtains control of the certificated or uncertificated security." An "adverse claim" is defined under § 8.102(a)(1) as a "claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant for another person to hold, transfer, or deal with the financial asset." Note that under Chapter 8 of the Texas UCC, the element of good faith is not now required for a purchaser to qualify as a protected purchaser, although the element of good faith was formerly required for a purchaser to achieve "bona fide purchaser" status. § 8.105 of the Texas UCC provides guidance on the various circumstances in which a person has notice of the existence of an adverse claim. It should be further noted that the status of "protected purchaser" of a certificated or uncertificated security can arise only through the direct holding system of Article 8, and does not apply to indirect holdings through securities intermediaries. However, an analogous concept in § 8.502 provides that an adverse claim also cannot be asserted against a person who acquires a security entitlement for value and without notice of an adverse claim.

Although this illustrative opinion letter includes an example, in the last sentence of paragraph 12, of a first-priority security interest opinion, it is the Committee's view that it is preferable to limit the opinion to the secured party's being a "protected purchaser" who takes "free of adverse claims." The Committee agrees with the TriBar UCC Report, at 397 n. 110, as to the following: "An opinion that the secured party acquired its security interest 'free of adverse claims' analyzes the secured party's rights at a particular point in time (i.e., the moment of transfer) . . . [and] need not address various claimants whose rights, if any, will accrue in the future. . . . By contrast, an opinion that a security interest . . . is a 'first priority' security interest may require qualification because it analyzes the rights of future secured parties, lien creditors, and purchasers of the . . . securities who acquire their interest through the debtor." Accordingly, some additional qualifications to a priority opinion of the type provided in the last sentence of paragraph 12 might be appropriate (*see* footnote 23 *infra*), even though fewer qualifications are ordinarily necessary for collateral in the form of securities than for collateral such as equipment or inventory. *See, e.g.*, TriBar UCC Report, at 397 n.110 & 398 n.112.

The secured party with control over an uncertificated security through an agreement with the issuer of such security to comply with instructions of the secured party without further consent of the pledgor (*see* § 8.106(c)(2) of the Texas UCC), could nevertheless lose its rights if a subsequent secured party enters into a similar agreement with the issuer (e.g., if the issuer violated its prior agreement with the first secured party). Even though § 9.115(e)(2) of the Texas UCC would rank equally two conflicting security interests each perfected by control, the second secured party may be a protected purchaser under § 8.303 who takes free of adverse claims (including the competing security interest of the first secured party). § 9.309 provides that nothing in Article 9 (i.e., including § 9.115) limits the rights of a protected purchaser under § 8.303. Under the Revised Texas UCC, this example would have a similar result under §§ 9.328(2) (whereby the first secured party obtaining control would have priority, but for § 8.303) and § 9.331(a), which is similar to the current § 9.309. The possibility discussed in this paragraph is one of the reasons why the Opinion Giver, in giving a priority opinion based in part on an agreement of an issuer of uncertificated securities, may want to assume that the issuer will comply with the agreement. The illustrative opinion

not agree, to comply with the instructions originated by any other Person with respect thereto, such perfected security interests in the Directly Held Securities have priority over any other security interests in favor of creditors of the Pledgor which may be perfected exclusively under Chapters 8 and 9 of the Texas UCC.]<sup>23</sup>

---

accomplishes this by assumptions stated in the last bracketed sentence of the opinion in paragraph 12 above and in assumptions (E) and (G), taken together.

<sup>23</sup> See footnote 13 *supra* regarding the “priority over” language. Under § 9.115(e)(1) of the Texas UCC, the security interest of a secured party who has control over investment property has priority over a security interest of a secured party who does not have control. With certain exceptions (relating to security interests held by a securities intermediary or commodity intermediary), conflicting security interests perfected by control rank equally. Texas UCC § 9.115(e)(2). Under § 9.328 of the Revised Texas UCC, the priority rule is similar, except that conflicting security interests perfected by control will rank in order of the time of obtaining control (with certain exceptions relating to security interests held by a securities intermediary or commodity intermediary). Unlike collateral which can be perfected only by the filing of a financing statement, the Directly Held Securities may be perfected by filing, but can also be perfected by control for better protection as to priority.

*See* footnote 14 *supra* as to limiting the scope of the priority opinion to security interests under Chapters 8 and 9 of the Texas UCC. It is beyond the scope of this illustrative opinion letter to address priority against all possible non-UCC claims, including those arising in the future, even on Directly Held Securities. Research as to all possible federal and state laws (in addition to bankruptcy, insolvency, fraudulent transfer, fraudulent conveyance or similar laws) that might affect the pledge of a negotiable security seems to be of dubious value when comparing legal costs to the remote possibility of discovering anything that would be relevant to a secured financing by a secured party who is without notice of adverse claims. The secured party should be content with the law and public policy protecting purchasers (including secured parties) of negotiable securities who meet the “protected purchaser” standard in § 8.303 of the Texas UCC.

In the unusual case where a secured party is concerned about a non-UCC priority risk that reasonably might be applicable to a security interest in a particular transaction, then it might in limited circumstances be appropriate, if the parties wish to bear the expense involved, for the secured party to request a legal opinion which is directed to the priority of its security interest as against specifically identified types of non-UCC security interests, liens or claims. For example, 26 U.S.C. § 6323 addresses the priority of federal tax liens. The U.S. Supreme Court has stated, “Federal tax liens do not automatically have priority over all other liens. Absent provision to the contrary, priority for purposes of federal law is governed by the common-law principle that ‘the first in time is the first in right.’” *U.S. v. McDermott*, 113 S.Ct. 1526, 1528 (1993). The U.S. Supreme Court, reading from § 6323(a) of the Internal Revenue Code, as amended, stated that a federal tax lien is not valid against secured parties until it is filed pursuant § 6323(a). *Id.* at 1528. This follows the literal language of § 6323(a), which states that a federal tax lien is not valid until notice thereof which meets the requirements of subsection (f) has been filed. In turn, subsection (f) requires the notice to be filed in the place where, under state law, liens on real or personal property, as the case may be, would be filed. Most important in regard to the Directly Held Securities in this illustrative opinion letter, however, is the protection afforded by 26 U.S.C. § 6323(b) to secured parties that would be protected purchasers of securities. This subsection of the federal tax lien statute provides that even if a tax lien notice has been filed, “such lien shall not be valid with respect to a security (as defined in subsection (h)(4) [of § 6323]) . . . as against a holder of a security interest in such security who, at the time such interest came into existence, did not have actual notice or knowledge of the existence of such lien.” The definition of a “security” in subsection (h)(4) is broad and should include all types of securities that also fall within the definition of a “security” under § 8.102(a)(15) of the Texas UCC and hence constitute investment property under § 9.115(a)(6) of the Texas UCC [Revised Texas UCC § 9.102(a)(49)]. This result is consistent with general federal and state legal policy favoring persons who acquire negotiable securities for value and without notice of adverse claims. Thus, if priority as against federal tax liens is to be addressed and the assumptions establishing protected-purchaser status remain in the opinion letter, including the acquisition of the security interest without notice of adverse claims as stated in the bracketed sentence preceding footnote 22 in paragraph 12 above, the illustrative opinion could have added at its end language such as “. . . and prior to any lien arising under the federal tax lien statute, 26 USC. § 6323.”

13. With respect to the security interest in the Instrument Promissory Note referred to in paragraph 8 above, based on the Agent's having taken possession of the Instrument Promissory Note in the State of Texas, such security interest is perfected (within the meaning of the Texas UCC) under Texas law [and has priority over any other security interests which may be perfected exclusively under Chapter 9 of the Texas UCC]<sup>24</sup> [, except that we express no opinion with respect to priority as against any adverse security interest perfected pursuant to Section 9.304(d) or (e) of the Texas UCC].<sup>25</sup> With respect to proceeds of the Instrument

---

<sup>24</sup> §§ 9.312 and 9.313 of the Revised Texas UCC permit perfection of a security interest in an instrument by either possession or filing so that, under the Revised Texas UCC, the opinion expressed in paragraph 9 of this Attachment might also cover the Instrument Promissory Note. However, since under the Revised Texas UCC, security interests in instruments perfected by possession are afforded greater protection than those perfected by filing, the practice of perfecting a security interest in instruments by taking possession will likely continue in many circumstances after the effectiveness of the Revised Texas UCC. *See* Revised Texas UCC §§ 9.330 and 9.331.

*See also* § 9.308(1) of the Texas UCC regarding the protection afforded to a purchaser (which term would include a secured party) of an instrument who gives new value and takes possession of it in the ordinary course of the purchaser's business and without knowledge of a security interest in favor of another person. Such a purchaser would have priority over a prior security interest perfected under § 9.304 (temporary perfection) or § 9.306 (proceeds). *Compare* Revised Texas UCC § 9.330(d). In this regard, the bracketed last sentence of assumption (G) is relevant if a priority opinion is given regarding the Instrument Promissory Note.

*See also* footnote 13 *supra* regarding the "priority over" language and footnote 14 regarding the limitation of the scope of a priority opinion to security interests arising under the Texas UCC. As stated above, it is beyond the scope of this illustrative opinion letter to address priority against all possible non-UCC claims including those arising in the future, even if the Instrument Promissory Note is a negotiable instrument. Research as to all possible federal and state laws (in addition to bankruptcy, insolvency, fraudulent transfer, fraudulent conveyance or similar laws) that might affect the pledge of a negotiable instrument seems to be of dubious value when comparing legal costs to the remote possibility of discovering anything that would be relevant to a secured financing by a secured party who is without notice of adverse claims. The secured party should be content with the law and public policy protecting purchasers (including secured parties) of negotiable instruments who meet the "holder in due course" standard in § 3.302 of the Texas UCC, by taking for value, in good faith, and without notice of the matters listed in clauses (C) through (F) of § 3.302(a)(2). A "holder in due course" of a "negotiable instrument" under Article 3 of the Texas UCC takes free of any adverse claim, which would include another security interest. § 3.302(e) of the Texas UCC states that a secured party may assert rights as a holder in due course up to the amount of the unpaid obligation secured. *See also* Comment 6 to § 3.302. If the secured party continuously maintains possession (as stated in assumption (H) of this Attachment) of the Instrument Promissory Note, there could not be another holder in due course. It is not, however, customary for a legal opinion to state, as an opinion, that a secured party or other purchaser of a note is a holder in due course, or, for that matter, to opine that a note is negotiable. In the unusual case where an opinion letter, for some reason, is required to discuss holder-in-due-course status, appropriate assumptions from § 3.302 of the Texas UCC would need to be inserted. These are not stated in this illustrative opinion letter.

In the unusual case where a secured party is concerned about a non-UCC priority risk that reasonably might be applicable to a security interest in a particular transaction, it might in limited circumstances be appropriate, if the parties wish to bear the expense involved, for the secured party to request a legal opinion which is directed to the priority of its security interest as against specifically identified types of non-UCC security interests, liens or claims. For example, *see* footnote 23 *supra* with regard to federal tax liens and the protection afforded to security interests in securities. In this regard, the definition of a "security" in the federal tax lien statute includes negotiable instruments. 26 U.S.C. § 6323(h)(4).

<sup>25</sup> Under the Revised Texas UCC, the references would be to §§ 9.312(e) and (g). The bracketed language footnoted here is not necessary if the Opinion Giver is able to assume or conclude that the secured party gives new value and takes possession of the Instrument Promissory Note in the ordinary course of its business, without knowledge of any other security interest. *See* Texas UCC § 9.308 [Revised Texas UCC § 9.330(d)]. A holder in

Promissory Note, the creation, perfection and continuation of perfection of the Agent's security interest therein will be limited to the extent provided in Section 9.306 of the Texas UCC.

In rendering the foregoing opinions, we have also assumed, with your permission and without independent investigation on our part, the following:

(A) \* \* \* [Assumptions relating to other, omitted opinions are omitted from this illustrative opinion letter.] \* \* \*

(E) Each Transaction Document (including the Control Agreement and the agreements referred to in assumption (G) below and in clause (iv) of assumption (H) below) is the legal, valid and binding obligation of each party thereto (including, without limitation, Investment Banking Company in its capacity as securities intermediary) [other than the Pledgor], enforceable against each such [other] party in accordance with its terms.<sup>26</sup>

(F) Investment Banking Company is acting and shall at all times act as a securities intermediary (within the meaning of the Texas UCC) in maintaining the Securities Accounts<sup>27</sup> and, in such capacity, is in compliance with and will continue to comply with its obligations under the Control Agreement, including, without limitation, its agreements (i) to hold and maintain each Securities Account as a "securities account" (within the meaning of Chapter 8 of the Texas UCC),<sup>28</sup> (ii) to identify and treat the Pledgor in its records as the Person for whom each Securities Account is maintained and as the entitlement holder of all security entitlements

---

due course of a negotiable instrument would take free of any adverse claim of temporary perfection of a security interest under §§ 9.304(d) or (e). *See* Texas UCC § 9.309 [Revised Texas UCC § 9.331].

