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Non-Party Interests In Closing Opinion Letters

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NON-PARTY INTERESTS IN CLOSING OPINION LETTERS

HEATHER HUGHES*

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INTRODUCTION

What do transactional lawyers do when they issue third-party opinion letters in financial transactions? This descriptive question turns out to be quite complex¹—so complex that the normative question of what lawyers should do when they issue opinions, as well as the practical question of what they could do, are difficult to answer.

This Symposium Article reflects upon third-party closing opinions as a central aspect of business law practice that can be opaque to outsiders. The ideas expressed here are exploratory. In the spirit of reflecting on what transactional lawyers do, this contribution considers deal lawyer strategies as potential tools for advancing the interests of non-parties affected by commercial transactions.

Many types of transactions call for opinions of counsel as a condition precedent to closing.² This Symposium Article focuses on certain types of opinions to third parties—namely, closing opinions in commercial finance

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1. See *infra* text accompanying notes 5–10.

2. See generally DONALD W. GLAZER ET AL., *GLAZER & FITZGIBBON ON LEGAL OPINIONS* (2d ed. 2001 & Cum. Supp.); *LEGAL OPINION LETTERS FORMBOOK* (A. Sidney Holderness, Jr. & Brooke Wunnicke eds., 3d ed. 2010); Thomas L. Ambro & Arthur Norman Field, *The Legal Opinion Risk Seminar Papers*, 62 *BUS. LAW.* 397 (2007).

transactions. These opinions assure investors that, among other things, the transaction will be enforceable against the attorney's client at closing.

Attorneys commonly issue closing opinions to parties who have some relationship to the transaction; these are the third parties who request and receive opinions.³ But there are also other parties, with no relationship to the deal and who are not named recipients of any opinion, who can nonetheless take interest in the existence and forms of closing opinion letters. Typical non-parties interested in closing opinions include rating agents or accountants who assess transactions.⁴ After all, opinions signal that a deal conforms to legal standards and should be priced and accounted for as such.

This Symposium Article considers the scope of non-party interests in opinion letters, exploring new kinds of interests in these letters that non-parties could take. It presents—in a preliminary way—the possibility of opinions practice as a site for expressing social or environmental commitments.⁵

Transactional representation, among other things, effectuates private ordering and governance. Deal lawyers translate the initiatives of market actors into legally enforceable contracts and conveyances. Private ordering involves commitment to industry social and environmental standards.⁶ Lawyers for corporations entering into transactions with social or environmental consequences, then, participate in the implementation (or not) of self-regulation or industry norms.

When a type of transaction affects non-parties—such as community or environmental groups—these groups often express their interests by pressuring transacting parties to adhere to their favored norms. These outsiders tend to focus on corporate reputation, creating pressure on companies to behave in accordance with the social and environmental commitments that they express publicly, but may not always implement.

What transactional lawyers do can be opaque to outsiders. This can result in lost opportunities for non-parties as they engage in strategic behavior to enforce industry norms that are central to contemporary, private governance.

For example, lawyers for non-governmental organizations (“NGOs”) concerned with the consequences of transactions could develop forms of

3. See Lipson, *infra* note 14, at 1203.

4. See *id.*

5. This Symposium Article does not intend to express any concrete proposals or normative commitments; the ideas presented below are purely exploratory and would require significant further trouble-shooting and research.

6. See *infra* text accompanying notes 32–35.

legal opinion. Organizations could demand of investors that they receive certain forms of opinion as a way of ensuring compliance with the organizations' standards. Failure to request or to obtain the opinion would signal to non-parties that a deal may be adverse to their interests. This type of exercise might enable interested non-parties to generate information about transactions with a level of specificity that they currently lack.

Part I briefly describes closing opinions in financial transactions. Part II describes non-party interests in closing opinions. Part III relates closing opinions to concepts of private lawmaking and of new governance. Part IV synthesizes the first three parts into a proposition that perhaps non-parties with normative agendas could make strategic use of opinions. It presents one sample context in which this idea could have traction: 'no violation of law' opinions in project finance transactions in which the lender has adopted the Equator Principles.⁷

Opinion letters are about deal details. Giving affected non-parties better understanding of transactional lawyering strategies could enable them to harness the power of specificity with respect to transactions with significant environmental or community effects.

