Supplemental TriBar LLC Opinion Report: Opinions on LLC Membership Interests

By the TriBar Opinion Committee*

The TriBar Opinion Committee’s 2006 report “Third-Party Closing Opinions: Limited Liability Companies” discussed at length three common opinions on limited liability companies (“LLCs”): the opinions on a company’s status as an LLC, its power to enter into the transaction, and its approval of the transaction. 1 That report also addressed, in a more limited way, the opinion on enforceability of LLC operating agreements. 2 This supplemental report discusses opinions on LLC

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* The TriBar Opinion Committee (the “Committee” or “TriBar”) currently includes designees of the following organizations functioning as a single Committee: (i) Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers’ Association; (ii) Corporation Law Committee, New York City Bar; and (iii) Special Committee on Legal Opinions of the Business Law Section, New York State Bar Association. Members of the state bars of California, Delaware, Georgia, North Carolina, Pennsylvania, and Texas and of the Allegheny County (Pittsburgh, PA), Boston, Chicago, and District of Columbia Bar Associations also are members of the Committee. The members of the Committee and the Co-Reporters and Advisers for this report are listed in Appendix A.

This report has not been approved by the governing body or membership of any of the bar associations whose committees or members were involved in its preparation. Accordingly, the views expressed are solely those of TriBar. This report reflects a consensus of the Committee. It does not, however, necessarily reflect the views of individual members or their firms, organizations, or associations on any particular point.

1. See TriBar Opinion Comm., Third-Party Closing Opinions: Limited Liability Companies, 61 Bus. Law. 679 (2006) [hereinafter TriBar 2006 LLC Report]. Because of the widespread practice of organizing LLCs in Delaware and the fact that many jurisdictions have adopted a statutory approach to LLCs similar to Delaware’s, this supplemental report, like the TriBar 2006 LLC Report, uses Delaware LLC law as a paradigm for its analysis. Section 1.0 of the TriBar 2006 LLC Report discusses opinions by non-Delaware lawyers on Delaware LLCs. The discussion in that section also applies to the opinions addressed in this supplemental report.

2. Id. § 6.0, at 692–94. This report uses the term “operating agreement” to refer to what is defined in the Delaware statute as the “limited liability company agreement.” As discussed in section 6.0 of the TriBar 2006 LLC Report, if an enforceability opinion is given on an operating agreement, the opinion covers, unless it states otherwise, all the provisions of the operating agreement. That includes the provisions applicable to LLC Interests.
membership interests ("LLC Interests") and related opinions.

As discussed in the TriBar 2006 LLC Report, LLCs have great flexibility in the governance structures they adopt. Some LLCs are member-managed and others are manager-managed. Member-managed LLCs function much like general partnerships. Manager-managed LLCs, like corporations, may have boards of directors and officers or, like limited partnerships, may be managed by named entities or natural persons. Whatever their governance structure, LLCs often include in their operating agreements provisions addressing the creation of LLC Interests, issuance of LLC Interests, admission of members, payment for LLC Interests, and obligations of members to make contributions to the LLC. Like limited partnerships, LLCs typically have more flexibility than corporations in their governance and capitalization.

Customary practice in preparing and interpreting opinions on LLC Interests is still evolving, as is the wording of opinions on LLC Interests. Some forms follow the approach typically taken in opinions on partnerships, others the approach taken in opinions on corporations, and still others an approach tailored to the language of the applicable LLC statute. In the following sections, this report discusses opinions on LLC Interests and related opinions not discussed in the TriBar 2006 LLC Report and suggests wording for these opinions.

1.0 VALID ISSUANCE OF LLC INTERESTS

Like opinions on corporate stock, opinions on LLC Interests typically state that the LLC Interests have been "validly issued." This opinion requires that the

3. The term “limited liability company interest” is defined in section 18-101(8) of the Delaware Limited Liability Company Act, Del. Code Ann. tit. 6, §§ 18-101 to 18-1109 (2005 & Supp. 2010) [hereinafter Delaware LLC Act], to mean a member’s share of the profits and losses of an LLC and a member's right to receive distributions of the LLCs assets. In Delaware, an LLC may establish more than one series of LLC Interests and more than one class or group of members, in each case with whatever relative rights, powers, and duties the operating agreement provides. See Delaware LLC Act §§ 18-215, 18-302.

Some states, such as New York, use the term “membership interest” in lieu of the term “limited liability company interest” and include in the concept a member's rights, if any, to vote and participate in management of the LLC. An opinion on an LLC formed in a particular state normally uses the same terminology as is used in that state’s LLC statute.

4. When LLC Interests are registered under the Securities Act of 1933, the U.S. Securities and Exchange Commission ("SEC") requires that an opinion stating whether the securities "will, when sold, be legally issued, fully paid and non-assessable" be filed as an exhibit to the registration statement. See infra note 43; Regulation S-K, Item 601, 17 C.F.R. § 229.601(b)(5) (2011); see also Task Force on Sec. Opinions, ABA Section of Bus. Law, Legal Opinions in SEC Filings, 59 Bus. Law. 1505, 1507 (2004) (noting that “validly issued” is an acceptable alternative to “legally issued”). This opinion also may be required by other regulatory bodies.

