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Legal Opinions on Incorporation, Good Standing, and Qualification To Do Business

By Scott FitzGibbon* and Donald W. Glazer**

Legal opinions are short—sometimes only two or three single-spaced typed pages—and they look simple. But they are an essential element of almost all major corporate financial transactions.

In an opinion for such a transaction, the lawyer confirms that the transaction is what it is meant to be from a legal point of view. He or she usually states, for example, that the company is a corporation, that its stock is valid, and that the agreements relating to the transaction have been properly entered into and constitute binding contracts. He confirms that any necessary permits and licenses have been obtained and that the transaction complies with law and the company's charter and bylaws. He or she may give special assurances about complying with federal securities laws and with the law generally.

Lawyers take great care to establish the factual and legal bases for their opinions. Their reputations are on the line, and the damages that may be caused by error are enormous. They support their opinions with careful legal research, extensive factual investigation, and certificates from company officers and government officials. They submit their conclusions to formalized review procedures, which sometimes include "second-partner review" or review by an opinion committee. They worry and negotiate over niceties of syntax and vocabulary.

The repeated scrutiny of several generations of corporate lawyers has reduced the body of most opinions to a litany of time-honed phrases appearing, in nearly lockstep order, from one transaction to the next. Underwriters, for example, expect assurance that the stock they purchase is "duly authorized, validly issued, fully paid, and nonassessable." Institutional lenders want to be told that

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the loan agreement "has been duly authorized, executed, and delivered and constitutes a legal, valid, and binding obligation of the company, enforceable in accordance with its terms." Almost all opinion recipients, regardless of the kind of transaction, want an opinion that the company is a "duly organized" and "validly existing" corporation "in good standing" in its state of incorporation and "duly qualified" to conduct business in other states. These are the canonical phrases with which corporate attorneys legally consecrate financial transactions.

The words are fixed, but their meanings are surprisingly unsettled. The standard phraseology, replete with fuzzy nouns and slippery adverbs, is susceptible to a broad range of interpretation. Commentators disagree over even the most basic points, and seeking interpretations from lawyers who regularly render opinions can be a little like consulting Humpty Dumpty.

This article treats the opinion of the company's status as a corporation in its state of organization and in foreign jurisdictions. The article recommends standard interpretations for each standard phrase. This delicate enterprise has been conducted with six principles in mind. The first is fidelity to the language. An effort has been made to interpret each phrase consistently with what its words will bear, in the light both of ordinary English usage and of specialized legal definitions. The second principle is respect for the practice of the bar. The article attempts to interpret opinions in a manner consistent with the general understanding of corporate and securities lawyers.¹ The third principle is respect for the needs of opinion recipients. Opinions should be interpreted to mean what recipients reasonably expect them to mean. The fourth is respect for the limits of professional knowledge and expertise. An effort has been made to limit the opinion to matters on which lawyers are in a position to judge. The fifth is internal consistency. Matters covered by carefully qualified terms in one part of the opinion ought not to be interpreted to be covered by more general, unqualified language elsewhere. The sixth principle is independence of context. An effort has been made to assign a constant meaning to each phrase, rather than one that varies according to the transaction or the parties. These principles sometimes conflict, but to the extent possible, each is taken into account.

1. The published commentaries on legal opinions include Babb, Barnes, Gordon & Kjellenberg, *Legal Opinions to Third Parties in Corporate Transactions*, 32 Bus. Law. 553 (1977) [hereinafter cited as Babb, Barnes]; Bermant, *The Role of the Opinion of Counsel: A Tentative Reevaluation*, 49 Cal. State Bar J. 132 (1974); Fuld; *Lawyers' Standards and Responsibilities in Rendering Opinions*, 33 Bus. Law. 1295 (1978) [hereinafter cited as Fuld, *Lawyers' Standards*]; Fuld, *Legal Opinions in Business Transactions—An Attempt to Bring Some Order Out of Some Chaos*, 28 Bus. Law. 915 (1973) [hereinafter cited as Fuld, *Legal Opinions*]; A. Jacobs, *Opinion Letters in Securities Matters: Text—Clauses—Law* (1985 revised ed.); Practising Law Institute, *Opinion Letters of Counsel* (1984) [hereinafter cited as *Opinion Letters of Counsel*]; Committee of the Business Law Section of the State Bar of California, *Report of the Committee on Corporations Regarding Legal Opinions in Business Transactions*, 14 Pac. L.J. 1001 (1983) [hereinafter cited as *California Report*]; Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers Association, *Legal Opinions to Third Parties: An Easier Path*, 34 Bus. Law. 1891 (1979) [hereinafter cited as *New York Report*]. In addition, through correspondence, telephone inquiries, and a more formal roundtable session, the authors have obtained the views of practicing lawyers and law professors specializing in the corporate, securities, and financial areas.

INCORPORATION, ORGANIZATION, EXISTENCE, AND GOOD STANDING

Almost all opinions pass on the corporate status of the company. Usually they state that “the company is a corporation duly organized, validly existing, and in good standing under the laws of” a stated jurisdiction.² Sometimes, in place of “is a corporation,” they state that the company has been “duly incorporated and organized” or simply that it has been “duly incorporated.”³ Opinion recipients are concerned about a company’s form of organization since it determines the formalities needed to engage in the transaction and the assets reachable in the event of a default.⁴

The corporate status opinion deals with the organization and structure of the company. It does not address the question of whether the company has the requisite licenses and permits to do business, or whether it is operating in compliance with law, or whether it is susceptible to “piercing the corporate veil” or other challenges to corporate attributes arising from the conduct of the business.

THE COMPANY IS A CORPORATION

To opine that a company is a corporation is to opine that it has complied in all material respects with the requirements, as then in effect, for incorporation under an applicable corporation statute and that it has not subsequently ceased to exist, for example, through merger, liquidation, dissolution, the forfeiture or suspension of its charter, or the expiration of its term of existence. The statute must be a “corporation statute”: one which purports to make entities organized under its “corporations,” using that word.⁵ And the statute must be “applicable”: the opinion could not be given, for example, about an entity that was

2. Sometimes a corporate status opinion is also given on material subsidiaries. Even when the subsidiaries are not parties to the transaction, such an opinion is of value because it conveys important assurance of the corporate group structure.

When a company has many subsidiaries, there are strong practical reasons for opining only on the more important ones. The difficult question is which subsidiaries to cover. One approach is to opine on “each of [named subsidiaries] (which the company has advised us are the only subsidiaries of the Company which would be considered a ‘significant subsidiary’ under Rule 405 of Regulation C under the [Securities Act of 1933].” Halloran, *Rendering Opinions of Law—Opinions in Registered Offerings*, in *Opinion Letters Of Counsel*, *supra* note 1, at 18.

3. Alternate language for this portion of the opinion is that “the corporation has been duly organized and is validly existing in good standing under the laws of” a stated jurisdiction.

