THIRD-PARTY CLOSING OPINIONS:
LIMITED LIABILITY COMPANIES AND PARTNERSHIPS

The Partnerships and Limited Liability Companies Committee and The Opinions Committee of the Business Law Section of The State Bar of California
Third-Party Closing Opinions: Limited Liability Companies and Partnerships

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and
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The State Bar of California

December 9, 2016
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I. INTRODUCTION

A. Purpose and Scope of this Report


The Prior Reports, together with the Remedies Report, Bus. Trans. Report, and other reports are included in the 2007 compendium entitled “California Opinion Reports,” published by the BLS.

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The Legal Opinions Committee of the Business Law Section of the American Bar Association (the “ABA Legal Opinions Committee”) also plays an influential role in opinion practice. Two of its cited publications are its Legal Opinion Principles, 53 Bus. Law. 831 (1998) (the “ABA Legal Opinion Principles”), and its Guidelines for the Preparation of Closing Opinions, 57 Bus. Law. 875 (2002) (“ABA Legal Opinion Guidelines”). Both of these publications are also available on the ABA Legal Opinion Committee’s website. See note 3.

The reports of TriBar, the ABA Legal Opinions Committee, and the BLS’ Opinions Committee all aim to reflect customary practice as the foundation for opinion practice in the United States. Customary practice is reflected in the reports of each of these organizations, and has been recognized as the foundation of opinion practice by other bar organizations, many of which (including the BLS) have adopted the Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions, 63 Bus. Law. 1277 (2008). In an effort to build on this Statement, the ABA Legal Opinions Committee and the Working Group on Legal Opinions Foundation have prepared an exposure draft of their proposed Statement on Opinion Practices, which, if adopted,
would supplant the ABA Legal Opinion Principles and a portion of the ABA Legal Opinion Guidelines. The *Statement on Opinion Practices* is accessible on the ABA Legal Opinion Committee's website. See note 3.

The Committees intend this report to be interpreted consistently with customary practice, as reflected generally across the United States.

The objective of this report is threefold: (i) to update the Prior Reports to reflect developments in the law and legal opinion practice since the Prior Reports were published; (ii) to present in detail matters unique to California limited liability companies ("LLCs") and partnerships when rendering third-party closing opinions on behalf of these entities; and (iii) to summarize briefly certain basic aspects of legal opinion practice, with extensive cross-references to the California and other legal opinion resources cited above, for the benefit of attorneys representing LLCs or partnerships who may be unfamiliar with or need to revisit those basics.

Cautionary Note: Although this report summarizes the basics of legal opinion practice, it does not attempt to restate in full the general principles of legal opinion practice, such as the definition and purpose of a legal opinion, the legal standards applicable to the preparation of a closing opinion, and the customary diligence undertaken in the preparation of an opinion letter. For these principles, the reader is referred to the Bus. Trans. Report at 4–39 and the TriBar Report at §§ 1.1–2.6.1, 53 Bus. Law. at 595–618. Unless the Committees state in this report that they are modifying the interpretation of any element of legal opinion practice included in these or the other opinion reports cited in this report, the summaries of opinion practice included in this report are qualified in their entirety by reference to the Bus. Trans. Report, the TriBar Report, and the other California and TriBar reports cited in this report.

B. Entities Addressed

This report addresses closing opinions delivered on behalf of California LLCs, limited partnerships ("LPs"), and general partnerships ("GPs"), including limited liability partnerships ("LLPs"). Given the popularity of LLCs, the focus is on this form of entity. Data from the California Secretary of State illustrate the increasing popularity of LLCs as the "non-corporate" form of choice for a business entity. The chart included as Appendix B to this report lists the number of domestic entities, by category, formed in the years 2000–2016. For the year 2003, for example, the Secretary of State accepted articles of organization from 39,778 California LLCs; by 2016, that number had increased to 104,646. For the same two years, the Secretary of State accepted 4,654 (2003) and 2,242 (2016) certificates of limited partnership for domestic LPs, and 426 (2003) and 425 (2016) registrations by LLPs (both foreign and domestic). For comparison, 83,763 California for profit corporations were organized in 2003 and 85,870 in 2016. Because GPs are not creatures of statute and are not required to file articles or a certificate of partnership upon formation with the Secretary of State, statistics regarding their numbers are not presented.