<sup>26</sup> The bracketed language as to the Pledgor would be included if the Opinion Giver is also covering (in other opinions beyond the scope of this illustrative opinion letter) the enforceability of all or some of the Transaction Documents against the Pledgor. Note that opinions as to the effectiveness of the Financing Statement and the indorsement of a certificated security also depend upon due execution or indorsement thereof on the part of the debtor by virtue of §§ 9.401 and 8.106 of the Texas UCC, so that if the Opinion Giver is not in a position to opine on due execution on the part of the Pledgor, that assumption will also need to be added to the opinion. *Compare* § 9.502 of the Revised Texas UCC with the related Comment 3 to that Section.

<sup>27</sup> Investment Banking Company's status as a "securities intermediary" (defined in § 8.102(a)(14)) is important to the treatment of the security entitlements to securities and other financial assets, and to the securities account. A security entitlement is a right against a securities intermediary. If Investment Banking Company were not a securities intermediary, perfection and priority would have to be established under other provisions of the Texas UCC, which, in the case of the XYZ Corp. Stock Certificate, could be perfected under the direct holding system, in which Investment Banking Company (if it held possession) would have to operate as a bailee or agent of the Agent in order for the Agent to perfect by control.

<sup>28</sup> The status of the Pledgor's accounts maintained with Investment Banking Company as "securities accounts" (defined in § 8.501(a)) is important to the indirect holding system and the rules for the perfection of security interests in security entitlements or securities accounts. A security entitlement is a right with respect to financial assets (including securities) in a securities account. *See* footnote 5 *supra*. If, for example, Investment Banking Company did not maintain a "securities account," it would be necessary for the Agent in this illustrative opinion letter to perfect the Financial Asset Note as an "instrument" by possession (directly or through Investment Banking Company's acting as a bailee, or by filing under the Revised Texas UCC), and likewise to perfect the Chattel Paper by possession or filing (or, under the Revised Texas UCC, by control of electronic chattel paper).

carried in each Securities Account,<sup>29</sup> (iii) to identify as being credited to the appropriate Securities Account each financial asset of the Pledgor maintained in such Securities Account,<sup>30</sup> (iv) to hold the Chattel Paper and the Financial Asset Note in the Brokerage Account and hold and treat all property credited by Investment Banking Company to each of the Securities Accounts as financial assets under Chapter 8 of the Texas UCC to the extent that a securities intermediary's express agreement to such treatment is required by Section 8.102(a)(9)(C) of the Texas UCC (including as to the Chattel Paper) in order for such property to constitute "financial assets" under Chapter 8 of the Texas UCC, and obtain indorsement, to Investment Banking Company or in blank, of any asset credited to a Securities Account that is registered in the name of, payable to the order of, or specially indorsed to any Person other than Investment Banking Company,<sup>31</sup> (v) to comply with all entitlement orders originated by the Agent in connection with the Securities Accounts and all security entitlements in the Securities Accounts (without further consent of the entitlement holder),<sup>32</sup> [(vi) not to identify in its records any Person as entitlement holder with respect to any Securities Account (or any security entitlement therein) other than the Pledgor, and (vii) not to comply or agree to comply with entitlement orders of any Person with respect to any Securities Account (or any security entitlement therein), except the Pledgor (to the extent permitted in the Control Agreement) or the Agent].<sup>33</sup>

---

<sup>29</sup> Because the illustrative opinion letter addresses the security interest in a "securities account," it is necessary that Investment Banking Company, as securities intermediary, continue to identify the Pledgor as the person entitled to exercise rights with respect to financial assets therein (subject to the Agent's rights under the Control Agreement, as provided in the Security Agreement). *See* § 8.501(a) of the Texas UCC (which is unchanged in the Revised Texas UCC).

<sup>30</sup> This assumption is one of the elements of establishing a "security entitlement" in favor of the Pledgor under § 8.501 of the Texas UCC.

<sup>31</sup> "Financial assets" are defined in § 8.102(a)(9) of the Texas UCC. They include: (A) securities, (B) obligations of a type dealt in or traded in financial markets as a medium for investment, and (C) any other property held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed that the property is to be treated as a financial asset under Chapter 8. In addition, §§ 8.103(c), (d) and (e) provide for certain additional financial assets. In this illustrative opinion letter, the status of Investment Banking Company as the securities intermediary agreeing to treat certain assets as "financial assets" is important to establish that the Chattel Paper and any other assets in the securities account that do not clearly constitute financial assets without agreement are "financial assets" and can therefore be perfected through a security entitlement in the indirect holding system. Otherwise, the Chattel Paper would have to be perfected as in the ordinary manner for chattel paper under Article 9 by filing or by delivery to the Agent or its bailee in accordance with §§ 9.304 and 9.305 of the Texas UCC. *See*, however, footnote 7 *supra* with respect to the Revised Texas UCC. The need for indorsement to the securities intermediary, or in blank, of items registered in the name of, payable to the order of, or specially indorsed to a person other than the securities intermediary is also necessary to ensure perfection through a security entitlement in the indirect holding system in accordance with § 8.501(d) of the Texas UCC.

As noted in footnotes 15 and 16 *supra*, some of the explicitly stated assumptions of this illustrative opinion letter may not be necessary or appropriate in a particular transaction. For example, in assumption (F) of this Attachment, any particular assumption expressed in the language beginning with, "including, without limitation, its agreements (i) . . ." through clause (vii) at the end of the paragraph should not be necessary to the extent that the Control Agreement contains that provision.

<sup>32</sup> This agreement of Investment Banking Company, as securities intermediary, is important to establish "control" in favor of the Agent. Perfection by control under §§ 9.115(d)(1) [Revised Texas UCC §§ 9.106 and 9.314(a)] and 8.106(d) of the Texas UCC has higher priority, under § 9.115(e)(1) of the Texas UCC [Revised Texas UCC § 9.328(1)], than a security interest perfected by a means other than control.

<sup>33</sup> The assumptions in clauses (vi) and (vii) as to other entitlement holders and exclusive control relate to the priority opinion. Under § 9.115(e)(2) of the Texas UCC, conflicting security interests based on control rank

(G) The Pledgor is the registered owner of the ABC Corp. Uncertificated Security. The issuer thereof, ABC Corp., has agreed with the Pledgor, as registered owner, and the Agent to comply with instructions originated by the Agent, without further consent of the Pledgor. The Agent has acquired its interests in the Directly Held Securities for value within the meaning of Section 1.201 of the Texas UCC<sup>34</sup> [and without notice of any adverse claim within the meaning of Sections 8.102(a)(1) and 8.105 of the Texas UCC]; and the Agent has acquired its interests in the security entitlements carried in the Securities Accounts for value within the meaning of Section 1.201 of the Texas UCC [and without notice of any adverse claim within the meaning of Sections 8.102(a)(1) and 8.105 of the Texas UCC]. The Agent has acquired its interest in the Instrument Promissory Note for value within the meaning of Section 1.201 of the Texas UCC [and taken possession of such note in the ordinary course of its business without knowledge on the part of the Agent (or any of the Lenders) that such note is subject to a security interest in favor of any other Person.]<sup>35</sup>

(H) With respect to the opinions expressed in paragraphs 9 through 13, we have assumed that (i) with respect to the Contractual Security and the Partnership Interest, the Pledgor is and will at all times be located in the State of Texas, within the meaning of Section 9.103 of the Texas UCC,<sup>36</sup> (ii) with respect to the ABC Corp. Uncertificated Security, Texas is and will at

---

equally, irrespective of the time of perfection (and except that a security interest in favor of the securities intermediary itself perfected by control would have priority). Under § 9.328(2) of the Revised Texas UCC, conflicting security interests perfected by control will rank (with certain exceptions) in priority of time of obtaining control.

<sup>34</sup> § 9.203 of the Texas UCC lists “value” as one of the requirements for the enforceability and attachment of a security interest. § 9.203 of the Revised Texas UCC continues the requirement of value.

<sup>35</sup> The first two sentences of assumption (G) relate to a method for the Agent’s obtaining control over the ABC Corp. Uncertificated Security and form the basis for the opinion relating thereto in paragraph 12 of this Attachment. *See* § 8.106(c)(2) of the Texas UCC. *See also* the last sentence of footnote 21 *supra*. The bracketed clauses of the second sentence are relevant if the opinions will cover the secured party’s status as a protected purchaser who takes free of adverse claims (*see* footnote 22 *supra*) or the priority of its security interest. *See* §§ 8.303(a) and 8.502 of the Texas UCC [which are not changed in the Texas Revised UCC]. In regard to the last bracketed clause regarding the Instrument Promissory Note, *see* § 9.308(1) of the Texas UCC, discussed in the second paragraph of footnote 24 *supra*. [Texas Revised UCC § 9.330(d)].

A secured party obtaining control and giving value without notice of any adverse claim within the meaning of § 8.105 of the Texas UCC is a “protected purchaser” under § 8.303. As such, the secured party takes certificated and uncertificated securities free of any adverse claim. The status of a protected purchaser exists only in the direct holding system, and not with respect to securities accounts, security entitlements or other indirect holdings. However, an analogous concept in § 8.502 provides that an adverse claim also cannot be asserted against a person who acquires a security entitlement for value and without notice of an adverse claim. The bracketed language is important if the Opinion Giver is giving a priority opinion as to the Securities Accounts or security entitlements carried therein.

With regard to the assumption of “value,” *see* footnote 26 of the Supplement. “Value” is defined in § 1.201(44) of the Texas UCC. This definition applies to both Chapter 8 (and therefore to part of the “protected purchaser” requirements) and to Chapter 9 (and therefore to part of the “attachment” requirements). § 8.116 of the Texas UCC has an additional provision for “value” given by a securities intermediary. Chapter 3 has its own tests for value (part of the “holder in due course” requirements) in § 3.303 of the Texas UCC.

<sup>36</sup> Revised Texas UCC § 9.307.

all times be the local law of ABC Corp.'s jurisdiction, within the meaning of Section 8.110 of the Texas UCC, (iii) with respect to the XYZ Corp. Stock Certificate and the Instrument Promissory Note, such certificate and note are and will at all times be held by the Agent in the State of Texas, and (iv) an agreement between Investment Banking Company and the Pledgor governing the Securities Accounts specifies and will continue to specify that [such agreement is governed by the law of the State of Texas] [or, if such agreement does not specify a governing law, then such agreement provides that each Securities Account is and will at all times be maintained at an office of Investment Banking Company located in the State of Texas] [or, if neither of the foregoing are specified in such an agreement, the account statements pertaining to the Securities Accounts identify and will continue to identify an office of Investment Banking Company located in the State of Texas as the office serving each such Securities Account] [or, if none of the foregoing assumptions in this clause (iv) applies, the chief executive office of Investment Banking Company is, and at all times shall be, located in the State of Texas].<sup>37</sup>

(I) With respect to the opinion expressed in paragraph 12, we have assumed that, with respect to the XYZ Corp. Certificated Security, the Agent is not acting in the capacity of a securities intermediary within the meaning of Section 8.102(14) of the Texas UCC [and applicable Federal Book-Entry Regulations].<sup>38</sup>

(J) The Financing Statement accurately shows the name and address of the Agent.

Our opinions set forth herein are also subject to the following qualifications and exceptions:

(a) \* \* \* [Customary qualifications relating to other, omitted opinions are omitted from this illustrative opinion letter.<sup>39</sup>] \* \* \*

---

<sup>37</sup> See § 8.110 of the Texas UCC and part F.1. of the Supplement. See also footnote 20 of the Supplement as to how these assumptions will change somewhat under § 8.110(e) of the Revised Texas UCC. Note also that the Brokerage Account includes, as stated in clause (e) of opinion 8 in this Attachment, the Chattel Paper and the Financial Asset Note.