I. OPINION LETTERS IN FINANCE

Third-party closing opinions are letters that attorneys issue on behalf of clients for the benefit of lenders or other parties to a transaction. A clean opinion will assure parties to a transaction that the deal meets certain legal criteria, including enforceability. A qualified opinion will identify legal risks; a reasoned opinion will explain the lawyers' views on identified issues.

Literature on opinions practice discusses third-party closing opinions' (i) value to transactions,⁸ (ii) risk of liability for issuing attorneys,⁹ or (iii) scope and degree of qualification.¹⁰ Scholars discuss both economic and non-economic reasons for opinions practice. In economic terms, these letters can reduce information asymmetries or can function as a type of deal insurance.¹¹ In non-economic terms, some scholars say opinions persist

7. See *infra* note 40.

8. See generally Lipson, *infra* note 14.

9. See *id.* at 1203–04; see generally John P. Freeman, *Symposium: Rethinking Legal Opinion Letters: Current Trends in Legal Opinion Liability*, 1989 COLUM. BUS. L. REV. 235 (1989).

10. See generally DONALD W. GLAZER ET AL., *supra* note 2; LEGAL OPINION LETTERS FORMBOOK, *supra* note 2; Kettering, *infra* note 17.

11. See, e.g., Ronald Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 290–91 (1984); cf. Barnett, *infra* note 16.

because of path dependency and conceptions of lawyers' professional roles in transactions.¹²

Many say that opinions are not cost-justified, and yet they endure as routine features of transactions.¹³ Others observe that it is difficult to determine when a closing opinion is cost-justified, because parties do not know the value of the opinion until after the client incurs the costs of its preparation.¹⁴ If a letter reveals important information about a transaction, it can be well worth its cost to the parties. If it does not, it may cost considerably more than the information provided adds to the deal.¹⁵ Some question the usefulness of opinions' signaling or certification capacity, given that they are often highly qualified and difficult to interpret.¹⁶

Opinions can be so full of caveats and qualifications that their effectiveness is questionable.¹⁷ The scope of exceptions to a legal opinion is often subject to negotiation between the attorney issuing the opinion and the opinion's beneficiaries. While some critics find a highly qualified opinion to be of little value, others find that the uncertainty such an opinion can convey is itself valuable information about a deal.¹⁸

12. See Jonathan C. Lipson, *Price, Path & Pride: Third-Party Closing Opinion Practice Among U.S. Lawyers (A Preliminary Investigation)*, 3 BERKELEY BUS. L.J. 59, 113–15 (2005); Jonathan Macey, *The Limits of Legal Analysis: Using Externalities to Explain Legal Opinions in Structured Finance*, 84 TEX. L. REV. 75, 78 (2005).

13. See BUS. LAW SECTION, STATE BAR OF CAL., REPORT ON THIRD-PARTY REMEDIES OPINIONS 2007 UPDATE (2007), available at <http://apps.americanbar.org/buslaw/tribar/materials/20120820000005.pdf>.

14. Jonathon C. Lipson, *Cost-Benefit Analysis and Third-Party Opinion Practice*, 63 BUS. LAW. 1187, 1198 (2008) (presenting a qualitative empirical analysis of whether and when closing opinions are justified by cost-benefit analyses).

15. See *id.*

16. See Jonathan M. Barnett, *Certification Drag: The Opinion Puzzle and Other Transactional Curiosities*, 33 J. CORP. L. 95, 102–03 (2007) (discussing the wide use of closing opinions in corporate practice even where opinions contribute little informational value).

17. See, e.g., Kenneth C. Kettering, *Securitization and Its Discontents: The Dynamics of Financial Product Development*, 29 CARDOZO L. REV. 1553, 1684 (2008) (noting that opinion letters in securitization opinions can contain so many caveats that they are virtually ineffectual); see also Jeffrey Manns, *Rating Risk After the Subprime Mortgage Crisis: A User Fee Approach for Rating Agency Accountability*, 87 N.C. L. REV. 1011, 1070 n.242, 1080 (2009) (referring to transactional lawyers' opinion letters as attorney work product loaded with *ad nauseum* caveats).