5. See TriBar 2006 LLC Report, supra note 1, at 689.

6. State corporation statutes often specify the steps a corporation must take to authorize and issue stock and the consideration a corporation must receive for newly issued shares. Compare with sections 18-301, 18-302, and 18-501 of the Delaware LLC Act.

7. This report assumes that the opinions it suggests will be given to recipients who understand or are represented by counsel who understand customary practice concerning the opinions they receive. See TriBar Opinion Comm., Third-Party “Closing” Opinions: A Report of the TriBar Opinion Committee, 53 Bus. Law. 591, 601 & n.24 (1998) [hereinafter TriBar 1998 Report].
LLC be validly existing\(^8\) and confirms that the creation and issuance of the LLC Interests satisfied the requirements of the applicable LLC statute and the LLC’s certificate of formation and operating agreement.\(^9\) In addition, it confirms that the issuance of the LLC Interests complied with any conditions on issuance in the resolution or other action, if any, adopted under the operating agreement approving the issuance,\(^10\) including receipt of the required kind and amount of consideration.\(^11\) As in the corporate context, this opinion requires that the LLC have the power under the applicable LLC statute, its certificate of formation, and its operating agreement to create interests in the LLC having the terms of the LLC Interests covered by the opinion. Thus, the opinion also confirms that the terms of the LLC Interests do not violate the applicable LLC statute, the LLC’s certificate of formation, or the operating agreement.\(^12\)

When giving a validly issued opinion on LLC Interests, opinion preparers customarily review the applicable LLC statute\(^13\) and the LLC’s certificate of formation and operating agreement to identify the requirements for creating\(^14\) and

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8. See TriBar 2006 LLC Report, supra note 1, § 2.0, at 683–87 (discussing opinion that LLC is validly existing). Often, opinion letters containing an opinion on the valid issuance of LLC Interests also contain an opinion on the LLC’s due formation and valid existence.

9. Some operating agreements establish a minimum or maximum number or dollar value of LLC Interests that may be issued. Unlike corporation statutes, which provide for the creation—i.e., authorization—of stock in a corporation’s charter and in most circumstances require the board of directors to approve stock issuances, LLC statutes permit LLCs to specify in their operating agreements what action, if any, must be taken to issue LLC Interests. Operating agreements of LLCs that follow a corporate model often require that managers approve the issuance of LLC Interests. Not all operating agreements specify that any particular action is required to create or issue LLC Interests, leaving that issue to be addressed by the applicable LLC statute or more general provisions in the operating agreement.

10. See TriBar 1998 Report, supra note 7, § 6.2.2, at 649–50 (discussing opinion that stock of a corporation has been “validly issued”).

11. See id. at 649, 651. Opinion preparers usually address receipt of required consideration by relying on an express assumption or a certificate of an appropriate official of the LLC.


13. See TriBar 2006 LLC Report, supra note 1, § 1.0, at 682 (discussing meaning of statement in opinion letter limiting coverage of Delaware law to Delaware LLC Act).

In Delaware, the opinion preparers must, among other things, confirm, if applicable, compliance with section 18-302 of the Delaware LLC Act (which addresses the creation of classes or groups of members and the rights, powers, and duties of those members) and, if the opinion covers a series of LLC Interests, section 18-215 of the Delaware LLC Act (which addresses the creation of series of LLC Interests and sets forth the requirements for limiting the liability of a series). A Delaware LLC has the power to create classes or series of LLC Interests, and to create additional classes or series in the future, only if its operating agreement so provides. When giving a valid issuance opinion on a class or series of LLC Interests, the opinion preparers should review the resolution or other document creating the class or series.

14. Instead of creating a specific number of “authorized” LLC Interests for later issuance, many operating agreements provide for the creation of particular LLC Interests as an incident to their issuance without establishing a limit on the number of LLC Interests that may be created or procedural steps (apart from the steps required for issuance) for creating them.
issuing the LLC Interests. They then confirm that those requirements and those of any resolution or other action have been satisfied.

An opinion that LLC Interests have been validly issued does not address the enforceability of the terms of the LLC Interests. Nor does the opinion address the issuance’s compliance with securities or antitrust laws or the status of the LLC Interests as general intangibles or securities (certificated or uncertificated) under the Uniform Commercial Code. These matters, if addressed at all, would be covered in other opinion paragraphs in the opinion letter.