4. It is sometimes suggested that if a company is not duly incorporated, the opinion recipient may be better off in that he may be able to reach the personal assets of the company’s principals. As a practical matter, however, the parties to a transaction are not looking to a lawsuit but rather are seeking assurance that from a legal standpoint the arrangements they negotiated are the ones they are getting. This is of particular concern when there are several parties to the transaction: each wants assurance that the others do not have a legal out not bargained for. Furthermore, if a company is not incorporated, creditors of its owners may be able to reach its assets.

5. A question might be raised when the statute, while purporting to make entities organized under it “corporations,” does not confer all of the usual corporate attributes. For example, professional incorporation statutes often modify the limited liability feature. When such a departure

ineligible for organization under the statute, as might be the case with a bank or a professional or nonprofit organization that attempted to incorporate under a general business corporation statute.⁶ The opinion further means that government officials have taken whatever steps the statute requires as a condition to incorporation and that the corporate existence began at or prior to the date of the opinion.⁷ The statute may contain booby traps on this latter point. The Massachusetts statute, for example, states that the corporate existence begins when the articles of organization are "filed" (unless a later date is specified) but, counterintuitively, defines filing not as submission of the documents to the Commonwealth but as something done by state officials after the documents are received.⁸

The opinion that "the company is a corporation" does not mean that the requirements for incorporation have been followed punctiliously in all respects. Minor failures to comply do not prevent the entity's being a corporation: the commentators agree that "[f]ailure to comply with a relatively inconsequential provision . . . which results in no prejudice to public interest does not destroy the *de jure* character of a corporation."⁹ Inconsequential defects include misspellings, omissions of immaterial information, such as addresses, from the charter documents, and minor procedural defects in organizational meetings.¹⁰ What is inconsequential, however, is not merely a function of the statutory requirement itself. The significance of a defect also depends upon a company's history and circumstances. Such considerations might make the difference, for example, in determining whether it is inconsequential that one of the incorporators was under the requisite age. If the incorporator was only a few years short of the statutory requirement, and the company was thereafter operated for many years as a corporation with fully qualified officers and directors, it seems likely that a

from the normal corporate structure is likely to be material to the recipient of the opinion, disclosure is the better practice.

6. Revised Model Business Corporation Act § 3.01(b) (1984). ("A corporation engaging in a business that is subject to regulation under another statute of this state may incorporate under this Act only if permitted by, and subject to all limitations of, the other statute.")

7. The opinion does not mean that the corporation "was incorporated on the date . . . specified in its Initial Charter Documents," as stated in Babb, Barnes, *supra* note 1 (discussing the phrase "has been duly incorporated"). If the exact date matters to the recipient, and it rarely will, he should ask that it be expressly stated. Normally the recipient's only concern is that the company was incorporated before the transaction took place.

8. Mass. Gen. Laws Ann. ch. 156B, §§ 6, 12 (West 1984).

9. H. Henn & J. Alexander, *Laws of Corporations and Other Business Enterprises* § 139, at 327 (3d ed. 1983). See *Robertson v. Levy*, 197 A.2d 443, 445 (D. Ct. App. 1964) ("[a] *de jure* corporation results when there has been substantial conformity with the mandatory conditions precedent (as opposed to merely directive conditions) established by the statute. A *de jure* corporation is not subject to direct or collateral attack either by the state in a *quo warranto* proceeding or by any other person") (dictum); Noennig, *The De Facto Corporation Doctrine in Montana*, 39 Mont. L. Rev. 305 (1978).

10. Of course, if some such minor defect caused the state to refuse to take steps necessary to incorporation, that would prevent the corporate existence from beginning.

court would accord it full corporate status despite the defect.¹¹ On the other hand, a court might deny corporate status to a company organized by a fourteen-year-old incorporator if the company had been in existence for only a short time and if the incorporator, still underage, was also the principal shareholder, sole director, and chief executive officer.

Counsel will find it easier to conclude that a defect is inconsequential if it does not relate to a step the statute makes a “condition” to incorporation and if courts in the jurisdiction of incorporation look leniently on mistakes in corporate procedures generally and organizational defects in particular—as courts increasingly have done. Ultimately, deciding what is and is not inconsequential should turn on counsel’s informed judgment on whether a court, after considering all the facts and circumstances, would refuse to recognize the company as a corporation because of the defect.¹²

Many corporation statutes contain provisions that make a certificate from a state official on the filing of charter documents evidence of incorporation. The Delaware statute, for example, provides that:

[a] copy of a certificate of incorporation . . . shall, when duly certified by the Secretary of State [and the recorder of the county] . . . be received in all courts, public offices and official bodies as prima facie evidence of: (1) Due execution, acknowledgement, filing and recording of the instrument; (2) Observance and performance of all acts and conditions necessary to have been observed and performed precedent to the instrument becoming effective; and of (3) Any other facts required or permitted by law to be stated in the instrument.¹³

States vary on the strength of the presumption established by such certificates, some going so far as to make them conclusive evidence of incorporation. Certain statutes make the presumption inapplicable to proceedings brought by the state.¹⁴

11. *But cf.* New York Report, *supra* note 1, at 1905–06. This authority states that “[a]n organization purporting to be a corporation might not have been ‘duly incorporated’ for various reasons. These include . . . execution of the relevant document by unqualified persons . . .” However, the report goes on to say that “[t]his matter is covered by the opinion assumption (whether or not stated) as to the authority of persons executing documents.” Since the age of the incorporators will not be set forth in the incorporated documents, a corporate record check is not likely to turn up an underage incorporator problem—unless counsel has a duty to investigate the question. If the matter is covered by an assumption, then there is no such duty and thus the New York Report renders the problem moot except when counsel has actual knowledge.

12. Some lawyers, in assessing the significance of a defect, may also take into account the nature and size of the transaction and give an opinion more readily when challenge is unlikely and the consequences of error are not severe. Other lawyers take a more absolutist approach, noting that errors in opinions may do more harm apart from disputes over the transaction. Failure to detect, cure, or describe a corporate defect, for example, may have consequences for later transactions and may harm a law firm’s reputation.

13. Del. Code Ann. tit. 8, § 106 (1983). For a discussion of the application of such provisions to the “duly incorporated” portion of the opinion, *see infra* note 15.

14. The Model Business Corporation Act, § 56 (1977), provides that the

Some lawyers are willing to give the "is a corporation" opinion based solely on the certificate of a state official and a statutory presumption unless they know of material defects in the incorporation process. They point out that in many circumstances, especially those involving small loan transactions, the cost of a full corporate record check is prohibitive. If the recipient wants such a record check, he should, they argue, ask for an opinion that the company is "duly incorporated."¹⁵ Other lawyers think the "is a corporation" opinion requires a full record check whatever the statutory presumption.¹⁶ They note that many statutes do not by their terms establish a conclusive presumption and that even those that do may exclude actions brought by the state. Moreover, they doubt whether a court would disregard a material defect even under a strongly worded statute when the defect involved a misrepresentation to the state secretary or did not appear in documents filed with the state. These lawyers regard the distinction between "is a corporation" and "duly incorporated" as an elusive one not likely to be appreciated by opinion recipients.¹⁷

A key point in this debate is that both sides agree on the substantive meaning of the "is a corporation" opinion. They disagree on the procedures to be followed by counsel in preparing the opinion. One side believes that lawyers have no duty to search out material defects through a review of the corporate records. The other believes they do. Although variations in local practice make it difficult to be prescriptive, lawyers who do not perform a corporate record check would appear to be running a real risk of misleading opinion recipients

certificate of incorporation shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this Act, except as against this State in a proceeding to cancel or revoke the certificate of incorporation or for involuntary dissolution of the corporation.