18. Attorneys distinguish qualified opinions from “non-opinions”—opinions that are so extensively qualified that they do not actually give the opinion they purport to render. ABA Guidelines advise against issuing “non-opinion” letters in favor of more explicitly expressing to the client and third party that the attorney cannot give the requested opinion. See, e.g., The ABA Silverado Guidelines, II.C. (4) (1991) (accompanying the 1991 Third-Party Legal Opinion Report and Accord).

Opinions practice has resisted centralized best-practices or regulation. In his qualitative empirical study, Jonathan Lipson finds that opinions practice appears to resist market-based change, and that the main forces behind changing practices are bar associations.¹⁹ Even bar associations, though, have not necessarily succeeded in establishing centrally-articulated standards.²⁰

II. RELATING NON-PARTY INTERESTS TO OPINIONS

Legal opinions serve a signaling function in markets. For example, opinions are integral to the creation of asset-backed securities.²¹ In a securitization, opinions assure investors that a company conveyed assets to a special purpose vehicle (SPV) in a sale—not to secure debt—and that the SPV is a legal entity distinct from the company such that it would not be consolidated with the company in bankruptcy. Attorneys for securitization originators issue opinion letters to investors, but accountants and rating agents often rely on the letters as well. The securitization context generates specific non-parties interested in specific forms of third-party opinion letter.²²

19. See Lipson, *supra* note 12, at 64. Practitioners involved with the American Bar Association Opinion Committee observe that “business law practice has become more national and even international in the years since Silverado”—the 1989 conference where the ABA Section of Business Law attempted (without success) to garner institutional support for opinions standards. See Ambro & Field, *supra* note 2, at 397–98. Therefore, “the consensus that malpractice insurers, financial institutions, opinion recipient interests and rating agencies needed to agree as to customary practice is relatively recent.” *Id.* at 398.

20. See Ambro & Field, *supra* note 2, at 397–98. Various bar association committee reports do address opinions practice. See, e.g., Ops. Comm., Cal. St. B. Bus. L. Sec., *Toward a National Legal Opinion Practice: The California Remedies Opinion Report*, 60 BUS. LAW. 907 (2005); TriBar Op. Comm., *U.C.C. Security Interest Opinions—Revised Article 9*, 58:4 BUS. LAW. 1449 (2003).

21. See generally Kettering, *supra* note 17; Schwarcz, *infra* note 22.

22. Another group of non-parties potentially affected by securitization transaction opinions are investors in originators. Steven Schwarcz has observed that opinion letters can create negative externalities if they mislead investors in originators’ securities. This is a function of an information problem: attorneys issue opinions to assure the bankruptcy remoteness of assets assigned to an SPV, as a legal matter, but then accountants use them for purposes of accounting for transactions as off-balance sheet sales. As Schwarcz observes, investors could learn about contingent recourse in these transactions if they more closely read disclosure statements. Steven L. Schwarcz, *The Limits of Lawyering: Legal Opinions in Structured Finance*, 84 TEX. L. REV. 1, 1, 2, 4, 7 n.33 (2005). Schwarcz is concerned with the effects of off-balance-sheet financing on investors, given investors’ capacities to access and understand information. But the government, not attorneys, he argues, should address the problem that off-balance sheet financing can be opaque to investors.

However, legal scholars writing about a range of transactional law subjects suggest that non-parties have interests in closing opinions.²³ These projects express concern for lawyers' professional responsibility generally and for lawyers as gatekeepers in complex markets.²⁴ Non-parties such as market participants, or parties affected by corporate practices, have interests in third-party opinions in situations where those opinions are supposed to serve a gatekeeping function.

For example, Susan Block-Lieb and Edward Janger write about the need for effective gatekeeping in the market for mortgage-backed securities.²⁵ Lawyers issuing opinions are one form of gatekeeper in this market. To the extent that the market relies upon the quality of gatekeepers, market participants generally are non-parties with interests in the opinions that lawyers issue upon analyzing the legal status of, and level of recourse in, any given issuance.