<sup>38</sup> This assumption is not applicable to the ABC Corp. Uncertificated Security where, as in this illustrative opinion letter, the Pledgor is the registered owner. The assumption should only be necessary if a person is in possession of a certificated security on behalf of a secured party, or if a person becomes a registered owner of an uncertificated security on behalf of a secured party. If the Agent were the registered owner of the ABC Corp. Uncertificated Security, then the words "XYZ Corp. Certificated Security" in assumption (I) of this Attachment would be replaced by "Directly Held Securities." See § 8.301 which sets forth the rules for "delivery" of a certificated or uncertificated security (which in turn is relevant to "control" under § 8.106). Generally, if a person acquires possession of a certificated security or becomes the registered owner of an uncertificated security on behalf of another person, the first person must not be a securities intermediary. The reason for this is that if a securities intermediary is acting for another person, such other person acquires a security entitlement under § 8.501, rather than a direct interest in the security. As to the bracketed reference to "Federal Book-Entry Regulations," see footnote 45 *infra*.

<sup>39</sup> Such customary qualifications would likely include an enforceability qualification applying to the Transaction Documents generally and, accordingly, to security interests created thereunder, such as: "The enforceability of each Transaction Document and the provisions thereof may be limited by bankruptcy, insolvency, reorganization, fraudulent transfer or conveyance, preference, moratorium or other similar laws now or hereinafter in effect relating to or affecting enforcement of creditors' rights generally and by general principles of equity (regardless of whether such enforcement is considered in a proceeding in equity or at law)."

(g) We express no opinion as to the legality, validity, binding effect or enforceability of any provision in the Transaction Documents which purports to provide rights or remedies, or impose obligations or standards, contrary to the Texas UCC.<sup>40</sup>

(h) In the case of property which becomes Collateral after the date hereof, our opinions regarding security interests are subject to the effect of Section 552 of the Bankruptcy Code, which limits the extent to which property acquired by a debtor after the commencement of a case under the Bankruptcy Code may be subject to a security interest arising from a security agreement entered into by the debtor before the commencement of such case.<sup>41</sup>

(i) Our opinions in paragraphs 9 and 10 are limited to Contractual Security and the Partnership Interest that constitute general intangibles, accounts or chattel paper under the Texas UCC.<sup>42</sup> In addition, in rendering such opinions, we express no opinion as to Collateral to which (pursuant to Section 9.104 of the Texas UCC) Chapter 9 of the Texas UCC is not applicable or which is subject to a state statute or a statute or treaty of the United States which provides for a certificate of title or national or international registration.<sup>43</sup>

(j) We call to your attention that security entitlements and rights of entitlement holders are governed by Part 5 of Chapter 8 of the Texas UCC, and our opinions in paragraphs 8 and 11 relating to security entitlements are subject to such Part 5. In rendering such opinions, we express no opinion as to any specific financial asset in any Securities Account.<sup>44</sup> In addition,

---

<sup>40</sup> This qualification is not necessary if the opinion letter contains a more general qualification that would subsume the reference to the Texas UCC. For example, a qualification may be stated generally as to provisions purporting to waive, subordinate or not give effect to rights to notice, demands, legal defenses, or other rights or benefits that cannot be waived, subordinated or rendered ineffective under applicable law.

<sup>41</sup> Of course, this qualification relating to § 552 of the Bankruptcy Code is not necessary if the Collateral does not include property acquired after the commencement of a bankruptcy case, and this qualification could be modified to refer more specifically to § 552(b)(1) of the Bankruptcy Code if the only after-acquired property consists of proceeds.

<sup>42</sup> This limitation on the scope of the opinion in paragraph 9 will depend upon what the parties intend to perfect by filing (versus control) and what Collateral is identified in the Financing Statement. *See* the last paragraph of footnote 10 *supra*. *See* footnote 10 *supra* also with respect to the characterization of the Partnership Interest. The Contractual Security probably constitutes general intangibles but, for purposes of this illustrative opinion letter, the Contractual Security is treated as though it could also constitute accounts or chattel paper. Although the Swap Agreement may be a “commodity” for purposes of federal commodities laws, § 9.115 of the Texas UCC [Revised Texas UCC § 9.102(a)(15)] defines a “commodity contract” in terms of being traded on or subject to the rules of a commodity exchange or market. In this illustrative opinion letter, the Swap Agreement is a privately negotiated interest rate swap, total return swap, currency swap or similar agreement, which would be a “general intangible” under the Texas UCC.

<sup>43</sup> This qualification will need to be modified to the extent the parties agree that the opinion should address collateral, such as certain intellectual property, governed in part by the Texas UCC and in part by federal statute. *See also* Revised Texas UCC § 9.109.

<sup>44</sup> This is an important qualification. Subchapter E (*i.e.*, Part 5) of Chapter 8 of the Texas UCC deals with the indirect holding system. § 8.104(c) provides that a person who acquires a security entitlement to a security or other financial asset has the rights specified in Subchapter E, but is the purchaser of any security entitlement, security or other financial asset only to the extent provided in § 8.503. That section makes clear that a purchaser

with respect to security entitlements in investments permitted under the Transaction Documents, such opinions do not apply to the extent that Chapter 8 of the Texas UCC is preempted by applicable federal law or regulation<sup>45</sup> [, and we express no opinion with respect to the

---

does not acquire an identifiable interest in any specific, identifiable security or financial asset. The purchaser has rights against the securities intermediary which are better than those of a general creditor, but the rights are complex and are described in and limited by Subchapter E. *See D. Keyes & T. Yates, Revised Articles 8 and 9 of the Uniform Commercial Code: Securities and Other Investment Property*, TEX. J. BUS. LAW, Vol. 32, No. 4, 1-33 (Winter 1994), at 13-17.

<sup>45</sup> If the opinion being rendered goes beyond the scope of this illustrative opinion letter and covers federal Book-Entry Securities, language comparable to the following should be considered to be inserted in lieu of the clause at the end of paragraph (j) in the text above: “; provided, however, in our opinion, Chapter 8 of the Texas UCC would not be preempted in a manner that would alter the opinions herein expressed with respect to security entitlements covered by existing Federal Book-Entry Regulations.” This proviso uses the defined term “Federal Book-Entry Regulations,” which would be defined in the Transaction Documents or, for purposes of rendering the opinion, in the opinion letter. Such defined term and certain related terms, which should be considered as to how they are used in a legal opinion covering federal book-entry securities, might, for example, read in the Transaction Documents or opinion letter as follows:

“Book-Entry Security” means a security maintained in the form of entries (including, without limitation, the security entitlements in, and the financial assets based on, such security) in the commercial book-entry system of the Federal Reserve System.

“entitlement holder” means a Person that (a) is an “entitlement holder” as defined in Section 8.102(a)(7) of the Texas UCC (except in respect of a Book-Entry Security), and (b) in respect of any Book-Entry Security, is an “entitlement holder” as defined in 31 C.F.R. § 357.2 (or, as applicable to such Book-Entry Security, the corresponding Federal Book-Entry Regulations governing such Book-Entry Security).

“Federal Book-Entry Regulations” means (a) the federal regulations contained in Subpart B (“Treasury/Reserve Automated Debt Entry System (TRADES)”) governing Book-Entry Securities consisting of U.S. Treasury bonds, notes and bills, and Subpart D (“Additional Provisions”) of 31 C.F.R. Part 357, 31 C.F.R. §§ 357.10 through 357.14 and §§ 357.41 through 357.44 (including related defined terms in 31 C.F.R. § 357.2); and (b) to the extent substantially identical to the federal regulations referred to in clause (a) above (as in effect from time to time), the federal regulations governing other Book-Entry Securities.

“securities intermediary” means (a) a “securities intermediary” as defined in Section 8.102(a)(14) of the Texas UCC (except in respect of a Book-Entry Security), and (b) in respect of any Book-Entry Security, a “securities intermediary” as defined in 31 C.F.R. § 357.2 (or, as applicable to such Book-Entry Security, the corresponding Federal Book-Entry Regulations governing such Book-Entry Security), and its successors and permitted assigns in either of such capacities, as applicable.

“security entitlement” means (a) a “security entitlement” as defined in Section 8.102(a)(17) of the Texas UCC (except in respect of a Book-Entry Security); and (b) in respect of any Book-Entry Security, a “security entitlement” as defined in 31 C.F.R. § 357.2 (or, as applicable to such Book-Entry Security, the corresponding Federal Book-Entry Regulations governing such Book-Entry Security).

If the opinion covers Book-Entry Securities, then qualification (m) in the text will have to be revised accordingly. It should be noted that, except as otherwise indicated therein, Federal Book-Entry Regulations provide that perfection by control, the effect of such perfection or non-perfection and the priority of a security interest in a security entitlement in Book-Entry Securities (excluding the rights and obligations of the United States and of Federal Reserve Banks and a security interest in favor of a Federal Reserve Bank from a participant maintaining a participant’s securities account at a Federal Reserve Bank) are governed by the law (not including the conflict-of-law rules) of the securities intermediary’s jurisdiction as though such jurisdiction has adopted “Revised Article 8”

requirements or effect of Federal Book-Entry Regulations as to U.S. treasury securities or other investments which may from time to time be included in the Collateral].

(k) In connection with the opinions expressed in paragraphs 8 through 13, we have assumed that the Pledgor has rights in the properties in which it is purporting to grant a security interest within the meaning of Section 9.203 of the Texas UCC,<sup>46</sup> and we express no opinion as to the title to or value of any property.<sup>47</sup>

---

(defined as Uniform Commercial Code, Revised Article 8, Investment Securities (with Conforming and Miscellaneous Amendments to Articles 1, 3, 4, 5, 9 and 10) 1994 Official Text). If an Opinion Giver is to give an opinion with respect to security entitlements in Book-Entry Securities, then Federal Book-Entry Regulations and Revised Article 8 (as defined in such Regulations) should be examined. As of the date of the Supplement, the Texas UCC and Revised Article 8 do not differ in ways that would adversely impact a perfection opinion based on control with respect to a security entitlement in a Book-Entry Security, assuming that Texas is the securities intermediary's jurisdiction under Federal Book-Entry Regulations and the Texas UCC. The Federal Book-Entry Regulations presently provide that the law (not including the conflict-of-law rules) of the location of the person creating the security interest in a security entitlement in a Book-Entry Security governs whether and how such security interest may be perfected by the filing of a financing statement. In giving any opinion on security entitlements in Book-Entry Securities, the Opinion Giver should also review any changes after the date of the Supplement to the Federal Book-Entry Regulations and to the Texas UCC, as such changes to the Texas UCC relate to compatibility with the Federal Book-Entry Regulations.

<sup>46</sup> Texas UCC § 9.203(a)(3). *Compare* Revised Texas UCC § 9.203(b)(2) which requires that the debtor have "rights in the collateral or the power to transfer rights in the collateral to a secured party."

<sup>47</sup> The Opinion Giver may add additional qualifications, depending on the nature of the transactions and on whether the Opinion Giver believes that the above opinions, assumptions, qualifications and exceptions make the scope and limitations of the opinions sufficiently clear to the recipients of the opinions. An Opinion Giver, for example, might add one or more of the following additional qualifications to the ones stated in this illustrative opinion letter:

(n) With reference to the opinions expressed in paragraphs 12 and 13, we call to your attention that the Agent's security interest could become subject to the rights, (i) under Sections 9.308 and 9.309 of the Texas UCC [Revised Texas UCC §§ 9.330 and 9.331], of certain subsequent holders or purchasers (including secured parties) or (ii) under Section 9.312(d) of the Texas UCC [Revised Texas UCC § 9.324], of holders of purchase money security interests. However, such rights would not arise, or in any event would not have priority over the security interests in favor of the Agent, for so long as the Agent maintains possession of the Instrument Promissory Note and the XYZ Corp. Stock Certificate, as contemplated by the Transaction Documents, in the State of Texas (or so long as the Agent is the registered owner of the ABC Corp. Uncertificated Security or otherwise maintains control thereof under Section 8.106(c) of the Texas UCC).

(o) We express no opinion as to the Pledgor's having any rights in any property or as to the perfection or priority of the Agent's security interest in any Collateral to the extent the Agent or any Lender has consented to any security interest in favor of any other party or has authorized the disposition of any Collateral or released or subordinated the Agent's security interest therein." [Note that this qualification overlaps in part with the assumption in qualification (k) of this Attachment. Further, this illustrative opinion letter is directed only to the Pledgor's "right, title and interest" in the various types of Collateral. With respect to the secured party's rights upon disposition of collateral, *see* § 9.315 of the Revised Texas UCC.]