The Texas statute is almost identical. Texas Bus. Corp. Act Ann. art. 3.04 (Vernon 1980). Section 1.28(c) of the Revised Model Business Corporation Act states that "[s]ubject to any qualification stated in the certificate, a certificate of existence or authorization issued by the secretary of state may be relied upon as conclusive evidence that the . . . corporation is in existence . . ." The New York statute provides that "[u]pon the filing of the certificate of incorporation by the department of state, the corporate existence shall begin, and such certificate shall be conclusive evidence that all conditions precedent have been fulfilled and that the corporation has been formed under this chapter, except in an action or special proceeding brought by the attorney general." N.Y. Bus. Corp. Law § 403 (Consol. 1983).

15. An opinion adopting this more limited approach would have to exclude the "duly organized" opinion as well, since due incorporation is implicit in due organization.

16. Lawyers who take the stricter view may still, on limited occasions when circumstances warrant, render an opinion based solely on a secretary of state's certificate, but only with appropriate disclosure, including an express statement of the limited nature of their investigation. Such circumstances might include, for example, the loss or destruction of corporate records or the impracticality of reconstructing historical statutory materials. *Cf.* New York Report, *supra* note 1, at 1905-06.

17. See Wolfson, *Opinions of Counsel to the Underwriters in Public Offerings of Securities*, in *Opinion Letters of Counsel*, *supra* note 1, at 72 (it is "open to question whether recipients . . . recognize that [an] opinion that [the] issuer 'is a corporation . . .' is a more limited opinion, or entails less investigation, than that [the] issuer was 'duly incorporated' ") (in the context of opinions of underwriters' counsel).

on the significance of an “is a corporation” opinion unless they take pains to disclose the limited scope of their review, the nature of the statutory presumption, and the consequences should a material defect later be discovered.

If material errors were committed in the incorporation process, courts may nevertheless treat the entity as a corporation for some purposes. Courts may characterize the entity as a “corporation by estoppel” if third parties have reasonably relied on its being incorporated; or they may regard it as a *de facto* corporation if there is an applicable corporate statute, an attempt to incorporate, and some exercise of corporate privileges or use of the supposed corporate charter.¹⁸ For example, a court would almost certainly deny *de jure* corporate status to an entity whose charter was never filed with state officials, but might nevertheless treat such an entity as a corporation by estoppel or a *de facto* corporation and enforce its obligation to repay bank loans and to perform its other contractual commitments.

Some commentators state that a lawyer may opine that the company is a corporation (but not that it is duly incorporated) even if the entity is a corporation only *de facto*.¹⁹ This assertion fails, however, to accord sufficient weight to the needs of opinion recipients for assurance that the company is fully a corporation in the eyes of the law. *De facto* corporations and corporations by estoppel are by definition not *de jure* corporations; they are mere shadowy projections of equitable principles. Nor are *de facto* corporations and corporations by estoppel treated as corporations for all purposes: for example, their charters may be subject to successful challenge by the state in *quo warranto* proceedings; their officers, directors, and shareholders may not be shielded from liability by the corporate form; and their assets may be vulnerable to the claims of creditors of the owners. “Application of the [de facto] doctrine . . . depends on the nature of the case and the fairness to the parties under the circumstances.”²⁰ Opinion recipients seek assurance against just this sort of uncertainty. For example, when a bank requests an opinion that its borrower is a corporation, it wants to know not only that a court would enforce the entity’s debt obligation, but also that under corporate law the entity’s assets will be insulated from claims that might be brought against stockholders by their personal creditors. Accordingly, the lawyer should not opine that the company is a corporation if it is a corporation only *de facto* or by estoppel.

The phrase “the company is a corporation” also means, since it is in the present tense, that the entity continues to be a corporation: the corporate existence has not ceased, for example, by reason of a merger or dissolution or the expiration of a term of existence established by its charter.

18. H. Henn & J. Alexander, *supra* note 9, at § 140.

19. Jacobs, *supra* note 1, at 1-1; Babb, Barnes, *supra* note 1, at 557 n.11 (“There are three forms of ‘incorporation’ opinions commonly requested and given: (1) The Company has been duly incorporated . . . (2) The Company is duly incorporated . . . (3) The Company is a corporation . . . The first two mean the same thing; the third permits reliance on the *de facto* incorporation doctrine”). See also California Report, *supra* note 1, at 1032-33.

20. H. Henn & J. Alexander, *supra* note 9, at § 140.

THE COMPANY IS "DULY INCORPORATED"

Whether an opinion that a company is duly incorporated adds anything to an opinion that it is a corporation depends on how the "is a corporation" opinion is interpreted. If "is a corporation" is interpreted to require a corporate record check, then the two opinions mean the same thing. If it is not, then "duly incorporated" imposes on the lawyer the same requirements that those who take a more expansive view of "is a corporation" think that opinion entails. In either case, counsel must identify any defects in the incorporation process and judge whether those defects would prevent a court from recognizing the entity as a corporation.

Whatever the differences in view over the scope of "is a corporation," commentators all agree that statutory provisions establishing a presumption that the company is a corporation or is incorporated do not establish a presumption that the company is duly incorporated as well.²¹ The adverb "duly," with few if any exceptions, requires that the procedures followed in establishing the corporation satisfy counsel.

THE COMPANY IS "DULY ORGANIZED"

The phrase "duly organized" relates to both the procedures for incorporating an enterprise and the steps incident to establishing its basic organizational structure.²² Thus, counsel must first be satisfied that the company is duly incorporated. Defects in incorporation procedures too minor to prevent the lawyer's opining on the company's legal existence should also be regarded as too minor to prevent his opining that the company is duly organized.

Commentators agree that "duly organized" covers more than "due incorporation,"²³ but they do not agree on how much more. It seems clear that to be duly organized a corporation must have bylaws, a president, at least one director, and

21. Nor do they establish a presumption that the company is "duly organized." "Duly incorporated" is implicit in "duly organized." Cf. *infra* note 46.

22. Several experienced corporate lawyers reacted to this statement with surprise and disbelief. On further reflection, they all conceded the point. But they noted that in practice the distinction between "duly incorporated" and "duly organized" rarely arises, since opinion recipients always want a "duly organized" opinion and giving it ordinarily poses few additional problems.

Some support for the view that "duly organized" means more than that the company is duly incorporated is afforded by § 2.05 of the Revised Model Business Corporation Act, which states that "[a]fter incorporation . . . if initial directors are named in the articles of incorporation, the initial directors shall hold an organizational meeting . . . to complete the organization of the corporation by appointing officers, adopting by-laws, and carrying on any other business brought before the meeting" (emphasis added).