Peter Margulies also discusses the importance of lawyers as gatekeepers.²⁶ He writes that we should not frame lawyers' professional responsibility and potential liability in terms of the independence that lawyers enjoy.²⁷ Rather, the measure of lawyers' acceptable behavior should fall between the opposing forces of (i) the lawyer's need to build an individual brand and business, and (ii) the collective need for protection from societal harms.²⁸ To the extent that rendering opinions is a crucial aspect of lawyering, Margulies implies a general, non-party interest in closing opinions to the extent that they sanction corporate practices that can cause societal harms in the name of innovation or boundary-pushing.²⁹

William H. Simon has written about the secrecy of opinions, explaining that they are only revealed to the public when a client finds doing so to be in its best interest.³⁰ If lawyers shirk their professional responsibility in the

23. See, e.g., Barnett, *supra* note 16; Schwarcz, *supra* note 22; Kettering, *supra* note 17.

24. See Block-Lieb & Janger, *infra* note 25; Margulies, *infra* note 26.

25. See generally Susan Block-Lieb & Edward Janger, *Demand-Side Gatekeepers in the Market for Home Loans*, 82 TEMP. L. REV. 465 (2009).

26. See Peter Margulies, *Lawyers' Independence and Collective Illegality in Government and Corporate Misconduct, Terrorism, and Organized Crime*, 58 RUTGERS L. REV. 939, 940–41, 947, 955 (2006); cf. Anthony V. Alfieri, *The Fall of Legal Ethics and the Rise of Risk Management*, 94 GEO. L.J. 1909 (2006) (discussing a shift in professional responsibility standards from an ethics-oriented approach with a sense of duty to the public, to a risk management approach focused only on advance clients' private interests and avoiding liability).

27. See Margulies, *supra* note 26, at 939, 940–41, 947, 955.

28. *Id.*

29. *Id.*

30. See William H. Simon, *The Market for Bad Legal Advice: Academic*

context of opinions practice, we are none the wiser because beneficiaries and clients have discretion to not disclose opinions. Regardless of whether one thinks opinions should be publicly available, the point here is that Simon articulates an interest of non-parties in opinions.³¹ To the extent that non-parties cannot see closing opinions, they have no way of knowing the legal nuances of a deal.

This Symposium Article considers how and why certain other kinds of non-parties might take interest in closing opinions. To think about potential new kinds of interests that non-parties might take in opinions, the next section relates opinions practice to private ordering and governance.

III. OPINION LETTERS AND GOVERNANCE

Transactional lawyers work at the heart of private ordering. They translate market actors' normative goals and commitments into legally binding agreements. Transactional lawyers draft the contracts that can impose rules on others, or that can make broadly stated social commitments into legal requirements. Opinions practice relates to the effectiveness and effects of these agreements.

Legal scholars in recent years have studied private ordering and its relationship to lawmaking.³² Governance is not necessarily top-down by the state, but also involves various modes of self-regulation—the private creation and enforcement of norms.

Along with the study of private ordering, scholars are writing about “new governance,” studying the nature of lawmaking where power and regulatory action emanate from multiple state and non-state sources.³³ A key concern of new governance is how to facilitate self-regulation and diverse sources of power without devolving into a mode of de-regulation.³⁴

Professional Responsibility Consulting as an Example, 60 STAN. L. REV. 1555, 1571 (2008).

31. Whether that interest deserves legal protection is a separate question. Some may say that disclosure rules already govern the scope of information that companies should provide, and that people should look to disclosures rather than opinions for information about deals. *Cf.* Schwarcz, *supra* note 22, at 4, 7 nn.33, 30–31.

32. *See, e.g.*, David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371 (2003).

33. *See, e.g.*, Orly Lobel, *New Governance as Regulatory Governance*, in THE OXFORD HANDBOOK OF GOVERNANCE (David Levi-Faur ed., 2012). Scholars can also describe new governance scholarship in methodological terms; it brings together empirical studies of regulation with normative scholarship about the role of the state. *Id.*

34. Lobel, *supra* note 33, at 3; *see also* ANNEISE RILES, COLLATERAL KNOWLEDGE: LEGAL REASONING IN THE GLOBAL FINANCIAL MARKETS (2011) (building on new governance veins of legal scholarship to explore legal techniques used by private actors as a potential site of regulatory innovation).