(p) Our opinions concerning the enforceability, perfection [and priority] of the Agent's security interests in the Collateral are in all cases limited to the borrowing under the Transaction Documents and such future advances as are made thereunder in accordance with the terms of the Transaction Documents; and no opinion is expressed as to the effectiveness of the

(l) We call to your attention that the perfection of the security interests referenced above will be terminated as to any Collateral (in each case as to which the filing of a financing statement is necessary) (A) acquired more than four months after the Pledgor so changes its name, identity, or corporate structure as to make the Financing Statement seriously misleading, unless a new appropriate financing statement indicating the new name, identity, or corporate structure of the Pledgor is properly filed before the expiration of such four months, and (B) four months after the Pledgor changes its location (within the meaning of Section 9.103(c)(4) of the Texas UCC<sup>48</sup>) to a new jurisdiction outside of the State of Texas (or, if earlier, when perfection would have ceased as set forth in our opinion in paragraph 9(b) above) unless the security interest is perfected in such new jurisdiction before such termination.<sup>49</sup>

(m) We express no opinion with respect to any liens in favor of any party other than the Agent that arise by operation of law and do not require possession or “control” (within the meaning of Sections 8.106 and 9.115 of the Texas UCC) of collateral or the filing of a financing statement in the State of Texas. Our opinions in paragraphs 8 through 13 are limited to Chapters 8 and 9 of the Texas UCC, and therefore those opinions do not address (i) laws of jurisdictions other than the State of Texas, [or] (ii) laws of the State of Texas other than Chapters 8 and 9 of the Texas UCC, or the creation or perfection of liens or security interests in any types or items of collateral the creation and perfection of which are not governed exclusively by Chapters 8 and 9 of the Texas UCC [or the priority or ranking of any security interests or other liens except to the extent that Chapter 8 or 9 of the Texas UCC governs the priority thereof]<sup>50</sup> [or (iii) under Section 8.110 and Section 9.103 of the Texas UCC, what law governs the perfection and priority of the security interests granted in the Collateral covered by this opinion letter].<sup>51</sup>

---

Transaction Documents to grant and create a security interest with respect to any obligations other than those arising under the Transaction Documents.

To the extent not addressed in the opinion, the Opinion Giver may also wish to add one or more qualifications relating to the transition to Revised Texas UCC. *See*, as an example, the discussion and illustrative qualification in footnote 11 *supra*.

<sup>48</sup> *See* Revised Texas UCC § 9.307.

<sup>49</sup> Revised Texas UCC §§ 9.506 through 9.508 will require a rewording of these rather standard qualifications that have been taken by Opinion Givers under the existing Texas UCC.

<sup>50</sup>Clauses (i) and (ii) of this qualification (m) limit the scope of opinions, including any priority opinions, to security interests whose creation, perfection and priority are governed by Chapters 8 and 9 of the Texas UCC, and the terms of the opinions stated in paragraphs 10 through 13 limit the priority opinions contained in those paragraphs only to priority over other security interests in favor of creditors of the Pledgor which may be perfected exclusively under Chapters 8 and 9 of the Texas UCC. With regard to the possibility of having the opinion letter cover the UCC of other states, or cover federal (including Federal Book-Entry Regulations) or state laws other than the Texas UCC, *see* footnotes 11, 14, 23, 24 and 45 *supra*. In those instances where a Texas attorney opines on the perfection and priority of security interests created under a security agreement governed by the laws of another jurisdiction, the validity and enforceability of the security agreement under the other jurisdiction’s laws (and therefore the creation of the security interests granted thereunder) may be assumed, in which case the language of clause (ii), to the extent that such language limits the opinion to security interests created under the Texas UCC, may be modified accordingly.

<sup>51</sup> *Compare* TriBar UCC Report, at 380-81 n.64 & 402. The bracketed clause (iii) is not necessary in this illustrative opinion letter due to assumption (H). For example, if the XYZ Corp. Certificated Security is delivered at the closing of a transaction in Texas and the other steps for perfection have been taken, under the Texas UCC Texas

The foregoing opinions are governed by the laws of the State of Texas and limited to matters involving the laws of the State of Texas and the federal laws of the United States of America. We do not express any opinion as to the laws of any other jurisdiction. \* \* \* [Other customary limitations are omitted from this illustrative opinion letter.] \* \* \*

This opinion letter is rendered as of the date set forth above and we expressly disclaim any obligation to update this letter after the date hereof. [[Except as explicitly stated herein,] no opinion is expressed herein as to the revisions to the Texas UCC that become effective July 1, 2001 or as to the effect, if any, of such revisions on the opinions rendered herein.]

This opinion letter is given solely for your benefit in connection with the transactions described in the Transaction Documents and may not be furnished to or relied upon by any other Person or for any other purpose without our prior written consent.

Very truly yours,

[Schedules are omitted.]

---

law governs perfection and the effect of perfection or non-perfection of such item of collateral. Texas UCC §§ 9.103(a)(2) and 9.103(f)(2) [Revised Texas UCC §§ 9.301 and 9.305(a)(1)]. However, note that the application of Texas law to perfection (and the effect of perfection or non-perfection) of a security interest in a security certificate would only be for so long as the security certificate remains in Texas, and so another qualification is necessary, and is contained in assumption (H) of this Attachment, to the effect that the XYZ Corp. Security Certificate remains in Texas.

ATTACHMENT B TO SUPPLEMENT NO. 2<sup>1</sup>

**Illustrative Opinion Letter on Security Interests in Certificated Securities<sup>2</sup>**

[LETTERHEAD OF OPINION GIVER]

Each of the Addressees Listed in  
the Attached Schedule I hereto

Ladies and Gentlemen:

We have acted as special Texas counsel to Borrowing Corporation, a Texas corporation (the “Pledgor”), in connection with certain aspects of the transactions described in the documents listed in Schedule II hereto (the “Transaction Documents”). This opinion letter is being delivered to you pursuant to Section \_\_\_\_\_ of the Loan Agreement, dated \_\_\_\_\_ (the “Loan Agreement”), among the Pledgor, the Agent Bank, as agent for the Lenders under the Loan Agreement (the “Agent”), and the Lenders party thereto. All capitalized terms used herein, but not defined herein, shall have the respective meanings given to such terms in the Loan Agreement. Other terms that are defined in the Uniform Commercial Code as currently in effect in the State of Texas (the “Texas UCC”) have the same meanings when used herein unless otherwise indicated by the context in which such terms are so used.

In rendering the opinions expressed below, we have examined:

- (a) executed counterparts of the Transaction Documents; and
- (b) such other documents and certificates as we have deemed necessary as a basis for the opinions expressed below.

As to any facts material to our opinions, we have made no independent investigation of such facts and have relied solely on certificates and statements of public officials and officers or

---

<sup>1</sup> This is an attachment to Supplement No. 2 (the “Supplement”) to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions cited in footnote 2 of the Supplement (the “Texas Report”). This illustrative opinion letter is drafted with reference to Texas law as in effect on the date of adoption of the Supplement. While certain notations or bracketed references are made to corresponding provisions of the Texas UCC as amended by the amendments effective July 1, 2001, cited in footnote 6 of the Supplement (the “Revised Texas UCC”), some revisions to this illustrative opinion letter will likely be required under the Revised Texas UCC. The reader should consult the Supplement for additional commentary on the effect of the Revised Texas UCC. Further, while illustrative opinions as to priority have been included in this illustrative opinion letter, they are bracketed for the reasons stated in Part 8 of the Supplement.

<sup>2</sup> A security interest in investment property may be perfected by the filing of a financing statement or by taking “control” (within the meaning of § 8.106 of the Texas UCC) in order to improve priority rights. This illustrative opinion letter deals only with a security interest in certificated securities that is perfected by control.

other representatives of the parties to the Transaction Documents and on the representations and warranties set forth in the Transaction Documents.

\* \* \* [Appropriate assumptions dealing with the legal capacity of all natural Persons, the genuineness of all signatures, the authority of all Persons signing each of the Transaction Documents on behalf of the parties to such documents, the authenticity of all documents submitted as originals, and the conformity to authentic original documents of all documents submitted as copies, and other customary matters are omitted from this illustrative opinion letter on security interests.] \* \* \*

Based on the foregoing, and subject to the assumptions, qualifications, exceptions and limitations set forth herein, we are of the following opinions:

1. \* \* \* [Portions of the opinion letter dealing with corporate power, authorization, execution and delivery, non-contravention of laws, governmental approvals, enforceability, choice-of-law<sup>3</sup> and other customary matters are omitted from this illustrative opinion letter on security interests.] \* \* \*

8. The Security Agreement creates a valid security interest under the Texas UCC in favor of the Agent for the benefit of the Lenders in the Pledgor's right, title and interest in and to the XYZ Corp. Stock Certificate and the proceeds thereof to secure the Obligations.

9. Based on the Agent's having acquired possession in the State of Texas of the XYZ Corp. Stock Certificate which is indorsed to the Agent or in blank,<sup>4</sup> such security interest of the Agent is perfected by "control" (within the meaning of Sections 8.106 and 9.115 of the Texas UCC)<sup>5</sup> under Texas law. With respect to proceeds of the XYZ Corp. Stock Certificate, the creation, perfection and continuation of perfection of the Agent's security interest therein will be limited to the extent provided in Section 9.306 of the Texas UCC.<sup>6</sup> [Assuming the Agent acquired its interest in the XYZ Corp. Stock Certificate for value and without notice of adverse

---

<sup>3</sup> Any choice-of-law opinion may require an exception to the effect of, "except to the extent mandatory provisions of Texas law regarding the perfection and priority of security interests granted pursuant to the Security Agreement require the application of the law of another jurisdiction." In this illustrative opinion letter, the Transaction Documents have selected Texas law, and all contacts related to the perfection and priority of the security interest in a certificated security under § 9.103(f)(2) of the Texas UCC [and § 9.305(a)(1) of the Revised Texas UCC] point to Texas as the place for determining perfection and the effect of perfection or non-perfection. *See* assumption (G) of this Attachment.

<sup>4</sup> The indorsement language assumes that the XYZ Corp. Stock Certificate is in registered and not bearer form. *See* § 8.106(b) of the Texas UCC.

<sup>5</sup> § 9.115 of the Texas UCC will be replaced as to control of investment property collateral by § 9.106 of the Revised Texas UCC. "Control" requires, among other things, "delivery." *See* §§ 8.106 and 8.301. "Delivery" of the XYZ Corp. Stock Certificate occurs when the Agent acquires possession of it. "Control" also requires, in the case of a certificated security in registered form, that such certificate be indorsed to the Agent or in blank by an effective indorsement.

<sup>6</sup> *See* § 9.315 of the Revised Texas UCC. *Compare* the expanded definition of "proceeds" in Revised Texas UCC § 9.102(a)(65) that includes not only what is received on sale, exchange, collection or other disposition of collateral, but also, among other things, other distributions on account of collateral and rights arising out of collateral. With regard to attachment and perfection in proceeds, *see* footnote 25 of the Supplement.

claims as stated in assumption (F) below, the Agent acquired its security interest in the XYZ Corp. Stock Certificate free of adverse claims in accordance with Section 8.303 of the Texas UCC.]<sup>7</sup> [Such perfected security interest in the XYZ Corp. Stock Certificate has priority over<sup>8</sup> any other security interests in favor of creditors of the Pledgor which may be perfected exclusively under Chapters 8 and 9 of the Texas UCC.]<sup>9</sup>

In rendering the foregoing opinions, we have also assumed, with your permission and without independent investigation on our part, the following:

(A) \* \* \* [Assumptions relating to other, omitted opinions are omitted from this illustrative opinion letter.] \* \* \*

(E) Each Transaction Document is the legal, valid and binding obligation of each party thereto [other than the Pledgor],<sup>10</sup> enforceable against each such [other] party in accordance with its terms.

(F) The Agent has acquired its interest in the XYZ Corp. Stock Certificate for value within the meaning of Section 1.201 of the Texas UCC<sup>11</sup> [and without notice of any adverse claim within the meaning of Sections 8.102(a)(1) and 8.105 of the Texas UCC].<sup>12</sup>

(G) With respect to the opinion expressed in paragraph 9, we have assumed that the XYZ Corp. Stock Certificate is and will at all times be held by the Agent in the State of Texas.