Besides addressing the valid issuance of shares, opinions on corporate stock normally state that the shares have been “duly authorized,” thereby confirming, among other things, that the shares are part of the corporation’s authorized capital. Sometimes, opinions on LLC Interests similarly state that the LLC Interests have been “duly authorized.” Unlike corporation statutes, however, LLC statutes do not provide for authorized capital or specify the requirements for creating it, and, unlike corporate charters, operating agreements usually do not create a pool of “authorized” LLC Interests from which LLC Interests may be issued from time to time in the future. Thus, the meaning of an opinion that LLC Interests have been duly authorized cannot be determined simply by viewing the opinion as analogous to a duly authorized opinion on corporate stock. Moreover, whatever its precise meaning, the opinion, if given on LLC Interests on which a validly issued opinion is also being given, would only cover matters already covered by the validly issued opinion and thus ordinarily would add nothing of value.

15. Sometimes, the opinion preparers address problems that they identify as they prepare the opinion by arranging for the adoption of an amendment to the operating agreement expressly authorizing the issuance of the LLC Interests.

16. When an approval is required from a member or manager that is not a natural person, the validly issued opinion, like the opinion that an agreement has been “duly authorized,” may be based on an unstated assumption that the member or manager is the type of entity it purports to be and that the member or manager and those acting on its behalf had the power and were authorized to take the action they took. As with any unstated assumption, opinion preparers may not rely on this assumption if reliance is unreasonable under the circumstances in which the opinion is given or they know it to be false. See TriBar 1998 Report, supra note 7, §§ 2.1.4, 2.3(c), at 610, 616. To avoid any misunderstanding, some opinion givers choose to state the assumption expressly. See TriBar 2006 LLC Report, supra note 1, at 689 n.52.


19. See U.C.C. §§ 8-102(a)(15), 8-103 (2008). The opinion does not address the status of the LLC Interests under the Uniform Commercial Code even if the operating agreement states that the LLC Interests are securities under Article 8 of the Uniform Commercial Code.


21. The validly issued opinion on corporate stock could not be given if the stock were not duly authorized. See TriBar 1998 Report, supra note 7, § 6.2.2, at 649–50.
2.0 Admission of Purchasers of LLC Interests as Members of the LLC

An opinion on admission of purchasers of LLC Interests as members is similar to the opinion often given to purchasers of limited partnership interests confirming their admission as limited partners. Unless otherwise provided in an LLC’s certificate of formation or operating agreement, only members are permitted to exercise membership rights.22

Under many state LLC statutes, including Delaware’s,23 purchasing or otherwise acquiring an LLC Interest does not by itself make a person a member.24 Instead, LLC statutes typically require that specified conditions be satisfied for a person to become a member unless an LLC’s operating agreement (and sometimes its certificate of formation) otherwise provides. LLC operating agreements often specify conditions for admission of members,25 sometimes establishing different requirements for admission of members when the LLC is formed and at a later time.26 An opinion that the purchasers of the LLC Interests have been duly admitted as members of the LLC means that the purchasers have been admitted as members of the LLC in compliance with the requirements, if any, of the LLC statute under which the LLC was formed27 and the requirements, if any, of the LLC’s operating agreement (and, depending on the state, its certificate of formation).

22. For example, in Delaware, the assignee of a member’s LLC Interest has no right to “participate in the management of the business and affairs” of an LLC except as provided either in the operating agreement or, unless otherwise provided in the operating agreement, by the affirmative vote or written consent of all members of the LLC. See Delaware LLC Act § 18-702, DEL. CODE ANN. tit. 6, § 18-702 (2005 & Supp. 2010).

23. The principal provisions of the Delaware LLC Act relating to the admission of members are sections 18-101(7), 18-301, 18-702, and 18-704. Those provisions are similar to the provisions relating to the admission of limited partners under the Delaware Revised Uniform Limited Partnership Act. In Delaware, a person can be admitted as a member, and become bound by an operating agreement, without executing an operating agreement if the operating agreement contains other conditions for admission and the person satisfies those conditions. See Delaware LLC Act § 18-101(7). Different rules for admission of members may apply in the case of a merger, conversion, or domestication. See Delaware LLC Act § 18-301(b)(3), 18-301(c).

24. For example, under the Delaware LLC Act, unless otherwise provided in the operating agreement, an LLC Interest is assignable in whole or in part, but the assignee of an LLC Interest is admitted as a member only as provided in the operating agreement or, unless otherwise provided in the operating agreement, upon the affirmative vote or written consent of all members of the LLC. See Delaware LLC Act §§ 18-301(b), 18-702, 18-704.

25. See, e.g., Delaware LLC Act § 18-301(a), (b).

26. For example, an operating agreement could specify as conditions to a person being admitted as a member after the LLC is formed that the person (i) execute the operating agreement and (ii) be listed as a member on a schedule to the operating agreement. In such a case, the opinion preparers would be required to confirm that those conditions have been satisfied or rely on an express assumption to that effect. LLC statutes also may contain different provisions for admission of a person who invests in an LLC and a person who acquires outstanding LLC Interests. See Delaware LLC Act § 18-301(b).