New governance scholarship certainly does not exclude from study the role of the state in regulation; rather, it explores effective roles for the state amidst the shift towards private governance efforts.³⁵

“Private lawmaking” refers to contexts in which a private body or group creates and imposes rules that govern many others.³⁶ Classic examples of private lawmaking include the activities of the National Conference of Commissioners on Uniform State Laws (“NCCUSL”). NCCUSL, a private body of experts, drafts form legislation—such as the Uniform Commercial Code—that state legislatures adopt.³⁷ Some scholars contend that standard form contracts themselves exemplify private lawmaking because the contract drafter imposes, effectively, legal terms and conditions on a broad class of people.³⁸

Investors often request standardized forms of opinion in a financial transaction. A third-party beneficiary that requires the opinion will send its requested form to the attorney issuing the opinion. But the attorney issuing the opinion does not simply sign and return this form. Rather, the attorney will perform the due diligence necessary to render the opinion, and then consider the risk involved in issuing the opinion in the form the investor requests. The attorney may respond with a new form or with comments altering the investor’s form. So, although initially forms of opinion may appear standardized and routine, it is not unusual to find opinions, as issued, bespoke.

It is beyond the scope of this Symposium Article’s contribution to consider whether opinion letters are “private lawmaking.” Opinions are key pieces of business transactions, and transactions express and implement market actors’ normative commitments. As such, opinions operate at the heart of private ordering.

35. See Lobel, *supra* note 33.

36. See Snyder, *supra* note 32.

37. See generally Alan Schwartz, *The Still Questionable Role of Private Legislatures*, 62 LA. L. REV. 1147 (2002); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995).

38. See W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971). The hallmark of private lawmaking is simply that private actors effectively impose rules on numerous others. A contract between two market actors creates rules the parties can enforce against one another. This is not private lawmaking—the rules of enforceability lie in state contract law—but rather just two parties submitting to a legally enforceable arrangement. See generally Snyder, *supra* note 32.

IV. DEAL LAWYER STRATEGIES AND NORMATIVE COMMITMENTS

Given the power of private ordering, and the role of opinions in financial transactions, to what extent is opinions practice a site for expressing normative commitments? This Symposium Article considers the possible private ordering potential of closing opinions.³⁹

Non-parties with normative agendas could develop forms of opinion that non-parties demand a deal include. Demanding the issuance of an opinion could be a strategy to advance social goals or to improve effects of transactions on natural resources. Failure to obtain certain forms of opinion would provide information—potentially, quite specific information—of interest to affected non-parties.

One context in which this could happen, for example, is the project finance context. Leading international project lenders have engaged in self-regulation by adopting industry standards known as the Equator Principles.⁴⁰ Non-parties, such as NGOs representing the interests of affected resources and populations, are concerned with enforcement of these privately adopted norms.⁴¹ Opinions practice may provide an opportunity to gain information about these transactions that is beneficial to interested non-parties.

Clients may express norms, but then avoid enforcing them. The gap between norms as expressed and actual levels of implementation can emerge in deal documentation. Interested non-parties have no capacity to negotiate contracts and do not have standing to sue if parties include norms in contracts but then abandon them. Attorneys working with interested non-parties may generate a market for a different kind of transactional practice: one in which they develop independent forms, and review industry forms, to affect the levels of implementation of norms that commercial parties may publicly adopt but privately neglect.

39. I have previously related Riles' presentation of legal techniques and regulatory possibilities to opinions practice in prior publication. See Heather Hughes, *Derivatives Traders Do What, Again?*, 30 J.L. & COM. 203, 216–218 (2012) (reviewing RILES, *supra* note 34, and raising the possibility of relating opinions practice in the securitization context to systemic risk regulation).