23. *E.g.*, California Report, *supra* note 1, at 1032 ("A corporation could be 'duly incorporated,' but not 'duly organized,' if no steps other than signing and filing the articles had been taken. A corporation has been duly organized when its initial bylaws have been adopted and its initial officers and directors ((in the minimum number required by law and the corporate charter documents)) have been elected. The phrase 'duly organized' is also commonly understood to require the board of directors to authorize the initial issuance of the company's capital stock") (footnote omitted); New York Report, *supra* note 1, at 1906; Babb, Barnes, *supra* note 1, at 557-58.

at least one stockholder who paid at least the minimum required by law for his shares. (Unless, in the case of any such feature, applicable corporate law expressly permits its omission: a Delaware close corporation without a board of directors, for example, might be duly organized.²⁴ Less clear is the case of a corporation with a president but no treasurer or clerk, or with directors but fewer than the statutory requirement, or with stockholders who did not all pay the statutory consideration for their shares.²⁵ The acid test for each should be whether the defect would prevent valid corporate action on the transaction at issue and, probably, on any other important matter. Only if it would should it preclude an unqualified opinion that the corporation is duly organized.

Interpreting the term “duly organized” sometimes becomes necessary when counsel is asked to give an opinion on a start-up business. For example, a group of entrepreneurs may organize a corporation and arrange for a loan²⁶ before they have agreed on how many shares each is to own and before the corporation has issued any stock. The bank may ask for a legal opinion concerning the corporate status of the borrower. The lawyer will be able to opine that the entity is a corporation if it is organized under the laws of a state in which corporate existence can begin prior to stock issuance. But under this interpretation, the lawyer could not give an unqualified opinion that the corporation is duly organized. On the other hand, counsel could give the “due organization” opinion if only one share of stock were issued and outstanding, even though the founders planned to issue more stock to more stockholders later.

Some commentators have suggested that “due organization” includes such additional matters as authorization of “appropriate corporate and accounting records”²⁷ and even “other matters required to commence business.”²⁸ If read

24. Under the Delaware statute, a corporation that elects to be treated as a close corporation may provide in its certificate of incorporation for the business of the corporation to be managed by the stockholders rather than a board of directors. Del. Code Ann. tit. 8, § 351 (1983).

The “due organization” opinion could be given to a corporation without shareholders when the state statute provides, as does the Massachusetts statute, that “[p]rior to the initial issuance of stock by a corporation, the incorporators may exercise all rights of stockholders and take any action required or permitted by law, the articles of organization or the by-laws to be taken by the stockholders.” Mass. Gen. Laws Ann. ch. 156B, § 44 (West 1984). This language, however, clearly contemplates the absence of shareholders as only a preliminary, not a permanent, condition and thus probably is not sufficient to support the opinion that a company without shareholders is “duly organized.” Unlike shareholder rights, which are transferable, the powers of an incorporator are personal attributes and terminate upon death.

25. To the extent that “duly organized” covers the issuance of stock, it overlaps the portion of the opinion that deals specifically with the authorization and issuance of stock.

26. The loan would no doubt be personally guaranteed by the entrepreneurs.

27. Babb, Barnes, *supra* note 1, at 557–58, states that the “due organization” portion of an opinion that “[t]he Company has been duly incorporated and organized and is existing as a corporation in good standing under the Illinois business corporation laws”

is an affirmative opinion the Company has complied with the Business Corporation Laws with respect to organization, including the following: (i) election of the minimum number of directors required by law, (ii) election of officers, (iii) adoption of by-laws, and (iv) where deemed an aspect of corporate organization, payment to the Company of the minimum capital required by statute to transact business.

literally, these suggestions go much too far. The appropriateness of accounting records and the requirements for commencing business are questions for accountants and business people, not lawyers. The recipient of a "due organization" opinion is seeking neither accounting nor business advice but rather assurance that all the key pieces are in place from a legal standpoint.

Because the phrase "duly organized" relates to structure, it should not be taken to mean that the corporation has been capitalized and managed in such a way as to make the shareholders immune from liability under the "piercing the corporate veil" theory, nor that the entity will be taxed as a corporation. Those are operational and not organizational matters.

THE COMPANY IS "VALIDLY EXISTING"

This phrase does no more than confirm that the preceding phrases, "is a corporation" and "duly organized," are effective as of the date of the opinion.²⁹

One authority states that "[a]n opinion that a corporation is 'validly existing' implies that no proceedings for dissolution have been commenced."³⁰ This interpretation goes beyond the plain meaning of the words and would make it almost impossible to give an unqualified opinion, since administrative proceedings toward dissolution are not always publicly disclosed at the outset. A similar objection applies to the interpretation suggested by one authority³¹ that a corporation is not "validly existing" if it is delinquent in paying its taxes. The

This portion of the opinion also commonly means the board of directors authorized the initial issuance of the Company's securities (and fixed the stated value of shares without par value), authorized payment of organization expenses, adopted a corporate seal and forms of stock certificates, and authorized the creation of appropriate corporate and accounting records for the Company.

28. New York Report, *supra* note 1, at 1906:

An opinion as to due organization covers both incorporation and organizational matters occurring thereafter. The organizational matters include the election of directors, the holding of the first meeting of the board of directors, adoption of by-laws, election of officers, authorization and issuance of stock, payment for any statutory minimum amount of stock and any other matters required to commence business.

29. The California Report states, however, that "[t]he word 'validly' is used to distinguish a 'de facto' from a 'de jure' corporation." California Report, *supra* note 1, at 1032. The California committee evidently thought that by omitting the term "validly" the lawyer could give an unqualified "is a corporation" opinion even for an entity that was a corporation *de facto* but not *de jure*. However, the phrase "the company is a corporation" (whether or not the term "existing" or "validly existing" follows) should be understood, without more, to mean a corporation *de jure*. See Wolfson, *Opinions of Counsel to the Underwriters in Public Offerings of Securities*, in Opinion Letters of Counsel, *supra* note 1, at 71 (stating, in the context of opinions to underwriters in public offerings, that there "[w]ould not appear to be any difference between 'existing,' 'validly existing,' or 'duly existing'").

30. California Report, *supra* note 1, at 1032.

31. Fuld, *Legal Opinions*, *supra* note 1, at 925 ("Whether non-payment of taxes for one year is a cloud on existence where forfeiture [of the corporate charter] is authorized for non-payment for three years, is a matter on which lawyers may disagree").

thought seems to be that tax delinquency clouds a corporation's existence because it is a ground for involuntary dissolution in many jurisdictions. The problem with this interpretation, however, is that the grounds for involuntary dissolution are numerous and vague. Delaware, for example, provides that "[t]he Court of Chancery shall have jurisdiction to revoke or forfeit the charter of any corporation for abuse, misuse or non-use of its corporate powers, privileges or franchises."³² Other states provide for involuntary dissolution if the corporation has "continued to transact business beyond the scope of the purpose or purposes of the corporation as expressed in its articles of incorporation,"³³ if it has "failed to pay any fees, franchise taxes or penalties prescribed by law,"³⁴ if it has abused its powers contrary to the public policy of the state,³⁵ and if it has misrepresented "any material matter in any application, report, affidavit, or other document submitted by such corporation."³⁶ Involuntary dissolution proceedings were instituted against a New York corporation in the early 1970s for engaging in the business of ghostwriting term papers.³⁷

That there are no grounds for involuntary dissolution is too broad an interpretation for the "validly existing" opinion, putting an impossible burden on the lawyer, and the interpretation that it covers only tax-related grounds for dissolution, while narrower, is not supported by the plain meaning of those words. Opinion recipients may seek assurance on these points in certificates of company officers and in opinion clauses dealing with pending and threatened litigation and taxation. Those portions of the opinion are usually qualified by the phrase "to counsel's knowledge" and hence would cover only those proceedings of which counsel is aware.