27. One requirement for admission as a member is that the person fit within one of the categories of persons who are permitted to be members under the applicable LLC statute. See TriBar 2006 LLC Report, supra note 1, at 684 n.28. Section 18-101(11) of the Delaware LLC Act defines “member” as a
Subscription agreements for LLC Interests\textsuperscript{28} sometimes set forth conditions on the admission of purchasers as members. An opinion that purchasers have been admitted as members covers compliance with those conditions when they are incorporated in or otherwise are made part of the operating agreement. The LLC statutes of some states, such as Delaware, do not expressly require that conditions on admission that are not part of the operating agreement be satisfied for a purchaser to become a member.\textsuperscript{29} Nevertheless, even in such a case, some opinion givers, to avoid any misunderstanding, either expressly assume in their opinion letters that the conditions on admission of members have been satisfied or state that they have relied on a certificate confirming compliance with those conditions.\textsuperscript{30}

An opinion that a person or entity has been admitted as a member of an LLC is not an opinion that (i) the LLC or its other members can enforce the member’s obligations under the operating agreement or (ii) if the member is an entity rather than a natural person, that it has the power to be a member under the law under which it was formed.\textsuperscript{31}

\section*{3.0 Obligations of Purchasers}

When LLC Interests are first issued, purchasers often request an opinion on their obligation to make payments and contributions to the LLC in connection with their purchase and ownership of LLC Interests. A suggested form of that opinion is discussed in section 3.1 below. Purchasers also sometimes request that the opinion in section 3.1 be supplemented by an opinion regarding their liability

\textsuperscript{28} Not all sales of LLC Interests involve the use of subscription agreements. Their use depends in large measure on the type of transaction. Investment funds often use subscription agreements when issuing LLC Interests.

\textsuperscript{29} See Delaware LLC Act § 18-301, DEL. CODE ANN. tit. 6, 18-301 (2005 & Supp. 2010). If the LLC statute of a state makes satisfaction of requirements in a subscription agreement a condition for admission of the purchaser as a member, the opinion would cover compliance with those requirements (and opinion preparers would need to confirm that the requirements have been met or assume that the requirements have been satisfied or validly waived).

\textsuperscript{30} Even though compliance with a condition for admission in a subscription agreement may not be required for a purchaser to be admitted as a member, if the opinion preparers are aware that a condition has not been satisfied or waived, they often will bring that to the attention of their client and consider whether to disclose the issue in their opinion letter or, in some circumstances, whether to deliver an opinion letter at all.

\textsuperscript{31} See TriBar 2006 LLC Report, supra note 1, at 689 n.52 (entities); see also TriBar 1998 Report, supra note 7, at 615 (natural persons).
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3.1 PAYMENTS AND CONTRIBUTIONS

Opinions regarding the obligations of purchasers to make payments and contributions to the LLC in connection with their purchase and ownership of LLC Interests currently take a variety of forms. Some, tracking the opinion normally given on corporate stock, state that the LLC Interests are “fully paid and nonassessable.”

Others adopt a different approach, one that is similar to that taken in opinions on interests in limited partnerships. For the reasons discussed below, the Committee suggests that opinion givers consider adopting the following form of opinion on purchasers’ obligations to make payments and contributions to the LLC:

Under [name of LLC statute under which LLC was formed], Purchasers have no obligation to make further payments for their purchase of LLC Interests or contributions to LLC solely by reason of their ownership [or their status as members of LLC] [except as provided in their Subscription Agreements or

32. This form of opinion is discussed in the last paragraph of this subsection.

33. The suggested form of opinion assumes that the terms “LLC,” “Purchasers,” “Holders” (if applicable), “LLC Interests,” “Subscription Agreements,” and “Operating Agreement” are defined previously in the opinion letter. The references to those terms in the opinion should be modified to reflect the names assigned to them in the transaction on which the opinion is being given.

34. When non-Delaware lawyers give opinions on Delaware LLCs, they normally limit their coverage of Delaware law to the Delaware LLC Act (just as they limit their coverage of Delaware law to the Delaware General Corporation Law when giving opinions on Delaware corporations). See TriBar 2006 LLC Report, supra note 1, at 681–82 (discussing meaning of statement in opinion letter limiting coverage of Delaware law to Delaware LLC Act). When an opinion letter limits its coverage of Delaware law to the Delaware LLC Act, that limitation applies to all the opinions in the opinion letter and, therefore, the language at the beginning of the suggested form of opinion (i.e., the introductory clause that begins with the word “Under”) is not needed to exclude from the opinion’s coverage obligations that arise under Delaware law apart from the Delaware LLC Act. However, that language would be needed to exclude from the opinion obligations that may arise under federal law, the law of another state (i.e., a state other than Delaware), or both, if they also are covered by the opinion letter and are not excluded for some other reason. See ABA Opinion Principles, supra note 18, § II, at 832–33.

When giving opinions on Delaware LLCs, Delaware lawyers typically cover Delaware law generally and, if they were to take that approach when giving the suggested form of opinion, would omit from the opinion the limitation on the opinion’s coverage to the Delaware LLC Act. Lawyers in states other than Delaware giving the suggested form of opinion on an LLC formed in their state will need to decide whether to limit the coverage of the opinion to their state’s LLC statute or to cover obligations arising under their state’s law generally.