40. *The Equator Principles: A Financial Industry Benchmark for Determining, Assessing and Managing Social & Environmental Risk in Project Financing*, EQUATOR PRINCIPLES (June 2013), http://www.equator-principles.com/resources/equator_principles_III.pdf [hereinafter *The Equator Principles*]. Numerous major U.S. and foreign lenders, such as Bank of America, ABN AMRO, and Wells Fargo, are Equator Principles financial institutions.

41. See, e.g., ADAPTATION FUND, www.adaptation-fund.org (last visited Nov. 10, 2013); *Equator Principles*, BANKTRACK, www.banktrack.org/show/pages/equator_principles (last visited Dec. 24, 2013).

Questions of transparency and access to legal documentation present a challenge to this kind of strategy; transparency has been an issue of ongoing concern to NGOs.⁴² While this Symposium Article has no quick answer to this challenge, market conventions do contemplate disclosure of certain features of deals to non-parties, such as rating agents. Non-parties concerned with social and environmental impact could potentially achieve an auditing function that becomes conventional in the project finance market, and as such could gain access to transaction details not heretofore contemplated, as other kinds of gatekeepers and auditors do.

Leading project financiers recently announced their support for the Equator Principles III (“EP III”)—the third iteration of the project finance industry’s statement of commitment to improving environmental and social impacts of international development projects.⁴³ Many applaud when banks become Equator Principles Financial Institutions (“EPFIs”), pledging to fund only projects that meet heightened standards. Critics, however, observe that EPFIs do not always require borrowers to comply with the principles.⁴⁴ Also, EPFIs have no obligation to exercise remedies when a project falls out of compliance post-closing.⁴⁵

Equator Principle 8 is titled “Covenants.”⁴⁶ It recognizes the importance of incorporating EP III compliance into financing documentation between EPFIs and project borrowers.⁴⁷ Under Principle 8, EPFIs commit to include covenants in financing documentation requiring the borrower to be in compliance with the principles.⁴⁸

The Equator Principles attempt to hold project borrowers to higher social and environmental standards than local laws could require. The principles cross-reference International Finance Corporation (“IFC”) and other World Bank requirements for projects in various industries.⁴⁹

42. For example, BankTrack (an NGO) has followed and commented on the development and implementation of the Equator Principles since the principles’ inception. BankTrack has targeted the transparency problem at multiple junctures. See, e.g., *Transparency and the Equator Principles: Proposals for EP Bank Disclosure Working Document*, BANKTRACK (Nov. 28, 2004), www.banktrack.org/manage/ems_files/download/transparency_for_the_equator_banks/041128_transparency_for_the_equator_banks.pdf.

43. See *The Equator Principles*, *supra* note 40.

44. See, e.g., Ariel Meyerstein, *Global Private Regulation, Global Finance and the Future of Corporate Human Rights Accountability* (Mar. 9, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2018999.

45. See *The Equator Principles*, *supra* note 40, at 5–6.

46. See *id.* at 10.

47. See *id.* at 5–6.

48. *Id.*

49. See *id.*

What is the relationship between Equator Principles compliance and opinions practice? What form might an opinion from counsel to the project borrower take if its function were to ensure the transaction's compliance with EP III (which requires no violation of applicable environmental laws)? What is the relationship between the fact-finding and auditing that assures compliance, and a legal opinion about compliance?

Typically, a “no violation of law” opinion requires the issuing attorney to state that the client will not violate laws by entering into the subject transaction.⁵⁰ In a project finance transaction, the issuing attorney's client is the project entity—a company formed to own and run a specific project, such as a dam, manufacturing facility, or utility, for example. The third-party recipient of the opinion, again, is the project lender—a bank or syndicate of banks. Many major project lenders are EPFIs. So, the “no violation of law” opinion assures an EPFI that its borrower will not violate the law by performing under the contracts that document their deal.