Although theoretically a corporation may be "validly existing," even after it has taken steps toward voluntary dissolution or merger into another company, any such steps known to counsel should, as a matter of good practice, be disclosed to the recipient of a "validly existing" opinion.³⁸

THE COMPANY IS "IN GOOD STANDING" IN THE JURISDICTION IN WHICH IT IS ORGANIZED

"Good standing certificates" are available in most states but mean different things in different jurisdictions. Some states issue a single certificate relating both to the payment of taxes and to other matters, such as the filing of periodic reports with the state secretary; other states give two certificates, one on taxes

32. Del. Code Ann. tit. 8, § 283 (1983).

33. Tex. Bus. Corp. Act Ann. art. 7.01(3) (Vernon 1980).

34. *Id.* art. 7.01(B)(1).

35. N.Y. Bus. Corp. Law § 1101(a)2 (Consol. 1983).

36. Tex. Bus. Corp. Act Ann. art. 7.01(A)(4) (Vernon 1980).

37. *See State v. Saksniit*, 69 Misc. 2d 554, 332 N.Y.S.2d 343 (Sup. Ct. 1972).

38. Wolfson, *Opinion of Counsel to the Underwriters in Public Offerings of Securities*, in *Opinion Letters of Counsel*, *supra* note 1, at 71 (discussing opinions of underwriters' counsel). Typically counsel will determine whether such steps have been taken by examining the minute books and an officer's certificate.

and one on other matters. In states that issue good standing certificates not limited by their terms to a particular matter, such as taxes, or that issue separate good standing certificates of corporate filings and taxes, the opinion that a company is "in good standing" is generally understood to be a shorthand way of referring to the matters covered by such certificates. In states that do not issue good standing certificates,³⁹ "good standing" may nevertheless have a settled meaning. Experienced California counsel, for example, has suggested that in California:

The form of certificate obtainable from the California Secretary of State was amended in 1982 to delete the words "good standing" and instead refer only to corporation's incorporation and authorization to exercise its corporate powers, rights, and privileges. It is submitted that no substantive change was intended by the amendment and that counsel may properly opine as to the good standing of a California corporation.⁴⁰

If there is no settled definition of the term, lawyers proceed at their peril if they render an unqualified good standing opinion—even if they do so relying on a tax good standing certificate. Opinion recipients may understand the term "good standing" to relate not only to tax problems but also to deficiencies in corporate filings, or vulnerability to dissolution for those or other defects;⁴¹ they may even interpret it to convey an unintended assurance of general corporate well-being. When the term has an unsettled meaning, it is better not to give an unqualified good standing opinion. When hard pressed, however, good lawyers sometimes do give the opinion if assured that all corporate and tax filings have been made with the state or after defining the term in the opinion in a manner appropriate under the circumstances.

The needs of opinion recipients can often be satisfied without a legal opinion, for example, through representations by company officers of the filing of

39. The Massachusetts Secretary of State, for example, does not certify good standing. Pending legislation would amend the Massachusetts Business Corporation Act to include the following provision:

A corporation shall be deemed to be in good standing with the Secretary of State if such corporation has filed all annual reports required to be filed by it with the State Secretary, has paid all fees due with respect to such reports, no proceedings are then pending under section 101 for its dissolution, and no articles of dissolution have been filed by it. Upon the request of any person and payment of such fee as may be prescribed by law, the State Secretary shall issue a certificate stating, in substance, that any corporation meeting the requirements of this section 110 appears from the records in his office to be in good standing.

40. Halloran, *Rendering Opinions of Law—Opinions in Registered Offerings*, in Opinion Letters of Counsel, *supra* note 1, at 18.

41. New York Report, *supra* note 1, at 1906, states that the good standing opinion means that the corporation is "not so delinquent in its filings of franchise tax returns as would give the state the power to revoke its corporate status." Wolfson, *Opinions of Counsel to the Underwriters in Public Offerings of Securities*, in Opinion Letters of Counsel, *supra* note 1, at 71, in discussing opinions of underwriters' counsel states that "good standing" is "[c]ommonly understood to mean" that the state does "not have [the] right to terminate or dissolve corporate experience."

franchise tax returns and other documents. Although lawyers are sometimes asked for legal opinions that such filings have been made, experienced counsel often decline such a request on the ground that such opinions involve no legal judgments.

SUPPORTING THE OPINION

Corporate lawyers commonly opine on the corporate status of companies under the laws of their own state and, unless special problems are presented, under the laws of Delaware. For corporations organized under the laws of other jurisdictions, opining lawyers commonly rely on opinions of local counsel or offer such opinions in place of their own.

When not relying on local counsel, an opining lawyer should examine the following documents.

The Statute Under Which the Corporation Was Organized

The statute in effect at the time of incorporation is, of course, the version relevant to the incorporation process; later versions may govern the “due organization,” “validly existing,” and “good standing” portions of the opinion. With older corporations this may present a difficult research problem since it may be hard to reconstruct the statute as in effect at a particular time.⁴²

Certificates from State Officials

Counsel should obtain from the state of incorporation a certificate, sometimes called a “long form legal existence certificate,” confirming the existence of the corporation and listing charter documents on file. In addition, he or she should obtain copies of the listed charter documents certified by the secretary of state as being true, accurate, and complete.

If an opinion on “good standing” is included, counsel should also obtain a good standing certificate from the state of incorporation.⁴³ State certificates can be obtained through CT Corporation System and other lawyer-service companies. In major transactions, counsel typically obtains telegrams from the state to “bring down” such certificates to the closing date.⁴⁴ In other transactions, however, counsel is often content with bring-down certificates from company

42. New York Report, *supra* note 1, at 1905–06 n.19, suggests that this may be an appropriate case for relying solely on a certificate of a state official. See *supra* text accompanying notes 13–17 for a discussion of reliance on such certificates.

43. Sometimes counsel should obtain other certificates that, while not using the term “good standing,” cover similar matters. See *supra* text accompanying notes 38–40.