35. In appropriate situations, “Holders” may be substituted for “Purchasers.”

36. The word “further” should be deleted if the opinion is being given before Purchasers have made any payments or contributions.

37. As discussed in section 2.0, in Delaware, Purchasers can acquire LLC Interests without becoming members of the LLC. The word “ownership” in the suggested form of opinion covers obligations of holders of LLC Interests who are not members as well as those who are members. Under section 18-702(d) of the Delaware LLC Act, holders of LLC Interests who are not members may still have obligations to make contributions to the LLC if they agree to make them (for example, in their Subscription Agreements) or the Operating Agreement so provides.

38. When all Purchasers are becoming members, opinion givers may choose to include these words (e.g., “or their status as members of LLC”) in the opinion. If some but not all Purchasers are becoming members, the phrase “if applicable, their status as members of LLC” could be added.
the Operating Agreement\textsuperscript{39,40,41} [and except for their obligation to repay any funds wrongfully distributed to them].\textsuperscript{42,43}

The bracketed exception to this opinion for obligations arising under the subscription agreements and the operating agreement excludes from the opinion’s coverage purchasers’ obligations to make future payments or contributions to the LLC under those documents.\textsuperscript{44} Often, purchasers of LLC Interests in pri-


\textsuperscript{40.} To deal with the possibility that Purchasers have agreed to make payments or contributions apart from their Subscription Agreements and the Operating Agreement, opinion givers often include in the opinion letter an express assumption that Purchasers are not parties to any agreements other than their Subscription Agreements and the Operating Agreement that are inconsistent with the opinion or rely on a certificate to that effect. An alternative is to add the phrase “or as they otherwise may have agreed” at the end of the suggested form of opinion.

\textsuperscript{41.} For the reasons discussed in the text, when this bracketed exception is included, the suggested form of opinion does not require the opinion preparers to identify particular obligations to make payments and contributions under Purchasers’ Subscription Agreements and the Operating Agreement. If coverage of those obligations is desired, see the second to last paragraph of section 3.1 of this report. If the Subscription Agreements and the Operating Agreement do not impose any obligations to make further payments or contributions, the bracketed exception may be deleted (as is done, for example, in the form of Exhibit 5 opinion suggested in note 43).

\textsuperscript{42.} When giving opinions on Delaware LLCs, some opinion givers, including many Delaware lawyers, include the bracketed exception for wrongful distributions out of concern that the provision of the Delaware LLC Act (section 18-303(a)) exempting members from personal liability for liabilities of the LLC begins with the phrase “Except as otherwise provided [in the Delaware LLC Act]” and thus might be read to exclude from the exemption provided by that provision the return obligations of members set forth in sections 18-607(b) and 18-804(c) of the Delaware LLC Act. Delaware lawyers also may include an exception for repayment obligations because their opinions often are not limited to the Delaware LLC Act and, without that limitation, the suggested form of opinion could be read to cover obligations to repay funds to the LLC that arise under other Delaware statutes such as Delaware’s fraudulent transfer statute. See supra note 34; see, e.g., Delaware Uniform Fraudulent Transfer Act, Del. Code Ann. tit. 6, §§ 1301–1312 (2005 & Supp. 2010). Other opinion givers do not include this exception because they do not regard the obligation under the Delaware LLC Act to repay wrongful distributions under sections 18-607(b) and 18-804(c) as being covered by the opinion, viewing that obligation as not being solely attributable to ownership of LLC Interests (or status as a member) and observing that it also does not satisfy the “solely” test because it depends on a recipient’s knowledge that the distribution is unlawful. In the Committee’s view, an express exception for the obligation of members to repay wrongful distributions is not necessary, but its inclusion is not objectionable.

\textsuperscript{43.} If included in an opinion letter filed as Exhibit 5 to a registration statement under the Securities Act of 1933, the suggested form of opinion could be modified to read as follows:

Upon issuance by the LLC against payment as contemplated by the Registration Statement and Prospectus, the LLC Interests will be validly issued, and holders of LLC Interests will have no obligation to make any further payments for the purchase of the LLC Interests or contributions to the LLC solely by reason of their ownership of LLC Interests.

The reference to the LLC statute at the beginning of the suggested form of opinion in the text has not been included in the foregoing opinion based on the assumption that the opinion is being given by Delaware counsel or that the opinion’s coverage already has been limited to the Delaware LLC Act by the opinion letter’s coverage limitation. See supra note 34. The bracketed exception for obligations arising under Subscription Agreements and the Operating Agreement near the end of the suggested form of opinion in the text has not been included because following a public offering holders of LLC Interests normally will have no obligation to make payments or contributions under those agreements. For whether or not to include the bracketed exception for wrongful distributions included at the end of the suggested form of opinion in the text, see supra note 42.