The relevant statutes addressed by this report are, for LLCs, the California Revised Uniform Limited Liability Company Act ("RULLCA"), Corp. Code §§ 17701.01 et seq., and the Beverly-Killea Limited Liability Company Act, former Corp. Code §§ 17000 et seq. ("Beverly-Killea Act"). Although RULLCA superseded the Beverly-Killea Act, effective January 1, 2014, and is applicable to all LLCs, whether formed after or before January 1, 2014, and is applicable to all LLCs, whether formed after or before January 1, 2014, the Beverly-Killea Act generally continues to apply to "all acts or transactions by a limited liability company or by the members or managers of the limited liability company occurring, or an operating agreement or other contracts entered into by the limited liability company or by the members or

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4 The trend in California is even more pronounced in Delaware. The Delaware Secretary of State reports that, for 2015, Delaware had 178,336 entity formations, including 38,288 corporations, 128,042 LLCs, and 10,746 LPs and LLPs; and for 2014, Delaware had 168,966 entity formations, including 36,445 corporations, 121,592 LLCs, and 9,721 LPs and LLPs. 2015 Annual Report, Delaware Division of Corporations, p. 2.

5 As discussed in § V of this report, a GP may file a Statement of Partnership Authority, Form GP-1 (GP Act, Corp. Code § 16105), but the filing is not mandatory.
Managers of the limited liability company, prior to that date.” RULLCA, Corp. Code § 17713.04(b). 6

California LPs are subject to the Uniform Limited Partnership Act of 2008 (the “LP Act”), Corp. Code §§ 15900 et seq., which, except as set forth in § 15912.06(c), applies to all California LPs, whenever organized.

GPs continue to be subject to the law that governed them at the time the 1998 Report was prepared, the Uniform Partnership Act of 1994, as amended (the “GP Act”), Corp. Code §§ 16100 et seq. LLPs are a species of general partnership, and are governed by Article 10 of the GP Act, Corp. Code §§ 16951 et seq.

C. The Importance of Contract

The primary non-tax distinction between LLCs and partnerships, on the one hand, and corporations, on the other, is the importance of the operating or partnership agreement in establishing the rights, powers, and obligations of the members of the entity. Freedom of contract is the touchstone of governance of these entities, as stated by RULLCA:

It is the policy of this title [RULLCA] and this state to give maximum effect to the principles of freedom of contract and to the enforceability of operating agreements.

ULLCA, Corp. Code § 17701.07(a). See also Beverly-Killea Act, former Corp. Code § 17005(a); LP Act, Corp. Code § 15901.10(a); GP Act, Corp. Code § 16103(a). 7 For opinion preparers, this means that a close knowledge of the entity's operating agreement or partnership agreement, as the case may be, is crucial in rendering closing opinions for these entities.

D. Elements of a Legal Opinion

Legal opinions customarily include the following elements, although the order in which the elements are set forth may vary:

- Introductory matters, e.g., the date, the name and address of the opinion recipient, a description of the role of the opinion giver (e.g., “counsel for the Borrower”), and the purpose for which the opinion is given (normally, a reference to the agreement or section of the agreement pursuant to which the opinion is being delivered);
- A general or specific list of the documents examined by the opinion giver;
- In some instances, a statement of reliance on certain factual assumptions;
- The legal conclusions expressed in the opinion letter;
- Any factual confirmations or negative assurances (e.g., the absence of litigation);
- Any qualifications to the opinion;
- Any matters unique to the particular opinion (e.g., matters concerning opinions of local counsel in other jurisdictions);
- Specific limitations on the use of the opinion; and
- The signature of the opinion giver.

For further general discussion of these elements, see Bus. Trans. Report at 21–39. A sample legal opinion is provided in Appendix C to this report.

E. Third-Party vs. First-Party Opinions

The focus of this report, as with opinion reports generally, is on third-party opinions, i.e., legal opinions delivered by a lawyer to a third party other than the entity represented in the transaction. 8

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6 See also Kennedy v. Kennedy, 235 Cal. App. 4th 1474, 186 Cal. Rptr. 3d 198 (2015); American Master Lease LLC v. Idanta Partners, Ltd., 225 Cal. App. 4th 1451, 171 Cal. Rptr. 3d 548 (2014) (as modified). Although now repealed, the full text of the Beverly-Killea Act remains accessible through the history or archive links in the WestLaw and LexisNexis legal research services.