44. “There has been a tendency away from so-called ‘bring-down’ telegrams If the [good standing] certificates are more than a week old, telephone confirmations by staff people in the law firm have increasingly been deemed adequate protection.” Halloran, *Rendering Opinions of Law—Opinions in Registered Offerings*, in *Opinion Letters of Counsel*, *supra* note 1, at 16. “[S]ome states cannot or will not deliver updating telegrams or telephonic advice as of or immediately prior to closing. Thus, [the] nature of [the] inquiry may be more limited than customary language would suggest and more limited than customary practice a few years ago.” Wolfson, *Opinions of Counsel to*

officers. When such certificates and telegrams are obtained for a company and its subsidiaries in all relevant states, the conference room in which the closing is held sometimes resembles a Western Union office during a nineteenth-century business panic. Experienced partners and their overworked associates often question the value of much of this paperwork.⁴⁵

Certificates of state officials are based only on a review of charter documents on file and on indices of dissolution proceedings.⁴⁶ State officials do not, and are not in a position to, look behind these documents to the records of board, shareholder, and incorporator action contained in the corporate minute book. Thus, a secretary of state's certificate of legal existence and good standing would often be of little value in litigating alleged misrepresentations in the charter documents or a failure to comply with statutory requirements not reflected in those documents. A state official, for example, will rely on a representation that requisite shareholder action was taken at a meeting and have no way of knowing that such meeting was procedurally defective, perhaps because it took the form of a conference telephone call not authorized by the state corporation statute.⁴⁷ Opinion recipients usually want greater assurance concerning the legal existence of the corporation.⁴⁸ Small companies can become large companies and opinion recipients may properly expect their law firms whenever they confirm a corporation's existence to do their homework without any shortcuts.

Corporate Records

To confirm that the statutory incorporation requirements have been satisfied, that the additional steps required for due organization have been taken, and that the corporation continues in existence, counsel should review the charter; the bylaws; records of proceedings taken in connection with the formation of the corporation (such as minutes of incorporators, directors' resolutions to issue stock, the stock transfer ledger, and the stock record book); and the minutes of stockholders' and directors' meetings generally (looking, for example, for steps

the Underwriters in Public Offerings of Securities, in *Opinion Letters of Counsel*, *supra* note 1, at 73.

45. The time to arrange for a lighter load of certificates is during negotiations. Obtaining due qualification and good standing assurances for all foreign jurisdictions in which the parent and all subsidiaries have been qualified to do business may be a practice that has outlived its usefulness. *See infra* text accompanying notes 68-71.

46. Reliance upon a certificate of an appropriate governmental official as to "due incorporation" is ordinarily not justified because such official has not verified that the certificate met the statutory incorporation requirements on the filing date. Nevertheless, if a historical reconstruction of statutory materials is unusually burdensome or impossible, such a certificate may provide the only available basis for an opinion and it may be proper to rely solely on the certificate, with appropriate disclosure.

New York Report, *supra* note 1, at 1905-06 n.19.

47. Most business corporation statutes authorize director action by conference telephone but are silent on shareholder action by telephone.

48. As to the propriety of a lawyer's giving an opinion solely on the basis of a secretary of state's certificate, *see supra* text accompanying notes 14-17.

relating to merger or dissolution).⁴⁹ The lawyer should focus on meetings in which actions relevant to the opinion were taken, scrutinize the substance of the resolutions adopted, and ascertain whether all required procedures were followed.⁵⁰

Certificates of Company Officers

Counsel should obtain certificates of company officers attesting the authenticity and completeness of the charter and bylaws and the completeness of the minute books; confirming that no resolutions have been adopted toward charter or bylaw amendments, merger, or dissolution; certifying that the required consideration has been received for the outstanding stock; and setting forth the names and signatures of incumbent officers (and, sometimes, directors).

HANDLING DEFECTS

If the lawyer learns of a material organizational defect, he or she will almost certainly not be able to solve the problem by delivering a reasoned or qualified opinion or omitting any portion of the standard formula that “the company is a corporation duly organized and validly existing.” Instead, the lawyer will usually seek to have the company correct the defect. Many defects can be cured by a simple step, such as a directors’ vote to elect a treasurer or filing an annual report with the state.

The most difficult defects to correct are those relating to the corporation’s charter. Suppose, for example, the lawyer discovers that the incorporators never met or that the charter was never properly filed. One approach would be to organize a new corporation and transfer the assets of the defective entity to it. This, of course, would require determining who has the power to transfer the assets of the defective entity. Since there is usually no clear answer, the safest course, and the one usually followed, is to locate all the purported incorporators, shareholders, directors, and officers of the defective entity and to obtain their consent to the transfer.

Other difficult defects to cure relate to stock issuance. Suppose, for example, that the lawyer discovers that all of the corporation’s purported stock was issued and sold pursuant to a vote of directors taken at a meeting for which no notice was given and at which a bare quorum, consisting of three of the five directors,

49. Besides records such as those here described, one authority recommends examination of “the Company’s pre-incorporation subscription agreement(s).” Babb, Barnes, *supra* note 1, at 558. It is not stated what bearing the preincorporation agreement has. The normal corporate status opinion should not be understood to include the opinion that the entity has been organized in the manner contemplated by an agreement among the organizers. Babb, Barnes’ reference to subscription agreements probably reflects a provision of the Illinois statute, no longer in effect, which required corporate organizers to be subscribers.

50. Some lawyers feel comfortable under some circumstances in giving an opinion that the company “is a corporation” in sole reliance on the certificate of a state official as to legal existence. See *supra* text accompanying notes 14–17.

was present.⁵¹ One approach would be to have the absent directors sign a waiver of notice; under many statutes a waiver would cure the defect even if executed after the meeting. If the absent directors were unavailable, a new meeting could be held upon proper notice at which the three directors on the scene could ratify the actions they took at the defective meeting. If waivers and ratifications could not be obtained—if, for example, a quorum were not available—another approach would be to elect additional board members. The validity of all the outstanding stock being in doubt, under many state statutes the incorporators would be the correct parties to take such a step. To be on the safe side, however, counsel should also seek the approval of the holders of the purported outstanding shares.

Other steps typically taken to cure material organizational defects include amending the charter and bylaws, filing a correction to the charter⁵² and bylaws, and seeking the assistance of a court.

QUALIFICATION AND GOOD STANDING IN FOREIGN JURISDICTIONS

QUALIFICATION

Lawyers are often asked for an opinion that a corporation or other entity is “qualified to do business in all states in which the ownership of its property or the nature of its business requires such qualification,” or for some similarly broad statement, the gist of which is that the company has qualified everywhere required.⁵³ A more elaborate clause in one fairly recent opinion stated: “The Company . . . is duly qualified . . . as a foreign corporation in each . . . jurisdiction within the United States in which the location of its properties (owned or leased) or the conduct of its business requires such qualification” Most states require entities organized under the laws of other jurisdictions to “qualify to do business” before conducting business or certain other activities in the state.

Opinion recipients seek assurance about qualification to do business because of the adverse consequences of a wrongful failure to qualify. For example, a corporation’s ability to collect its receivables and otherwise enforce its contractual rights may be impaired in those jurisdictions that forbid corporations that

51. Had all of the directors been present, the defect might not have mattered: many corporation statutes provide that presence without objection at a directors’ meeting constitutes waiver of notice. *See, e.g.* Del. Code Ann. tit. 8, § 229 (1983).

52. *See* Revised Model Business Corporation Act § 1.24 (“[a] domestic or foreign corporation may correct a document filed by the secretary of state if the document (1) contains an incorrect statement or (2) was defectively executed, attested, sealed, verified or acknowledged. * * * Articles of correction are effective on the effective date of the document they correct except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, articles of correction are effective when filed”).