---

<sup>7</sup> The term “protected purchaser” replaces the term “bona fide purchaser” under the prior version of Article 8. *See* comment 4 to § 8.303. Under the current § 8.303, a protected purchaser “acquires its interest in the security free of any adverse claim.” A purchaser is a “protected purchaser” if, in accordance with § 8.303(a), it “(1) gives value; (2) does not have notice of any adverse claim to the security; and (3) obtains control of the certificated or uncertificated security.” An “adverse claim” is defined under § 8.102(a)(1) as a “claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant for another person to hold, transfer, or deal with the financial asset.” Note that under Chapter 8 of the Texas UCC, the element of good faith is not now required for a purchaser to qualify as a protected purchaser, although the element of good faith was formerly required for a purchaser to achieve “bona fide purchaser” status. § 8.105 of the Texas UCC provides guidance on the various circumstances in which a person has notice of the existence of an adverse claim.

<sup>8</sup> With regard to the “priority over” language, *see* footnote 13 of Attachment A to the Supplement.

<sup>9</sup> Although this illustrative opinion letter includes an example, in the last sentence of paragraph 9, of a first-priority security interest opinion, it is the Committee’s view that it is preferable to limit the opinion to the secured party’s being a “protected purchaser” who takes “free of adverse claims.” *See* footnote 22 of Attachment A to the Supplement.

<sup>10</sup> The bracketed language as to the Pledgor would be included if the Opinion Giver is also covering (in other opinions beyond the scope of this illustrative opinion letter) the enforceability of all or some of the Transaction Documents against the Pledgor.

<sup>11</sup> § 9.203 of the Texas UCC lists “value” as one of the requirements for the enforceability and attachment of a security interest. § 9.203 of the Revised Texas UCC continues the requirement of value. With regard to the assumption of “value,” *see* footnote 26 of the Supplement and footnote 35 of Attachment A to the Supplement.

<sup>12</sup> *See* footnote 7 *supra*. The bracketed language is relevant if the opinions will cover the secured party’s status as a protected purchaser who takes free of adverse claims or the priority of its security interest.

(H) With respect to the opinion expressed in paragraph 9, we have assumed that, with respect to the XYZ Corp. Stock Certificate, the Agent is not acting in the capacity of a securities intermediary within the meaning of Section 8.102(14) of the Texas UCC.<sup>13</sup>

Our opinions set forth herein are also subject to the following qualifications and exceptions:

(a) \* \* \* [Customary qualifications relating to other, omitted opinions are omitted from this illustrative opinion letter.] \* \* \*

(g) We express no opinion as to the legality, validity, binding effect or enforceability of any provision in the Transaction Documents which purports to provide rights or remedies, or impose obligations or standards, contrary to the Texas UCC.<sup>14</sup>

(h) In the case of property which becomes Collateral after the date hereof, our opinions regarding security interests are subject to the effect of Section 552 of the Bankruptcy Code, which limits the extent to which property acquired by a debtor after the commencement of a case under the Bankruptcy Code may be subject to a security interest arising from a security agreement entered into by the debtor before the commencement of such case.<sup>15</sup>

(i) In connection with the opinions expressed in paragraphs 8 and 9, we have assumed that the Pledgor has rights in the properties in which it is purporting to grant a security interest within the meaning of Section 9.203 of the Texas UCC,<sup>16</sup> and we express no opinion as to the title to or value of any property.<sup>17</sup>

---

<sup>13</sup> This assumption should only be necessary if a person is in possession of a certificated security on behalf of a secured party. *See* § 8.301 which sets forth the rules for “delivery” of a certificated security (which in turn is relevant to “control” under § 8.106). Generally, if a person acquires possession of a certificated security on behalf of another person, the first person must not be a securities intermediary. The reason for this is that if a securities intermediary is acting for another person, such other person acquires a security entitlement under § 8.501, rather than a direct interest in the security. *See* § 8.301 for a limited exception to this rule.

<sup>14</sup> This qualification is not necessary if the opinion letter contains a more general qualification that would subsume the reference to the Texas UCC. For example, a qualification may be stated generally as to provisions purporting to waive, subordinate or not give effect to rights to notice, demands, legal defenses, or other rights or benefits that cannot be waived, subordinated or rendered ineffective under applicable law.

<sup>15</sup> Of course, this qualification relating to § 552 of the Bankruptcy Code is not necessary if the Collateral does not include property acquired after the commencement of a bankruptcy case, and this qualification could be modified to refer more specifically to § 552(b)(1) of the Bankruptcy Code if the only after-acquired property consists of proceeds.

<sup>16</sup> Texas UCC §9.203(a)(3). *Compare* Revised Texas UCC §9.203(b)(2) which requires that the debtor have “rights in the collateral or the power to transfer rights in the collateral to a secured party.”

<sup>17</sup> The Opinion Giver may add additional qualifications, depending on the nature of the transactions and on whether the Opinion Giver believes that the above opinions, assumptions, qualifications and exceptions make the scope and limitations of the opinions sufficiently clear to the recipients of the opinions. An Opinion Giver, for example, might add one or more of the additional qualifications discussed in footnote 47 of Attachment A to the Supplement.

(j) We express no opinion with respect to any liens in favor of any party other than the Agent that arise by operation of law and do not require possession of collateral or the filing of a financing statement in the State of Texas. Our opinions in paragraphs 8 and 9 are limited to Chapters 8 and 9 of the Texas UCC, and therefore such opinions do not address (i) laws of jurisdictions other than the State of Texas, [or] (ii) laws of the State of Texas other than Chapters 8 and 9 of the Texas UCC [or the priority or ranking of any security interests or other liens except to the extent that Chapter 8 or 9 of the Texas UCC governs the priority thereof],<sup>18</sup> [or (iii) under Section 8.110 and Section 9.103 of the Texas UCC, what law governs the perfection and priority of the security interest granted in the Collateral covered by this opinion letter].<sup>19</sup>

The foregoing opinions are governed by the laws of the State of Texas and limited to matters involving the laws of the State of Texas and the federal laws of the United States of America. We do not express any opinion as to the laws of any other jurisdiction. \* \* \* [Other customary limitations are omitted from this illustrative opinion letter.] \* \* \*

This opinion letter is rendered as of the date set forth above, and we expressly disclaim any obligation to update this letter after the date hereof. [No opinion is expressed herein as to the revisions to the Texas UCC that become effective July 1, 2001 or as to the effect, if any, of such revisions on the opinions rendered herein.]

This opinion letter is given solely for your benefit in connection with the transactions described in the Transaction Documents and may not be furnished to or relied upon by any other Person or for any other purpose without our prior written consent.

Very truly yours,

[Schedules are omitted.]

---

<sup>18</sup> Clauses (i) and (ii) of this qualification (j) limit the scope of opinions, including any priority opinions, to security interests whose creation, perfection and priority are governed by Chapters 8 and 9 of the Texas UCC, and the terms of the opinion stated in paragraph 9 limits the priority opinion contained in such paragraph only to priority over other security interests in favor of creditors of the Pledgor which may be perfected exclusively under Chapters 8 and 9 of the Texas UCC. With regard to the possibility of having the opinion letter cover the Uniform Commercial Code of other states, or cover federal or state laws other than the Texas UCC, *see* footnotes 11, 14, 23 and 24 of Attachment A to the Supplement. In those instances where a Texas attorney opines on the perfection and priority of security interests created under a security agreement governed by the laws of another jurisdiction, the validity and enforceability of the security agreement under the other jurisdiction's laws (and therefore the creation of the security interests granted thereunder) may be assumed.

<sup>19</sup> The bracketed clause (iii) is not necessary in this illustrative opinion letter due to assumption (G). For example, if the XYZ Corp. Certificated Security is delivered at the closing of a transaction in Texas and the other steps for perfection have been taken, under the Texas UCC Texas law governs perfection and the effect of perfection or non-perfection of such item of collateral. Texas UCC § 9.103(f)(2) [Revised Texas UCC § 9.305(a)(1)]. However, note that the application of Texas law to perfection (and the effect of perfection or non-perfection) of a security interest in a security certificate would only be for so long as the security certificate remains in Texas, and so another qualification is necessary, and is contained in assumption (G) of this Attachment, to the effect that the XYZ Corp. Security Certificate remains in Texas.

## ATTACHMENT C TO SUPPLEMENT NO. 2<sup>1</sup>

### Illustrative Opinion Letter on Security Interests in Uncertificated Securities<sup>2</sup>

[LETTERHEAD OF OPINION GIVER]

Each of the Addressees Listed in  
the Attached Schedule I hereto

Ladies and Gentlemen:

We have acted as special Texas counsel to Borrowing Corporation, a Texas corporation (the “Pledgor”), in connection with certain aspects of the transactions described in the documents listed in Schedule II hereto (the “Transaction Documents”). This opinion letter is being delivered to you pursuant to Section \_\_\_\_ of the Loan Agreement, dated \_\_\_\_\_ (the “Loan Agreement”), among the Pledgor, the Agent Bank, as agent for the Lenders under the Loan Agreement (the “Agent”), and the Lenders party thereto. All capitalized terms used herein, but not defined herein, shall have the respective meanings given to such terms in the Loan Agreement. Other terms that are defined in the Uniform Commercial Code as currently in effect in the State of Texas (the “Texas UCC”) have the same meanings when used herein unless otherwise indicated by the context in which such terms are so used.

In rendering the opinions expressed below, we have examined:

- (a) executed counterparts of the Transaction Documents; and
- (b) such other documents and certificates as we have deemed necessary as a basis for the opinions expressed below.

As to any facts material to our opinions, we have made no independent investigation of such facts and have relied solely on certificates and statements of public officials and officers or

---

<sup>1</sup> This is an attachment to Supplement No. 2 (the “Supplement”) to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions cited in footnote 2 of the Supplement (the “Texas Report”). This illustrative opinion letter is drafted with reference to Texas law as in effect on the date of adoption of the Supplement. While certain notations or bracketed references are made to corresponding provisions of the Texas UCC as amended by the amendments effective July 1, 2001, cited in footnote 6 of the Supplement (the “Revised Texas UCC”), some revisions to this illustrative opinion letter will likely be required under the Revised Texas UCC. The reader should consult the Supplement for additional commentary on the effect of the Revised Texas UCC. Further, while an illustrative opinion as to priority has been included in this illustrative opinion letter, such priority opinion is bracketed for the reasons stated in Part 8 of the Supplement.

<sup>2</sup> A security interest in investment property may be perfected by the filing of a financing statement. A security interest in investment property may also be perfected by taking “control” (within the meaning of §§ 8.106 and 9.115 of the Texas UCC) in order to improve priority rights. This opinion letter deals only with a security interest in uncertificated securities (other than governmental book-entry securities) that is perfected by control.

other representatives of the parties to the Transaction Documents and on the representations and warranties set forth in the Transaction Documents.

\* \* \* [Appropriate assumptions dealing with the legal capacity of all natural Persons, the genuineness of all signatures, the authority of all Persons signing each of the Transaction Documents on behalf of the parties to such documents, the authenticity of all documents submitted as originals, and the conformity to authentic original documents of all documents submitted as copies, and other customary matters are omitted from this illustrative opinion letter on security interests.] \* \* \*

Based on the foregoing, and subject to the assumptions, qualifications, exceptions and limitations set forth herein, we are of the following opinions:

1. \* \* \* [Portions of the opinion letter dealing with corporate power, authorization, execution and delivery, non-contravention of laws, governmental approvals, enforceability, choice-of-law<sup>3</sup> and other customary matters are omitted from this illustrative opinion letter on security interests.] \* \* \*

8. The Security Agreement creates a valid security interest under the Texas UCC in favor of the Agent for the benefit of the Lenders in the Pledgor's right, title and interest in and to the ABC Corp. Uncertificated Security and the proceeds thereof to secure the Obligations.

9. Based on the issuer of the ABC Corp. Uncertificated Security having agreed with the Pledgor, as registered owner, and the Agent to comply with instructions originated by the Agent without further consent of the Pledgor, the security interest of the Agent in the ABC Corp. Uncertificated Security is perfected by "control" (within the meaning of Sections 8.106 and 9.115 of the Texas UCC)<sup>4</sup> under Texas law. With respect to proceeds of the ABC Corp. Uncertificated Security, the creation, perfection and continuation of perfection of the Agent's security interest therein will be limited to the extent provided in Section 9.306 of the Texas UCC.<sup>5</sup> [Assuming the Agent acquired its interest in the ABC Corp. Uncertificated Security for

---

<sup>3</sup> Any choice-of-law opinion may require an exception to the effect of, "except to the extent mandatory provisions of Texas law regarding the perfection and priority of security interests granted pursuant to the Security Agreement require the application of the law of another jurisdiction." In this illustrative opinion letter, the Transaction Documents have selected Texas law, and Texas law governs the perfection and priority of the security interest in the uncertificated security, because the jurisdiction of the issuer of the ABC Corp. Uncertificated Security is Texas, within the meaning of § 8.110(d) of the Texas UCC, to which § 9.103(f)(3) refers [Revised Texas UCC §§ 8.110(d) and 9.305(a)(2)]. *See* assumption (G) of this Attachment.