\textsuperscript{44.} In a transaction in which purchasers are paying the full purchase price at the closing and are not subject to any such obligations, this exception may be deleted. See supra note 41.
vately held LLCs agree in their subscription agreements or otherwise are obligated under the LLC’s operating agreement to make contributions to the LLC after the closing, for example, to satisfy capital calls or to provide funding for a specified event such as the acquisition by the LLC of a particular business or property. Use of the bracketed exception is premised on the notion that purchasers should not need a third-party opinion on factual matters that they (or their counsel) can readily determine for themselves by reading the LLC’s operating agreement and their subscription agreements. It thus gives the opinion preparers the responsibility to consider whether under the law covered by the opinion, apart from the operating agreement and purchasers’ subscription agreements, purchasers are subject to any requirements following the closing to make payments for their LLC Interests or contributions solely by reason of their ownership of LLC Interests and leaves to purchasers the responsibility for knowing what their obligations are to make payments and contributions under their subscription agreements and the operating agreement. Not covering those obligations eliminates the need for what, in many circumstances, could be numerous exceptions to the opinion.

Opinion recipients sometimes ask opinion givers to identify the particular obligations purchasers have under the operating agreement and their subscription agreements to make payments and contributions otherwise excluded from the opinion by the bracketed exception. To do so, the opinion preparers could delete the bracketed exception and instead refer to the specific sections of the operating agreement and the subscription agreements that impose obligations to make further payments or contributions (i.e., “except as provided in Sections __, __ and __ of the Operating Agreement and Section __ of the Subscription Agreements”).

The Committee is suggesting that opinion givers provide recipients the form of opinion set forth above rather than an opinion, worded like the opinion ordinarily given on corporate stock, that LLC Interests are “fully paid and nonassessable.” An opinion using the words “fully paid and nonassessable” standing alone does not clearly convey what it is intended to cover, and the Committee believes that the continued use of “fully paid and nonassessable” in the LLC

45. Out of an abundance of caution, some opinion givers have included an exception in similar opinions for particular obligations of members under the operating agreement such as the obligation to pay for copies of books and records of the LLC if the member makes a demand for them and to pay for costs the LLC incurs to transfer LLC Interests to an assignee. Because these obligations are not obligations to make payments for the purchase of LLC Interests or contributions solely by reason of ownership of LLC Interests, an exception for them is not necessary even if the bracketed exception is not included.

46. See infra note 55 (regarding statutory provisions outside the applicable LLC statute that impose obligations on purchasers or members that are excluded from the coverage of the suggested form of opinion); cf. TriBar 1998 Report, supra note 7, at 651 (pointing out that although section 630 of the New York Business Corporation Law “is not strictly an assessment statute . . . many lawyers make express reference to it in opinions on the nonassessability of stock of privately-held New York corporations”).
context should be discouraged because those words typically are not defined in LLC statutes\(^{47}\) and do not have a generally understood meaning with respect to LLC Interests.\(^{48}\)

### 3.2 Liability to Third Parties

As a supplement to the opinion discussed in section 3.1, purchasers of LLC Interests sometimes request an opinion, analogous to the opinion often requested by purchasers of limited partnership interests, that as members of the LLC they will have no personal liability to third parties for debts, obligations, and liabilities of the LLC. This opinion covers a subject that is not normally addressed in opinions given on corporations, and the Committee is hopeful that, over time, as opinion recipients become more comfortable with the protections provided them by LLC statutes\(^{49}\) and opinion givers focus more closely on the issues discussed in this section, opinions on the personal liability of LLC members to third parties for liabilities of the LLC will cease to be requested or given. As matters now stand, the opinion, when given, normally does not take the form of a stand-alone opinion but is combined with the opinion discussed in section 3.1. The Committee suggests that the combined opinion be worded as follows:

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\(^{47}\) This is in contrast to many state corporation statutes, which define the words “fully paid” and “nonassessable.” See, e.g., Del. Code Ann. tit. 8, § 152 (Supp. 2010) (“The board of directors may authorize capital stock to be issued for consideration consisting of cash, any tangible or intangible property or any benefit to the corporation, or any combination thereof. In the absence of actual fraud in the transaction, the judgment of the directors as to the value of such consideration shall be conclusive. The capital stock so issued shall be deemed to be fully paid and nonassessable stock upon receipt by the corporation of such consideration . . . .”).

\(^{48}\) As the Delaware Court of Chancery has pointed out, the underpinnings of the law governing corporations and other entities are different. CML V, LLC v. Bax, 6 A.3d 238, 249–50 (Del. Ch. 2010) (explaining that “[b]ecause the conceptual underpinnings of the corporation law and Delaware’s . . . [LLC] law are different, courts should be wary of uncritically importing requirements from the [Delaware General Corporation Law] into the . . . [Delaware LLC] context”). Thus, lawyers who give “fully paid and nonassessable” opinions on LLC Interests should be sensitive to the contractual as opposed to statutory nature of LLC Interests and should not automatically assume that “fully paid and nonassessable” has the same meaning with regard to LLC Interests that it has in the corporate context. In view of the uncertainty as to its meaning, the Committee believes that the safest approach when opinion preparers give an opinion that LLC Interests are “fully paid and nonassessable” is for them to do the same work to support it as they would for the form of opinion suggested in the text.