But consider the following, typical qualification to “no violation of law” opinions:

[W]e express no opinion as to any statutory laws other than statutory laws that lawyers in the State[s] of New York [and STATE] exercising customary professional diligence would reasonably recognize as being applicable to transactions of the type contemplated by the Credit Documents, assuming for such purpose that each Obligor conducts only businesses, and owns only assets, that are not subject to any special regulatory or other legal regime by reason of the type or nature of the business conducted or the assets owned.⁵¹

This qualification raises at least two issues for parties interested in ensuring that projects comply with the Equator Principles. The opinion speaks only to “statutory laws” of the jurisdiction the opinion covers. The various international standards for human rights and environmental compliance with which EPFIs are concerned are not “statutory law” within the meaning of the opinion. Also, the opinion is limited to laws that lawyers in the issuing attorney's jurisdiction “would reasonably recognize as being applicable to transactions of the type contemplated.” A law concerned with environmental quality, for example, would likely fall outside of the scope of this opinion.

A non-party NGO or other group interested in implementation of the Equator Principles could, in theory, draft a form of opinion and

50. See LEGAL OPINION LETTERS FORMBOOK, *supra* note 2.

51. *Id.* at 145.

qualification that recognizes the principles—and the IFC standards—as “law” for purposes of the opinion. The qualification would clarify that the Equator Principles “laws” are recognized as applicable to the transaction. If a non-party demanded that EPFIs request opinions of this form, it is possible the EPFI may do so, leading to better diligence and compliance with the principles. If the EPFI refused to request such an opinion, or the issuing attorney refused to render it, that fact would be information about the transaction that the interested non-party did not previously have. The information may or may not indicate failure to comply with the Equator Principles, but it is information, that could, nonetheless, be of strategic importance.

Lawyers typically assume the underlying facts on which their legal opinion is based. They do not do the fact-finding that underscores an opinion; rather, they expressly rely on representations of others. Rendering a legal opinion, however, can require clients to make factual representations that they may otherwise avoid. Also, attorneys issuing opinions do not (generally speaking) assume facts to be true that they know are false.

Costs associated with issuing opinions are allocated to the company—the client of the attorney issuing the opinion to third parties. Expanding the scope of an opinion in response to a non-party demand raises questions of cost allocation. In theory, if banks commit to EP III, and a corporate debtor seeks project financing from EPFIs, then transaction costs of EP III compliance should be priced into the transaction. However, because EP III adoption does not create legal liabilities,⁵² parties can price EP III compliance out of project finance transactions. The question of allocating costs of the kind of hypothetical closing opinion presented here is a subset of the larger question of costs of implementing EP III standards.

In short, attorneys working with non-party stakeholders could potentially strengthen EP III implementation by creating form documentation that they then demand EPFIs use. This approach may provide a model for other contexts in which deal lawyers can, potentially, help to affect market actors’ level of commitment to environmental and social standards.

Of course, the ideas presented in this Symposium Article would require significant further consideration before taking the form of any concrete proposal or normative agenda. The purpose, here, is to reflect in new ways on what transactional lawyers do—and what they might do.

52. See *The Equator Principles*, *supra* note 40, at 12 (providing a disclaimer to the effect that adoption of the principles creates no liability and that implementation is entirely voluntary).

CONCLUSION

Transactional lawyers work at the nexus of law and markets. Many scholars and lawmakers adhere to the view that markets necessarily precede and outpace regulation.⁵³ Others emphasize the continuity of legal structure and market activity, observing that all private contracts are a function of legal order and require the government for enforcement.⁵⁴ Wherever one falls on this spectrum, deal lawyers are the ones that make legal structure and market movements cohere.

In transactional contexts where a client expresses commitment to certain norms, and non-parties have an interest in the company's adherence to the norms, opinions practice could, possibly, facilitate greater compliance and better information about compliance levels. Non-parties concerned about the effects of transactions could gain from strategically considering transactional lawyers' roles.

53. This view of regulation and markets we associate with Hayek. See RILES, *supra* note 34, at 157–81; Scott Beaulier, Peter J. Boettke, & Christopher J. Coyne, *Knowledge, Economics, and Coordination: Understanding Hayek's Legal Theory*, 1 N.Y.U. J.L. & LIBERTY 209, 209–24 (2004).

54. See, e.g., R. L. Hale, *Law Making by Unofficial Minorities*, 20 COLUM. L. REV. 451 (1920); Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, XV LEGAL STUD. F. 327 (1991).