<sup>4</sup> § 9.115 of the Texas UCC will be replaced as to control of investment property collateral by § 9.106 of the Revised Texas UCC. "Control" requires, among other things, "delivery." *See* §§ 8.106 and 8.301. "Delivery" of the ABC Corp. Uncertificated Security would occur under § 8.301(b)(1) if its issuer registers the Agent as the registered owner, and "control" would occur upon such delivery. Alternatively, if the ABC Corp. Uncertificated Security has not been "delivered" to the Agent under § 8.301(b)(1), the Agent would nevertheless acquire "control" of the ABC Corp. Uncertificated Security if its issuer agrees with the Pledgor and the Agent, pursuant to § 8.106(c)(2), that such issuer will comply with instructions originated by the Agent without further consent of the Pledgor.

<sup>5</sup> *See* § 9.315 of the Revised Texas UCC. *Compare* the expanded definition of "proceeds" in Revised Texas UCC § 9.102(a)(65) that includes not only what is received on sale, exchange, collection or other disposition of

value and without notice of adverse claims as stated in assumption (F) below,<sup>6</sup> the Agent acquired its security interest in the ABC Corp. Uncertificated Security free of adverse claims in accordance with Section 8.303 of the Texas UCC.] [Such perfected security interest in the ABC Corp. Uncertificated Security has priority over<sup>7</sup> any other security interests in favor of creditors of the Pledgor which may be perfected exclusively under Chapters 8 and 9 of the Texas UCC.]<sup>8</sup>

In rendering the foregoing opinions, we have also assumed, with your permission and without independent investigation on our part, the following:

(A) \* \* \* [Assumptions relating to other, omitted opinions are omitted from this illustrative opinion letter.] \* \* \*

(E) Each Transaction Document (including the agreement referred to in assumption (F) below) is the legal, valid and binding obligation of each party thereto [other than the Pledgor],<sup>9</sup> enforceable against each such [other] party in accordance with its terms.

(F) The Pledgor is the registered owner of the ABC Corp. Uncertificated Security. The issuer thereof, ABC Corp., has agreed with the Pledgor, as registered owner, and the Agent to comply with instructions originated by the Agent, without further consent of the Pledgor.<sup>10</sup> The Agent has acquired its interest in the ABC Corp. Uncertificated Security for value within the

---

collateral, but also, among other things, other distributions on account of collateral and rights arising out of collateral. With regard to attachment and perfection in proceeds, *see* footnote 25 of the Supplement.

<sup>6</sup> The term “protected purchaser” replaces the term “bona fide purchaser” under the prior version of Article 8. *See* comment 4 to § 8.303. Under the current § 8.303, a protected purchaser “acquires its interest in the security free of any adverse claim.” A purchaser is a “protected purchaser” if, in accordance with § 8.303(a), it “(1) gives value; (2) does not have notice of any adverse claim to the security; and (3) obtains control of the certificated or uncertificated security.” An “adverse claim” is defined under § 8.102(a)(1) as a “claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant for another person to hold, transfer, or deal with the financial asset.” Note that under Chapter 8 of the Texas UCC, the element of good faith is not now required for a purchaser to qualify as a protected purchaser, although the element of good faith was formerly required for a purchaser to achieve “bona fide purchaser” status. § 8.105 of the Texas UCC provides guidance on the various circumstances in which a person has notice of the existence of an adverse claim.

<sup>7</sup> With regard to the “priority over” language, *see* footnote 13 of Attachment A to the Supplement.

<sup>8</sup> Although this illustrative opinion letter includes an example, in the last sentence of paragraph 9, of a first-priority security interest opinion, it is the Committee’s view that it is preferable to limit the opinion to the secured party’s being a “protected purchaser” who takes “free of adverse claims.” *See* footnote 22 of Attachment A to the Supplement.

<sup>9</sup> The bracketed language as to the Pledgor would be included if the Opinion Giver is also covering (in other opinions beyond the scope of this illustrative opinion letter) the enforceability of all or some of the Transaction Documents against the Pledgor.

<sup>10</sup> This assumption is necessary where the secured party is not the registered owner. *See* § 8.106(c)(2) of the Texas UCC. *See also* the last sentence of footnote 4 *supra*. The first two sentences of assumption (F) relate to a method for the Agent’s obtaining control over the ABC Corp. Uncertificated Security and form the basis for the opinion relating thereto in paragraph 9 of this Attachment.

meaning of Section 1.201 of the Texas UCC<sup>11</sup> [and without notice of any adverse claim within the meaning of Sections 8.102(a)(1) and 8.105 of the Texas UCC].<sup>12</sup>

(G) With respect to the opinion expressed in paragraph 9, we have assumed that Texas is and will at all times be the local law of ABC's jurisdiction, within the meaning of Section 8.110 of the Texas UCC.

[(H) With respect to the opinion expressed in paragraph 9, we have assumed that the Agent is not acting in the capacity of a securities intermediary within the meaning of Section 8.102(14) of the Texas UCC.]<sup>13</sup>

Our opinions set forth herein are also subject to the following qualifications and exceptions:

(a) \* \* \* [Customary qualifications relating to other, omitted opinions are omitted from this illustrative opinion letter.] \* \* \*

(g) We express no opinion as to the legality, validity, binding effect or enforceability of any provision in the Transaction Documents which purports to provide rights or remedies, or impose obligations or standards, contrary to the Texas UCC.<sup>14</sup>

(h) In the case of property which becomes Collateral after the date hereof, our opinions regarding security interests are subject to the effect of Section 552 of the Bankruptcy Code, which limits the extent to which property acquired by a debtor after the commencement of a case under the Bankruptcy Code may be subject to a security interest arising from a security agreement entered into by the debtor before the commencement of such case.<sup>15</sup>

---

<sup>11</sup> § 9.203 of the Texas UCC lists "value" as one of the requirements for the enforceability and attachment of a security interest. § 9.203 of the Revised Texas UCC continues the requirement of value. With regard to the assumption of "value," *see* footnote 26 of the Supplement and footnote 35 of Attachment A to the Supplement.

<sup>12</sup> *See* footnote 6 *supra*. The bracketed language is relevant if the opinions will cover the secured party's status as a protected purchaser who takes free of adverse claims or the priority of its security interest.

<sup>13</sup> This bracketed assumption is not applicable where, as in this illustrative opinion letter, the Pledgor is the registered owner. The assumption should only be necessary if a person becomes a registered owner of an uncertificated security on behalf of a secured party. *See* § 8.301 which sets forth the rules for "delivery" of an uncertificated security (which in turn is relevant to "control" under § 8.106). Generally, if a person becomes the registered owner of an uncertificated security on behalf of another person, the first person must not be a securities intermediary. The reason for this is that if a securities intermediary is acting for another person, such other person acquires a security entitlement under § 8.501, rather than a direct interest in the security.

<sup>14</sup> This qualification is not necessary if the opinion letter contains a more general qualification that would subsume the reference to the Texas UCC. For example, a qualification may be stated generally as to provisions purporting to waive, subordinate or not give effect to rights to notice, demands, legal defenses, or other rights or benefits that cannot be waived, subordinated or rendered ineffective under applicable law.

<sup>15</sup> Of course, this qualification relating to § 552 of the Bankruptcy Code is not necessary if the Collateral does not include property acquired after the commencement of a bankruptcy case, and this qualification could be modified to refer more specifically to § 552(b)(1) of the Bankruptcy Code if the only after-acquired property consists of proceeds.

(i) In connection with the opinions expressed in paragraphs 8 and 9, we have assumed that the Pledgor has rights in the properties in which it is purporting to grant a security interest within the meaning of Section 9.203 of the Texas UCC,<sup>16</sup> and we express no opinion as to the title to or value of any property.<sup>17</sup>

(j) We express no opinion with respect to any liens in favor of any party other than the Agent that arise by operation of law and do not require “control” (within the meaning of Sections 8.106 and 9.115 of the Texas UCC) of collateral or the filing of a financing statement in the State of Texas. Our opinions in paragraphs 8 and 9 are limited to Chapters 8 and 9 of the Texas UCC, and therefore such opinions do not address (i) laws of jurisdictions other than the State of Texas, [or] (ii) laws of the State of Texas other than Chapters 8 and 9 of the Texas UCC [or the priority or ranking of any security interests or other liens except to the extent that Chapter 8 or 9 of the Texas UCC governs the priority thereof],<sup>18</sup> [or (iii) under Section 8.110 and Section 9.103 of the Texas UCC, what law governs the perfection and priority of the security interest granted in the Collateral covered by this opinion letter].<sup>19</sup>

The foregoing opinions are governed by the laws of the State of Texas and limited to matters involving the laws of the State of Texas and the federal laws of the United States of America. We do not express any opinion as to the laws of any other jurisdiction. \* \* \* [Other customary limitations are omitted from this illustrative opinion letter.] \* \* \*

This opinion letter is rendered as of the date set forth above, and we expressly disclaim any obligation to update this letter after the date hereof. [No opinion is expressed herein as to the revisions to the Texas UCC that become effective July 1, 2001 or as to the effect, if any, of such revisions on the opinions rendered herein.]

---

<sup>16</sup> Texas UCC § 9.203(a)(3). *Compare* Revised Texas UCC § 9.203(b)(2) which requires that the debtor have “rights in the collateral or the power to transfer rights in the collateral to a secured party.”

<sup>17</sup> The Opinion Giver may add additional qualifications, depending on the nature of the transactions and on whether the Opinion Giver believes that the above opinions, assumptions, qualifications and exceptions make the scope and limitations of the opinions sufficiently clear to the recipients of the opinions. An Opinion Giver, for example, might add one or more of the additional qualifications discussed in footnote 47 of Attachment A to the Supplement.

<sup>18</sup> Clauses (i) and (ii) of this qualification (j) limit the scope of opinions, including any priority opinions, to security interests whose creation, perfection and priority are governed by Chapters 8 and 9 of the Texas UCC, and the terms of the opinion stated in paragraph 9 limits the priority opinion contained in such paragraph only to priority over other security interests in favor of creditors of the Pledgor which may be perfected exclusively under Chapters 8 and 9 of the Texas UCC. With regard to the possibility of having the opinion letter cover the Uniform Commercial Code of other states, or cover federal (including federal book-entry security regulations) or state laws other than the Texas UCC, *see* footnotes 11, 14, 23 and 24 of Attachment A to the Supplement. In those instances where a Texas attorney opines on the perfection and priority of security interests created under a security agreement governed by the laws of another jurisdiction, the validity and enforceability of the security agreement under the other jurisdiction’s laws (and therefore the creation of the security interests granted thereunder) may be assumed.

<sup>19</sup> The bracketed clause (iii) is not necessary in this illustrative opinion letter due to assumption (G). For example, if ABC Corp. is a Texas corporation (*i.e.*, the local law of the issuer’s jurisdiction is Texas) then under the Texas UCC Texas law governs perfection and the effect of perfection or non-perfection of the ABC Corp. Uncertificated Security. Texas UCC § 9.103(f)(3) [Revised Texas UCC § 9.305(a)(2)].

This opinion letter is given solely for your benefit in connection with the transactions described in the Transaction Documents and may not be furnished to or relied upon by any other Person or for any other purpose without our prior written consent.

Very truly yours,

[Schedules are omitted.]

## ATTACHMENT D TO SUPPLEMENT NO. 2<sup>1</sup>

### Illustrative Opinion Letter on Security Interests in Securities Accounts<sup>2</sup>

[LETTERHEAD OF OPINION GIVER]

Each of the Addressees Listed in  
the Attached Schedule I hereto

Ladies and Gentlemen:

We have acted as special Texas counsel to Borrowing Corporation, a Texas corporation<sup>3</sup> (the “Pledgor”), in connection with certain aspects of the transactions described in the documents listed in Schedule II hereto (the “Transaction Documents”). This opinion letter is being delivered to you pursuant to Section \_\_\_\_\_ of the Loan Agreement, dated \_\_\_\_\_ (the “Loan Agreement”), among the Pledgor, the Agent Bank, as agent for the Lenders under the Loan Agreement (the “Agent”), and the Lenders party thereto. All capitalized terms used herein, but not defined herein, shall have the respective meanings given to such terms in the Loan Agreement. Other terms that are defined in the Uniform Commercial Code as currently in effect in the State of Texas (the “Texas UCC”) have the same meanings when used herein unless otherwise indicated by the context in which such terms are so used.