53. The opinion is sometimes given about the company’s subsidiaries as well. When there are many subsidiaries, it may be desirable to limit the opinion to the more important ones. *See supra* note 1.

violate the qualification requirement from bringing suit in their courts.⁵⁴ Although the disqualification to sue commonly is removed if the corporation later qualifies to do business, in some states, the corporation must qualify prior to the commencement of the litigation.⁵⁵ In others, notably Mississippi⁵⁶ and Alabama,⁵⁷ tardy qualification is not a complete cure. A failure to qualify can also affect the validity of a corporation's contracts, rendering them void, voidable, or unenforceable.⁵⁸ These are often matters of great concern to opinion recipients. Lenders holding a security interest in the company's receivables, for example, may rightly doubt that the company would (or could be compelled to) attempt a cure in the event of default, dispute, or receivership.⁵⁹ Another concern is the potential liability for state taxes that may accompany a wrongful failure to qualify.⁶⁰ And still another is the possibility, although remote, that fines and

54. Section 15.02 (a) of the Revised Model Business Corporation Act provides that "[a] foreign corporation transacting business in this state without a certificate of authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority." The Wisconsin and Nevada statutes disable the wrongfully unqualified corporation from defending as well as suing. Wisconsin Stat. Ann. § 180.847 (West Supp. 1985); Nev. Rev. Stat. § 80.210 (1979). But judicial decisions have considerably vitiated both of these provisions. See *Bazan v. Kux Machine Co., Inc.*, 52 Wis. 2d 325, 190 N.W.2d 521, 529 (1971) (interpreting the statute in light of the fact that "[a] denial of the right to defend a judicial proceeding raises obvious constitutional objections" and that "[e]very effort will be made to reasonably construe a statute so as to save its constitutionality"); *Scott v. Day-Bristol Consol. Mining Co.*, 37 Nev. 299, 304, 142 P. 625 (1914) ("the plaintiff having sued the defendant as a corporation . . . is deemed to have waived any question of its capacity to defend . . ."). The Colorado Supreme Court has construed the Colorado statutory prohibition against a wrongfully unqualified corporation's maintaining an action as a bar to its advancing a permissive counterclaim, but has implied that a compulsory counterclaim would not be barred. *Levitt Multihousing Corp. v. District Court of El Paso County*, 188 Colo. 360, 364, 534 P.2d 1207 (1975). In *Thomas-CSF Components Corp. v. Hathaway Instruments, Inc.*, 85 F.R.D. 344 (D. N.J. 1980), the court held that the state's bar on counterclaims was "adjective" law and therefore inapplicable in federal court in a diversity case; the court indicated that a bar to a compulsory counterclaim might deny due process. *Id.* at 346-47.

55. See J. Henn & H. Alexander, *supra* note 9, at 232. *Cf.* Revised Model Business Corporation Act § 15.02(a) ("A foreign corporation transacting business in this state may not maintain a proceeding in any court in this state until it obtains a certificate of authority").

56. Miss. Code Ann. § 79-3-247 (1972); *Parker v. Lin-Co Producing Co.*, 197 So. 2d 228, 230 (Miss. 1967) ("In order to avail itself of the state courts to enforce a cause of action, a foreign corporation doing business in this state must have qualified to the business when the cause of action accrued").

57. *Sanjay, Inc. v. Duncan Constr. Co., Inc.*, 445 So. 2d 876, 879 (Ala. 1983).

58. See H. Henn & J. Alexander *supra* note 9, § 101 at 233.

59. Most statutes expressly apply the disqualification to successors and assignees. Section 15.02(b) of the Revised Model Business Corporation Act provides:

[T]he successor to a foreign corporation that transacted business in this state without a certificate of authority and the assignee of a cause of action arising out of that business may not maintain a proceeding based on that cause of action in any court in this state until the foreign corporation or its successor obtains a certificate of authority.

The Delaware statute, however, expressly excludes from its disqualification provision "any successor in interest of such foreign corporation." Del. Code Ann. tit. 8, § 383(a) (1983).

60. In such situations, curing the defect could cause the company to incur substantial state taxes and penalties that otherwise would not have come to the attention of the authorities.

criminal penalties may be imposed on the company and its principals⁶¹ or that corporate insiders may be exposed to personal liability for corporate contracts made or torts committed within the state.⁶²

It is usually a simple matter to determine whether a corporation is qualified in a particular state. States will furnish certificates of qualification, and arrangements to obtain such certificates can be obtained through CT Corporation System and similar lawyer-service companies. A current certificate of this sort is sufficient to support an opinion that the company is qualified in the jurisdiction,⁶³ at least absent knowledge to the contrary.

If is far more difficult, however, for the lawyer to ascertain that a corporation is not required to be qualified in each jurisdiction in which it is not qualified. Such a determination involves a thorough knowledge of the scope and locations of the corporation's business activities. Such knowledge may be easy to obtain when the company is a start-up business still in the research and development phase or when it is a bank operating in one state. When the company's business is complex and widespread, however, the requisite knowledge will be difficult to obtain. The problem is compounded by differences among the states' qualification requirements. Some states have narrow requirements,⁶⁴ but many require qualification even for minimal contacts. Vermont, for example, has a statute providing that "[n]o foreign corporation shall have the right to transact business in this state until it shall have procured a certificate of authority so to do" and defines "doing business" to include "each and every act, power or privilege exercised or enjoyed in this state by a foreign corporation except the mere ownership of real property which is not producing any income, or which is not used in the performance of a corporate function."⁶⁵ One practitioner has "hazard[ed] the guess that very few interstate corporations have qualified everywhere the local law requires. The cost which would be incurred in verifying specific fact situations and legal principles would be staggering if more than a few states are involved."⁶⁶

The lawyer's difficulties cannot readily be overcome by a certificate from a company officer attesting that the company does not do business or own property in any jurisdiction (other than those in which the company is already

61. Section 15.02(d) of the Revised Model Business Corporation Act provides that "[a] foreign corporation is liable for a civil penalty of \$_____ for each day, but not to exceed a total of \$_____ for each year, it transacts business in this state without a certificate of authority."

62. See H. Henn & J. Alexander, *supra* note 9, § 101 at 234. No judicial decision upholding the application of such a penalty more recently than 1967 is cited.

63. Babb, Barnes, *supra* note 1, at 557.

64. The Revised Model Business Corporation Act imposes the requirement on foreign corporations that "transact business" in the state, and does not define that term except to list many activities that do not constitute transacting business. Revised Model Business Corporation Act § 15.01. A similar approach, with very broad exclusions, is taken by W. Va. Code § 31-1-49 (1982).

65. Vermont Stat. Ann. tit. 11, § 2101 (1984). There are constitutional restrictions on how far a state may reach with its qualification requirement, but they are not strict. See *Eli Lilly & Co. v. Sav-on-Drugs, Inc.*, 366 U.S. 276 (1961). A subsequent decision limiting states' power to require qualification is *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974).