\(^{49}\) Section 18-303(a) of the Delaware LLC Act provides, “Except as otherwise provided by [the Delaware LLC Act], the debts, obligations and liabilities of [an LLC], whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the [LLC], and no member or manager . . . shall be obligated personally for any such debt, obligation or liability of the [LLC] solely by reason of being a member or acting as a manager of the [LLC].” Del. Code Ann. tit. 6, § 18-303(a) (2005).

Because this opinion covers matters not addressed by a standard opinion on the stock of a corporation, it is not required to be included in an opinion on LLC Interests delivered as Exhibit 5 to a registration statement under the Securities Act of 1933. See supra note 43.
Under [name of LLC statute under which LLC was formed] (the “Act”), Purchasers have no obligation to make further payments for their purchase of LLC Interests or contributions to LLC solely by reason of their ownership and no personal liability for the debts, obligations, and liabilities of LLC, whether arising in contract, tort, or otherwise, solely by reason of being members of LLC [except in each case as provided in their Subscription Agreements or the Operating Agreement] [and except for their obligation to repay any funds wrongfully distributed to them].

50. See supra note 34 (regarding inclusion of an express limitation on the opinion’s coverage to the applicable LLC statute).
51. In appropriate circumstances, “Purchasers” may be changed to “Holders.”
52. The word “further” should be deleted if the opinion is being given before Purchasers have made any payments or contributions.
53. See supra note 37.
54. See supra note 38.
55. By its terms, the suggested form of opinion does not address the personal liability of Purchasers (or, if changed, Holders) who are not members. See supra section 2.0. If an assignee of an LLC Interest is not admitted as a member, under section 18-702(d) of the Delaware LLC Act the assignee may still have personal liability as a member for the debts, obligations, or liabilities of the LLC if the assignee otherwise agrees, for example in an assumption agreement, or the operating agreement otherwise provides. Nevertheless, opinions are rarely requested or given on the personal liability of holders of LLC Interests who are not members for the debts, obligations, or liabilities of an LLC.

On occasion, a state may have a statutory provision, outside the LLC Act referred to in the opinion, that imposes personal liability on LLC members solely in that capacity for an obligation of the LLC. See, e.g., N.Y. TAX LAW § 1131(1) (McKinney 2008) (imposing liability on LLC members for New York sales taxes not remitted by LLC to state tax authorities). Although not technically required to do so, some opinion preparers, if aware of such a provision, may choose, depending on the circumstances (for example when the opinion letter generally covers the law of the state with that provision), to refer to the provision in the opinion letter or otherwise to bring it to the attention of the recipient or its counsel.

56. The bracketed exception for liability of members under their Subscription Agreements and the Operating Agreement may be omitted (at least from opinions on Delaware LLCs) if the Subscription Agreements and Operating Agreement do not require the future payments or contributions to the LLC and do not make members personally liable for the debts, obligations, or liabilities of the LLC.
57. Although LLC statutes uniformly protect members from liability for the debts and other obligations of an LLC, some LLC statutes, including the Delaware LLC Act, expressly permit LLCs in their operating agreements and members in other agreements to override the statutory protection. See, e.g., Delaware LLC Act § 303(b), DEL. CODE ANN. tit. 6, § 303(b) (2005 & Supp. 2010). The Delaware LLC Act expressly permits a member or manager under an operating agreement, or under another agreement, to agree to be obligated personally for any or all of the debts, obligations, and liabilities of an LLC. Id.; see Thomas v. Hobbs, C.A. No. 04C-02-010 RFS, 2005 WL 1653947, at *2–3 (Del. Super. Ct. Apr. 27, 2005) (noting that member may have personal liability when member executes contract on his own behalf rather than on behalf of the LLC and when member agrees to be obligated personally for the obligations of the LLC).

As in the case of the suggested form of opinion in section 3.1, opinion givers often deal with the possibility that members may have agreed, apart from their Subscription Agreements or Operating Agreement, to be personally liable for debts, obligations, or liabilities of the LLC by relying on an express assumption in the opinion letter that, apart from their Subscription Agreements and Operating Agreement, members have not entered into any agreements (which would include agreements delivered to the opinion preparers but not identified to them as being relevant) that are inconsistent with the opinion, by relying on a certificate to that effect or by adding the words “or as they otherwise may have agreed” as an exception at the end of the opinion. See supra note 40.
58. See supra note 42.
As in the case of the suggested form of opinion in section 3.1, the exception in brackets near the end of the suggested form of opinion in this section 3.2—i.e., the exception excluding from the opinion’s coverage the liability of purchasers under their subscription agreements and the operating agreement for the debts, obligations, and liabilities of the LLC—has the practical effect, as discussed in section 3.1, of leaving to each opinion recipient responsibility for knowing its obligations under its subscription agreement and the operating agreement.59 Again, as with the suggested form of opinion in section 3.1, if opinion recipients want the opinion to identify purchasers’ personal liability (if any) under their subscription agreements and the operating agreement to third parties for the debts, obligations, and liabilities of the LLC, that can be done by adding appropriate language along the lines discussed in the second to last paragraph of section 3.1.