In rendering the opinions expressed below, we have examined:

- (a) executed counterparts of the Transaction Documents; and
- (b) such other documents and certificates as we have deemed necessary as a basis for the opinions expressed below.

---

<sup>1</sup> This is an attachment to Supplement No. 2 (the “Supplement”) to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions cited in footnote 2 of the Supplement (the “Texas Report”). This illustrative opinion letter is drafted with reference to Texas law as in effect on the date of adoption of the Supplement. While certain notations or bracketed references are made to corresponding provisions of the Texas UCC as amended by the amendments effective July 1, 2001, cited in footnote 6 of the Supplement (the “Revised Texas UCC”), some revisions to this illustrative opinion letter will likely be required under the Revised Texas UCC. The reader should consult the Supplement for additional commentary on the effect of the Revised Texas UCC. Further, while illustrative opinions as to priority have been included in this illustrative opinion letter, they are bracketed for the reasons stated in Part 8 of the Supplement.

<sup>2</sup> A security interest in investment property may be perfected by the filing of a financing statement or by taking “control” (within the meaning of § 8.106 of the Texas UCC) in order to improve priority rights. This illustrative opinion letter deals only with a security interest in a securities account (containing only property treated under the Texas UCC as “financial assets”) that is perfected by control.

<sup>3</sup> In this illustrative opinion letter, the securities intermediary’s jurisdiction is Texas, within the meaning of § 8.110(e) of the Texas UCC, to which § 9.103(f)(4) refers [Revised Texas UCC §§8.110(e) and 9.305(a)(3)].

As to any facts material to our opinions, we have made no independent investigation of such facts and have relied solely on certificates and statements of public officials and officers or other representatives of the parties to the Transaction Documents and on the representations and warranties set forth in the Transaction Documents.

\* \* \* [Appropriate assumptions dealing with the legal capacity of all natural Persons, the genuineness of all signatures, the authority of all Persons signing each of the Transaction Documents on behalf of the parties to such documents, the authenticity of all documents submitted as originals, and the conformity to authentic original documents of all documents submitted as copies, and other customary matters are omitted from this illustrative opinion letter on security interests.] \* \* \*

Based on the foregoing, and subject to the assumptions, qualifications, exceptions and limitations set forth herein, we are of the following opinions:

1. \* \* \* [Portions of the opinion letter dealing with corporate power, authorization, execution and delivery, non-contravention of laws, governmental approvals, enforceability, choice-of-law<sup>4</sup> and other customary matters are omitted from this illustrative opinion letter on security interests.] \* \* \*

8. The Security Agreement creates a valid security interest under the Texas UCC in favor of the Agent for the benefit of the Lenders in the Pledgor's right, title and interest in and to the Brokerage Account<sup>5</sup> and the proceeds thereof to secure the Obligations [, to the extent that Chapters 8 and 9 of the Texas UCC are applicable].<sup>6</sup>

9. Based on the agreement of Investment Banking Company (as securities intermediary) with the Pledgor and the Agent in the Control Agreement to act on entitlement orders originated by the Agent with respect to such security entitlements without further consent of the Pledgor, the security interest of the Agent in the Brokerage Account is perfected by "control" (within the meaning of Sections 8.106 and 9.115 of the Texas UCC) under Texas law

---

<sup>4</sup> Any choice-of-law opinion may require an exception to the effect of, "except to the extent mandatory provisions of Texas law regarding the perfection and priority of security interests granted pursuant to the Security Agreement require the application of the law of another jurisdiction." In this illustrative opinion letter, the Transaction Documents have selected Texas law, and all contacts related to the perfection and priority of liens under §§ 8.110 and 9.103 of the Texas UCC [§§ 8.110 and 9.301 *et seq.* of the Revised Texas UCC] point to Texas as the place for determining perfection and the effect of perfection or non-perfection. *See* assumption (H) of this Attachment.

<sup>5</sup> Note that a security entitlement includes rights of an entitlement holder with respect to a financial asset credited to a securities account (§§ 8.102(a)(17) and 8.501(b) of the Texas UCC), but does not include the financial asset itself. Perfection by control of securities pursuant to the direct holding system of Article 8 (as distinct from control of a security entitlement) requires different steps under §§ 9.115(d) and 8.106 of the Texas UCC [§§ 9.314, 9.106 and 8.106 of the Revised Texas UCC] than the steps required thereunder for perfection by control of security entitlements.

<sup>6</sup> It is not necessary to include the bracketed language if the scope of the opinion is limited by qualification (k) of this Attachment. The limitation to Chapters 8 and 9 of the Texas UCC will have to be modified if the opinion is expected to cover federal book-entry securities, such as U.S. treasury bills. *See* footnote 26 *infra*.

[and under Federal Book-Entry Regulations].<sup>7</sup> With respect to proceeds of the Brokerage Account, the creation, perfection and continuation of perfection of the Agent's security interest therein will be limited to the extent provided in Section 9.306 of the Texas UCC.<sup>8</sup> [Assuming Investment Banking Company has not entered into and will not enter into any other control agreements relating to the Brokerage Account, such perfected security interest in the Brokerage Account has priority over<sup>9</sup> any other security interests in favor of creditors of the Pledgor which

---

<sup>7</sup> Control of investment property under the Revised Texas UCC will be governed by § 9.106 as well as § 8.106 thereof. The bracketed language is one type of reference to the "control" concept as adopted by federal book-entry regulations (*see* footnotes 15-17 and 45 of Attachment A, including a sample definition of "Federal Book-Entry Regulations"). Such regulations relate to security entitlements in book-entry treasury bills, bonds and notes and other book-entry securities governed by substantially identical federal regulations. Some language regarding "control" under such regulations would be appropriate if the opinion is expected to cover specified federal book-entry securities, such as U.S. treasury bills. *See also* footnote 26 *infra*.

It should be noted that, for purposes of explanation and analysis, the illustrative opinions in this Attachment are crafted to serve as guidelines to the criteria requisite for perfection (including control) and are therefore in some cases more detailed than need be the case in a particular transaction. With respect to securities accounts and security entitlements, the transaction documents (e.g., a Control Agreement, which may be contained in a security agreement) should contain provisions requisite to effect perfection (including control), including the requisite agreements and representations of the securities intermediary. Consequently, in reliance on the representations and covenants in of the transaction documents (*see* footnote 16 of Attachment A), the Opinion Giver may be able to give a shorter opinion. An example of such an opinion (which contemplates the secured party's being the entitlement holder) is as follows:

Upon the establishment of the Brokerage Account with Investment Banking Company in the name of the Agent, as entitlement holder, in accordance with the Control Agreement, the security interest of the Agent in the right, title and interest of the Pledgor in the Brokerage Account, securing the Obligations, will be perfected by control (within the meaning of Sections 8.106 and 9.115 of the Texas UCC and under Federal Book-Entry Regulations).

<sup>8</sup> *See* § 9.315 of the Revised Texas UCC. *Compare* the expanded definition of "proceeds" in Revised Texas UCC § 9.102(a)(65) that includes not only what is received on sale, exchange, collection or other disposition of collateral, but also, among other things, other distributions on account of collateral and rights arising out of collateral. With regard to attachment and perfection in proceeds, *see* footnote 25 of the Supplement.

<sup>9</sup> With regard to the "priority over" language, *see* footnote 13 of Attachment A to the Supplement.

This illustrative opinion letter assumes that there is a Control Agreement or appropriate language signed by Investment Banking Company in connection with the Security Agreement. In this regard, *see* assumption (F) of this Attachment. The securities intermediary should represent that there are not any other control agreements with respect to the securities account or any security entitlement with respect thereto, and agree not to enter into any other control agreements relating thereto. This illustrative opinion in paragraph 9 of this Attachment is to the effect that the security interest has priority over a security interest perfected by filing (based on the general priority rule of § 9.115(e)(1) that a security interest in investment property perfected by control has priority over one not perfected by control). § 9.115(e)(2) of the Texas UCC states, with certain exceptions, that conflicting security interests in investment property of secured parties each of whom has control rank equally; however, § 9.328 of the Revised Texas UCC will provide (with similar exceptions) that they will rank in order of time of perfection.

As noted in the Supplement (*see* footnote 46 therein and also footnotes 15 and 16 of Attachment A to the Supplement) with respect to securities accounts generally, the transaction documents should contain provisions requisite to perfection of the security interest in the Brokerage Account and security entitlements with respect to financial assets credited thereto, including matters requisite to assure that the Brokerage Account is and will be maintained as a securities account and that control by the secured party will be effected (where perfection is to be achieved by control). Thus, in an actual transaction, the matters assumed in assumption (F) of this Attachment should be in the transaction documents. In such event, the Opinion Giver may shorten assumption (F) by assuming that the representations of the securities intermediary in the transaction documents are true and correct and that the

may be perfected exclusively under Chapters 8 and 9 of the Texas UCC,<sup>10</sup> except that we express no opinion with respect to priority as against any claim asserted by Investment Banking Company under Section 9.115 or Section 9.116 of the Texas UCC.]<sup>11</sup>

In rendering the foregoing opinions, we have also assumed, with your permission and without independent investigation on our part, the following:

(A) \* \* \* [Assumptions relating to other, omitted parts of the opinions, are omitted from this illustrative opinion letter.] \* \* \*

(E) Each Transaction Document (including the Control Agreement and the agreement referred to in assumption (H) below) is the legal, valid and binding obligation of each party thereto (including, without limitation, Investment Banking Company in its capacity as securities intermediary) [other than the Pledgor], enforceable against each such [other] party in accordance with its terms.<sup>12</sup>

(F) Investment Banking Company is acting and shall at all times act as a securities intermediary (within the meaning of the Texas UCC) in maintaining the Brokerage Account<sup>13</sup> and, in such capacity, is in compliance with and will continue to comply with its obligations under the Control Agreement, including, without limitation, its agreements (i) to hold and maintain the Brokerage Account as a “securities account” (within the meaning of Chapter 8 of

---

securities intermediary will comply with its obligations in the transaction documents. Likewise, some of the other assumptions expressly stated in this illustrative opinion letter may be replaced by assuming or relying on the accuracy of representations, or assuming compliance with agreements, contained in the transaction documents or in related certificates of the parties.

<sup>10</sup> The limitation to Chapters 8 and 9 of the Texas UCC will have to be modified if the opinion is expected to cover security entitlements in federal book-entry securities, such as U.S. treasury bills. *See* footnote 26 *infra*.

<sup>11</sup> A securities intermediary may at any time automatically acquire control with respect to a security entitlement when an interest in a security entitlement is granted by the entitlement holder to the securities intermediary. *See* § 8.106(e). A typical example is in connection with a margin loan. Under §§ 9.115 and 9.116 of the Texas UCC, the securities intermediary’s security interest has priority over other security interests perfected by control, irrespective of the chronological order in which the security interests were obtained. Under the Revised Texas UCC, *see* the corresponding provisions in §§ 9.206, 9.309 and 9.328. Therefore, it is necessary to assume that there will not be a security interest granted to the securities intermediary, or to state an exception to the priority opinion (as done in this illustrative opinion letter), or to obtain the securities intermediary’s agreement (e.g., in the Control Agreement) not to acquire a security interest and then to assume that the securities intermediary will comply with its agreement, or to gain the securities intermediary’s subordination of the priority of any such security interest pursuant to § 9.316 of the Texas UCC [Revised Texas UCC §9.339]. If the Control Agreement provides for a waiver or subordination of any such security interest or claim in favor of the securities intermediary, the bracketed exception as to one or both of §§ 9.115 and 9.116 may not apply.

<sup>12</sup> The bracketed language as to the Pledgor would be included if the Opinion Giver is also covering (in other opinions beyond the scope of this illustrative opinion letter) the enforceability of all or some of the Transaction Documents against the Pledgor.