66. Bermant, *supra* note 1, at 186.

qualified) in such a way or to such an extent that it would make qualification necessary. A company officer cannot carry an opining lawyer's burden by putting on a lawyer's hat and interpreting legal terms such as "transact business in the state" and "acquire, hold, or dispose of property in the state." The officer is in no position, for example, to judge whether a sale of equipment to a buyer in a particular state constitutes a "disposition" of property in that state.

Nor can the problem readily be solved by relying on the opinion of other counsel. Inside counsel is often asked to opine that qualification is not required in various jurisdictions. Inside counsel, however, will experience the same difficulty in giving this opinion as outside counsel, moderated but not overcome in most instances by his or her greater familiarity with the business. Retaining local counsel for the sole purpose of opining on qualification to do business will rarely be worth the cost.

Opining counsel sometimes seeks to solve the problem by having the company qualify to do business in worrisome jurisdictions. Qualification usually can be accomplished by simply filing and paying a fee. However, it may not be easy to identify all worrisome jurisdictions, and companies sometimes reject this approach because qualification involves consent to service of process in the state and higher visibility to state tax authorities.⁶⁷ The Massachusetts corporate excise tax statute expressly provides that "[t]he qualification to carry on or do business in this state" is an "incident" giving rise to tax.⁶⁸ Qualification in a state that employs unitary taxation may be especially undesirable, since it may give rise to additional taxes based on the operations of affiliates.

Another solution may be to modify the way the company does business. If qualification difficulties arise solely from the possibility that the company is "entering into contracts" in certain jurisdictions, for example, the difficulties may be overcome by changing the place in which contracts are accepted.

The most common solution is to modify the opinion. Materiality limitations are often used—for example, that "the company is qualified to do business in all jurisdictions in which failure to qualify would have a materially adverse effect on its business or financial condition," or that it is qualified wherever it "owns or leases any material properties or conducts any material business." This adds another nonlegal variable, but it may be a reasonable compromise in instances in which the scope of the company's business is easily ascertainable and its operations not substantial in states in which qualification is arguably required. A materiality qualification will not, however, overcome the lawyer's difficulties in all cases.

In some instances the recipient may be satisfied with yet more limited and specific language, for example, by the opinion that "the company is qualified to do business as a foreign corporation in New York and New Jersey and is not required to qualify to do business as a foreign corporation in Delaware or

67. A further drawback to qualifying to do business as a foreign corporation in Wisconsin is the likelihood that doing so subjects shareholders to liability for unpaid wages. *See Joncas v. Krueger*, 61 Wis. 2d 529, 213 N.W.2d 1 (1973).

68. Mass. Gen. Laws Ann. ch. 63, § 39 (West 1984).

Pennsylvania.” If the recipient’s chief concern is with the enforceability of the company’s receivables and other contract rights, such a limited opinion may be acceptable if accompanied by an officer’s certificate stating that the company has no material receivables in or contract rights against persons or businesses located in states other than those identified in the opinion. Another modified form of the opinion states that “the company is qualified in those states in which it is required to do so by reason of its ownership or leasing of real property located in the state or its maintaining an office in the state.” This limits the factual questions to matters that can be supported by an officer’s certificate stating, for example, that “the company does not own or lease any property located in states other than New York, New Jersey, Delaware, and Pennsylvania, nor does it maintain offices in any other states.” It does not, however, address the contract rights concern.

In many instances lawyers will rightly question the recipient’s need for an opinion in jurisdictions in which the company is not qualified, and resist giving even these limited versions of the opinion. The issue to be considered in each case is whether the potential harm to the business from wrongful failure to qualify is substantial enough to require extensive due qualification assurance. Of course, the recipient has a strong need for a due qualification opinion in the jurisdiction whose law applies to the transaction to which the opinion relates,⁶⁹ since that is normally only one state, giving the opinion ought not to pose any great difficulty. Beyond that, however, an opinion in states in which the company is qualified, together with an appropriate officer’s certificate, may be all the recipient really needs. In some instances, further legal comfort can be provided in the form of a side letter from the lawyer on certain legal aspects of qualification to do business comparable to the blue sky memorandum often given in underwritten public offerings.

GOOD STANDING

The opinion language on qualification often is accompanied by a statement that the company is in “good standing” in the foreign jurisdictions as well. A requested opinion, for example, might be that “the company is duly qualified and in good standing in all states in which the ownership of its property or the nature of its business requires such qualification.”⁷⁰

The term “good standing” has no clear meaning in some jurisdictions. Therefore, lawyers are justified in refusing to opine on good standing in foreign jurisdictions that do not give good standing certificates or that have not otherwise assigned a specific meaning to that term.

69. In most cases, this means the jurisdiction in which the contract is entered into or the closing held or the jurisdiction whose law is specified in the contract as applying to the transaction. Wrongful failure to qualify in such a jurisdiction might cast doubt on other portions of the standard opinion relating to the enforceability of the contract.

70. The opinion is sometimes given about the company’s subsidiaries as well. When there are many subsidiaries, it may be desirable to limit the opinion to the more important ones. See *supra* note 1.

The New York County Lawyers' Association has expressed the view that

[a] corporation is in good standing in a jurisdiction other than the jurisdiction of incorporation if it has received government authorization to do business in the jurisdiction (which authorization has not been terminated) and is not so delinquent in its filings of franchise tax returns as to give the state the power to revoke its authorization to do business.⁷¹

This view is unobjectionable to the extent that it merely restates the standard used by a jurisdiction to issue good standing certificates. Within other jurisdictions, however, the objections relating to the opinion on good standing in the state of organization apply. In the absence of a settled meaning in a particular jurisdiction, the words "good standing" afford no warrant for singling out failure to file tax returns from among the many ways a company can jeopardize its authority to do business.⁷²

71. New York Report, *supra* note 1, at 1906-07. Another commentator states that "[generally, a] corporation is in good standing in a jurisdiction other than the jurisdiction of its incorporation if it has received government authorization to do business in the jurisdiction and is not so delinquent in its filings of franchise tax returns that the state *has revoked* its authorization to do business." Halloran, *Rendering Opinions of Law—Opinions in Registered Offerings* in *Opinion Letters of Counsel*, *supra* note 1, at 18-19 (emphasis added) (discussing the opinion of issuer's counsel in a registered issue of securities). This makes the opinion on good standing in other jurisdictions virtually indistinguishable from the opinion on qualification to do business in other jurisdictions.

72. For example, section 15.30 of the Revised Model Business Corporation Act provides that a foreign corporation's certificate of authority may be revoked if:

- (1) the foreign corporation does not deliver its annual report to the secretary of state within 60 days after it is due;
- (2) the foreign corporation does not pay within 60 days after they are due any franchise taxes or penalties imposed by this Act or other law;
- (3) the foreign corporation is without a registered agent or registered office in this state for 60 days or more;
- (4) the foreign corporation does not inform the secretary of state . . . that its registered agent or registered office has changed, that its registered agent has resigned, or that its registered office has been discontinued within 60 days of the change, resignation or discontinuance;
- (5) an incorporator, a director, officer or agent of the foreign corporation signed a document he knew was false in any material respect with intent that the document be delivered to the secretary of state for filing . . .