The phrase “solely by reason of being members” in the suggested form of opinion appears in section 18-303(a) of the Delaware LLC Act,60 and its inclusion in the opinion together with the express reference in the opinion to the Act61 is intended to limit the coverage of the opinion to the effect of the Act. In other states the opinion should be tailored to the terminology of the comparable provision of the applicable LLC statute.

Some opinion givers historically have included more exceptions than are set forth in the suggested form of opinion. The Committee believes that many of these exceptions, such as the exception sometimes included for the liability of a member for the member’s own conduct or acts, are unnecessary because they do not relate to liabilities attributable solely to a person’s status as a member. However, even if not required, opinion preparers may wish to include language in the opinion such as that quoted in the last paragraph of this section that makes the limited coverage of the opinion clear.

An opinion on purchasers’ personal liability for debts, obligations, and liabilities of the LLC that like the suggested form of opinion is limited to liability solely by reason of their status as members does not address the liabilities that state and federal laws, such as securities and environmental laws, impose on controlling persons of an entity because those liabilities derive from a status that is not solely that of being

59. See supra note 41.

60. The protection from personal liability for obligations of the LLC provided by section 18-303 of the Delaware LLC Act does not extend to liability of members for their own tortious or wrongful conduct or acts. See Spanish Tiles Ltd. v. Hensey, C.A. No. 05C-07-025 RFS, 2009 WL 86609, at *2 (Del. Super. Ct. Jan. 7, 2009) (applying personal participation doctrine from corporate case law to LLC and noting that individual liability attaches only when an officer “directed, ordered, ratified, approved or consented to the tortious act in question” (quoting Brasby v. Morris, C.A. No. 05C-10-022-RFS, 2007 WL 949485, at *8 (Del. Super. Ct. Mar. 29, 2007))); see also Pepsi-Cola Bottling Co. of Salisbury, Md. v. Handy, No. 1973-5, 2000 WL 364199, at *3 (Del. Ch. Mar. 15, 2000) (pointing out that the phrase “solely by reason of being a member or acting as a manager” implies that situations may arise in which members are not shielded by section 18-303 of the Delaware LLC Act). The suggested form of opinion does not cover liability for a member’s own tortious or wrongful conduct or acts. See generally Elizabeth S. Miller, Are There Limits on Limited Liability? Owner Liability Protection and Piercing the Veil of Texas Business Entities, 43 TEX. J. BUS. L. 406 (2009) (discussing various ways members may be personally liable for obligations of an LLC).

61. See supra note 34 (regarding inclusion of an express reference to the applicable LLC statute).
a member. In addition, the opinion does not address the liability of purchasers under a piercing-the-veil, alter ego, or similar theory, the liability of purchasers for their tortious or wrongful conduct (which is liability for their own conduct and not liability solely by reason of their being members), or their liability for actions they take in some other capacity, for example, as managers. Although unnecessary, to avoid any misunderstanding when giving an opinion that addresses the personal liability of purchasers to third parties for obligations of the LLC, opinion givers may choose to include the following in their opinion letters:

The phrase “solely by reason of being a member” in opinion paragraph ___ is taken from [insert applicable section of applicable LLC statute] and, together with the reference in the opinion to the Act, has been included to make clear that the opinion does not cover personal liability that a Purchaser may have that is not attributable solely to a Purchaser’s status as a member, such as the personal liability a Purchaser may incur as a result of (i) a Purchaser’s status as a controlling person under the securities laws, environmental laws, or other laws, (ii) a Purchaser’s service in another capacity, for example, as a manager or an officer of the LLC, (iii) a Purchaser’s own tortious or wrongful conduct, or (iv) application of a piercing-the-veil or similar doctrine.

**Conclusion**

This report discusses and suggests specific language for opinions on the issuance of LLC Interests, the admission of purchasers of LLC Interests as members of the LLC, the obligations of purchasers of LLC Interests to make payments and contributions to the LLC, and the personal liability of purchasers to creditors of the LLC for the LLC’s debts, obligations, and liabilities. The suggested forms of opinion are tailored to the particular nature of LLCs. This report should be read together with the TriBar 2006 LLC Report.

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62. See supra note 60.
63. Even though an opinion is correct on its face, circumstances may exist that lead the opinion preparers to decline to give it. See TriBar 1998 Report, supra note 7, § 1.4(d), at 602–03 (including box on page 603).
APPENDIX A

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