<sup>13</sup> Investment Banking Company’s status as a “securities intermediary” (defined in § 8.102(a)(14)) is important to the treatment of the security entitlements to securities and other financial assets, and to the securities account. A security entitlement is a right against a securities intermediary.

the Texas UCC),<sup>14</sup> (ii) to identify and treat the Pledgor in its records as the Person for whom the Brokerage Account is maintained and as the entitlement holder of all security entitlements carried in the Brokerage Account,<sup>15</sup> (iii) to identify as being credited to the Brokerage Account each financial asset of the Pledgor maintained in such Brokerage Account,<sup>16</sup> (iv) to hold and treat all property credited by Investment Banking Company to the Brokerage Account as financial assets under Chapter 8 of the Texas UCC to the extent that a securities intermediary's express agreement to such treatment is required by Section 8.102(a)(9)(C) of the Texas UCC in order for such property to constitute "financial assets" under Chapter 8 of the Texas UCC, and obtain indorsement, to Investment Banking Company or in blank, of any asset credited to the Brokerage Account that is registered in the name of, payable to the order of, or specially indorsed to any Person other than Investment Banking Company,<sup>17</sup> [and] (v) to comply with all entitlement orders originated by the Agent in connection with all security entitlements in the Brokerage Account (without further consent of the entitlement holder),<sup>18</sup> [(vi) not to identify in its records any Person as entitlement holder with respect to the Brokerage Account (or any security entitlement therein) other than the Pledgor, and (vii) not to comply or agree to comply with entitlement orders of any Person with respect to the Brokerage Account (or any security entitlement therein), except the Pledgor (to the extent permitted in the Control Agreement) or the Agent].<sup>19</sup>

(G) The Agent has acquired its interests in the security entitlements carried in the Brokerage Account for value within the meaning of Section 1.201 of the Texas UCC<sup>20</sup> [and

---

<sup>14</sup> The status of the Brokerage Account maintained with Investment Banking Company as a "securities account" (defined in § 8.501(a)) is important to the indirect holding system and the rules for the perfection of security interests in securities accounts. *See* footnote 5 *supra*.

<sup>15</sup> Because the illustrative opinion letter addresses a security interest in a "securities account," it is necessary that Investment Banking Company, as securities intermediary, continue to identify the Pledgor as the person entitled to exercise rights with respect to financial assets therein (subject to the Agent's rights under the Control Agreement, as provided in the Security Agreement). *See* § 8.501(a) of the Texas UCC (which is unchanged in the Revised Texas UCC).

<sup>16</sup> This assumption is one of the elements of establishing a "security entitlement" in favor of the Pledgor, under § 8.501(b) of the Texas UCC.

<sup>17</sup> *See* footnote 32 of Attachment A to the Supplement.

<sup>18</sup> This agreement of Investment Banking Company, as securities intermediary, is important to establish "control" in favor of the Agent. Perfection by control under §§ 9.115(d)(1) [Revised Texas UCC §§ 9.106 and 9.314(a)] and 8.106(d) of the Texas UCC has higher priority, under § 9.115(e)(1) of the Texas UCC [Revised Texas UCC § 9.328(1)], than a security interest perfected by a means other than control.

<sup>19</sup> The assumptions in clauses (vi) and (vii) as to other entitlement holders and exclusive control relate to the priority opinion. Under § 9.115(e)(2) of the Texas UCC, conflicting security interests based on control rank equally, irrespective of the time of perfection (and except that a security interest in favor of the securities intermediary itself perfected by control would have priority). Under § 9.328(2) of the Revised Texas UCC, conflicting security interests perfected by control will rank (with certain exceptions) in priority of time of obtaining control.

<sup>20</sup> § 9.203 of the Texas UCC lists "value" as one of the requirements for the enforceability and attachment of a security interest. § 9.203 of the Revised Texas UCC continues the requirement of value. With regard to the assumption of "value," *see* footnote 26 of the Supplement and footnote 35 of Attachment A to the Supplement.

without notice of any adverse claim within the meaning of Sections 8.102(a)(1) and 8.105 of the Texas UCC].<sup>21</sup>

(H) With respect to the opinion expressed in paragraph 9, we have assumed that an agreement between Investment Banking Company and the Pledgor governing the Brokerage Account specifies and will continue to specify that [such agreement is governed by the law of the State of Texas] [or, if such agreement does not specify a governing law, then such agreement provides that the Brokerage Account is and will at all times be maintained at an office of Investment Banking Company located in the State of Texas] [or, if neither of the foregoing are specified in such an agreement, the account statements pertaining to the Brokerage Account identify and will continue to identify an office of Investment Banking Company located in the State of Texas as the office serving the Brokerage Account] [or, if none of the foregoing assumptions in this paragraph applies, the chief executive office of Investment Banking Company is, and at all times shall be, located in the State of Texas].<sup>22</sup>

Our opinions set forth herein are also subject to the following qualifications and exceptions:

(a) \* \* \* [Customary qualifications relating to other, omitted opinions are omitted from this illustrative opinion letter.] \* \* \*

(g) We express no opinion as to the legality, validity, binding effect or enforceability of any provision in the Transaction Documents which purports to provide rights or remedies, or impose obligations or standards, contrary to the Texas UCC.<sup>23</sup>

(h) In the case of property which becomes Collateral after the date hereof, our opinions are subject to the effect of Section 552 of the Bankruptcy Code, which limits the extent to which property acquired by a debtor after the commencement of a case under the Bankruptcy Code may be subject to a security interest arising from a security agreement entered into by the debtor before the commencement of such case.<sup>24</sup>

(i) We call to your attention that security entitlements and rights of entitlement holders are governed by Part 5 of Chapter 8 of the Texas UCC, and our opinions relating to

---

<sup>21</sup> § 8.502 provides that an adverse claim cannot be asserted against a person who acquires a security entitlement for value and without notice of an adverse claim. The bracketed language is important if the Opinion Giver is giving a priority opinion as to the Brokerage Account or security entitlements carried therein.

<sup>22</sup> See § 8.110 of the Texas UCC and part F.1. of the Supplement. See also footnote 20 of the Supplement as to how these assumptions will change somewhat under § 8.110(e) of the Revised Texas UCC.

<sup>23</sup> This qualification is not necessary if the opinion letter contains a more general qualification that would subsume the reference to the Texas UCC. For example, a qualification may be stated generally as to provisions purporting to waive, subordinate or not give effect to rights to notice, demands, legal defenses, or other rights or benefits that cannot be waived, subordinated or rendered ineffective under applicable law.

<sup>24</sup> Of course, this qualification relating to § 552 of the Bankruptcy Code is not necessary if the Collateral does not include property acquired after the commencement of a bankruptcy case, and this qualification could be modified to refer more specifically to § 552(b)(1) of the Bankruptcy Code if the only after acquired property consists of proceeds.

security entitlements are subject to such Part 5. In rendering such opinions, we express no opinion as to any specific financial asset in the Brokerage Account.<sup>25</sup> In addition, with respect to security entitlements in investments permitted under the Transaction Documents, our opinions do not apply to the extent that Chapter 8 of the Texas UCC is preempted by applicable federal law or regulation<sup>26</sup> [, and we express no opinion with respect to the requirements or effect of federal book-entry securities regulations as to U.S. treasury securities or other investments which may from time to time be included in the Collateral].

(j) In connection with the opinions expressed in paragraphs 8 and 9, we have assumed that the Pledgor has rights in the properties in which it is purporting to grant a security interest within the meaning of Section 9.203 of the Texas UCC,<sup>27</sup> and we express no opinion as to the title to or value of any property.<sup>28</sup>

(k) We express no opinion with respect to any liens in favor of any party other than the Agent that arise by operation of law and do not require possession or “control” (within the meaning of Sections 8.106 and 9.115 of the Texas UCC) of collateral or the filing of a financing statement in the State of Texas. Our opinions in paragraphs 8 and 9 are limited to Chapters 8 and 9 of the Texas UCC, and therefore those opinions do not address (i) laws of jurisdictions other than the State of Texas, [or] (ii) laws of the State of Texas other than Chapters 8 and 9 of the Texas UCC, or the creation or perfection of liens or security interests in any types or items of collateral the creation and perfection of which are not governed exclusively by Chapters 8 and 9 of the Texas UCC [or the priority or ranking of any security interests or other liens except to the

---

<sup>25</sup> This is an important qualification. Subchapter E (*i.e.*, Part 5) of Chapter 8 of the Texas UCC deals with the indirect holding system. § 8.104(c) provides that a person who acquires a security entitlement to a security or other financial asset has the rights specified in Subchapter E, but is the purchaser of any security entitlement, security or other financial asset only to the extent provided in § 8.503. That section makes clear that a purchaser does not acquire an identifiable interest in any specific, identifiable security or financial asset. The purchaser has rights against the securities intermediary which are better than those of a general creditor, but the rights are complex and are described in and limited by Subchapter E. *See* D. Keyes & T. Yates, *Revised Articles 8 and 9 of the Uniform Commercial Code: Securities and Other Investment Property*, TEX. J. BUS. LAW, Vol. 32, No. 4, 1-33 (Winter 1994), at 13-17.

<sup>26</sup> If the opinion being rendered goes beyond the scope of this illustrative opinion letter and covers federal book-entry securities, language comparable to the following should be considered to be inserted in lieu of the clause at the end of paragraph (i) of this Attachment: “; provided, however, in our opinion, Chapter 8 of the Texas UCC would not be preempted in a manner that would alter the opinions herein expressed with respect to security entitlements covered by existing Federal Book-Entry Regulations.” This proviso uses the defined term “Federal Book-Entry Regulations,” which would be defined in the Transaction Documents or, for purposes of rendering the opinion, in the opinion letter. *See* the discussion relating to federal book-entry securities in footnote 45 of Attachment A to the Supplement. If the opinion covers federal book-entry securities, then qualification (k) in the text will have to be revised accordingly.

<sup>27</sup> Texas UCC § 9.203(a)(3). *Compare* Revised Texas UCC § 9.203(b)(2) which requires that the debtor have “rights in the collateral or the power to transfer rights in the collateral to a secured party.”

<sup>28</sup> The Opinion Giver may add additional qualifications, depending on the nature of the transactions and on whether the Opinion Giver believes that the above opinions, assumptions, qualifications and exceptions make the scope and limitations of the opinions sufficiently clear to the recipients of the opinions. Some Opinion Givers, for example, may wish to add one or more of the additional qualifications discussed in footnote 47 of Attachment A to the Supplement.

extent that Chapter 8 or 9 of the Texas UCC governs the priority thereof]<sup>29</sup> [or (iii) under Section 8.110 and Section 9.103 of the Texas UCC, what law governs the perfection and priority of the security interest granted in the Collateral covered by this opinion letter].<sup>30</sup>

The foregoing opinions are governed by the laws of the State of Texas and limited to matters involving the laws of the State of Texas and the federal laws of the United States of America. We do not express any opinion as to the laws of any other jurisdiction. \* \* \* [Other customary limitations are omitted from this illustrative opinion letter.] \* \* \*

This opinion letter is rendered as of the date set forth above, and we expressly disclaim any obligation to update this letter after the date hereof. [No opinion is expressed herein as to the revisions to the Texas UCC that become effective July 1, 2001, or as to the effect, if any, of such revisions on the opinions rendered herein.]

This opinion letter is given solely for your benefit in connection with the transactions described in the Transaction Documents and may not be furnished to or relied upon by any other Person or for any other purpose without our prior written consent.

Very truly yours,

[Schedules are omitted.]

---

<sup>29</sup> Clauses (i) and (ii) of this qualification (k) limit the scope of opinions, including any priority opinions, to security interests whose creation, perfection and priority are governed by Chapters 8 and 9 of the Texas UCC, and the terms of the opinion stated in paragraph 9 limit the priority opinion contained in such paragraph only to priority over other security interests in favor of creditors of the Pledgor which may be perfected exclusively under Chapters 8 and 9 of the Texas UCC. With regard to the possibility of having the opinion letter cover the Uniform Commercial Code of other states, or cover federal (including federal book-entry security regulations) or state laws other than the Texas UCC, *see* footnotes 11, 14, 23, 24 and 45 of Attachment A to the Supplement. In those instances where a Texas attorney opines on the perfection and priority of security interests created under a security agreement governed by the laws of another jurisdiction, the validity and enforceability of the security agreement under the other jurisdiction's laws (and therefore the creation of the security interests granted thereunder) may be assumed, in which case the language of clause (ii), to the extent that such language limits the opinion to security interests created under the Texas UCC, may be modified accordingly.

<sup>30</sup> The bracketed clause (iii) is not necessary in this illustrative opinion letter due to assumption (H).