7 Unless otherwise noted, all section references in this report are to the California Corporations Code, and “Corp. Code” refers to the California Corporations Code.

8 See Bus. Trans. Report at 24–25 for a discussion of varying opinion practice concerning whether to include a specific list of documents and certificates reviewed or a more general statement that the opinion giver has examined such documents and has made such legal and factual investigation as it considers necessary for purposes of rendering the opinion—or both. Alternative examples of statements describing the scope of an attorney’s examination of factual matters, including any limitations on such examination, are provided in the Bus. Trans. Report at 25 nn.98–99.
than the lawyer’s client, at the request of the client. As noted in the Bus. Trans. Report, however, lawyers may also from time to time be asked to render legal opinions to their own clients. For example, a financial institution may request a remedies opinion on the loan documents under the chosen law from its own lawyer (who typically prepares the loan documents) when borrower’s counsel delivers an “as if” remedies opinion. (For discussion of the “as if” remedies opinion, see § VII(B)(2) of this report.) As noted in the Bus. Trans. Report (at 5), different considerations may apply when a lawyer is rendering an opinion to its own client.

II. FACTUAL EXAMINATION AND FACTUAL ASSUMPTIONS

A. Factual Examination

As noted in the Bus. Trans. Report at 24, the opinion preparers must be satisfied that they have reviewed or assumed (either expressly or impliedly) sufficient facts to support each of the legal conclusions expressed in the opinion letter. In most instances, the facts underlying the legal conclusions in an opinion concerning a business transaction can be determined by an examination of documents, such as the relevant transactional documents, the articles of organization and operating agreement or certificate of limited partnership and partnership agreement of the subject entity, certificates of public officials, and certificates of managers, officers, members, or general partners of the subject entity relating to factual matters, such as pending litigation or identification of material agreements. The specific documents that should be reviewed to support each particular opinion discussed in this report are described in the paragraphs titled “Information Relied on to Render the Opinion” that follow each discussion of a particular opinion in this report.

B. Factual Assumptions

It is usually necessary, and indeed is customary, for a legal opinion to be based partly on certain factual assumptions, which may or may not be expressly stated. See generally TriBar Report § 2.3, 53 Bus. Law. at 615; Bus. Trans. Report at 31–32. As TriBar observes, “[a] factual assumption is a bridge that allows the opinion preparers to render an opinion without establishing the facts being assumed.” TriBar Report § 2.3, 53 Bus. Law. at 615.

1. Assumptions of General Applicability

Both the Bus. Trans. Report and the TriBar Report take the view that assumptions of general applicability need not be stated. For example, the following assumptions, relating to facts that “are common to transactions generally and are customarily assumed as a matter of course” (TriBar Report § 2.3(a), 53 Bus. Law. at 615), are understood to be applicable, whether or not stated in the opinion letter, as long as they are not known to be false or reliance on them in the particular circumstance is not unreasonable: (a) the legal capacity of individuals; (b) that copies of documents furnished to the opinion preparers conform to the originals; (c) that original documents furnished to the opinion preparers are authentic; (d) that the signatures on executed documents are genuine; and (e) that the agreement(s) that are the subject of the opinion are binding on the other parties to them. See Bus. Trans. Report at 32 and Sample Corporate Closing Opinion, With Notes, at n.15, each citing TriBar Report § 2.3(a). Similarly, it is generally thought unnecessary to state separately an assumption that those who have approved an agreement have satisfied their fiduciary obligations in doing so. See Bus. Trans. Report at 68–69; TriBar Report § 6.4, 53 Bus. Law. at 654; TriBar LLC Report § 5.0, 61 Bus.

10 See Bus. Trans. Report at 26–31 for discussion of specific types of documents and certificates customarily examined and for sample forms of officer’s certificates. See Appendix D to this report for sample officer’s certificates in support of the sample opinion included with this report.
11 Most assumptions are essentially fact substitutes, which facilitate the rendering of a legal opinion. Factual assumptions should be distinguished from qualifications, discussed in § VII of this report, which generally pertain to legal matters and operate to narrow the scope of a legal opinion. Qualifications are also known as exceptions or limitations, and assumptions are sometimes also referred to as qualifications. See Bus. Trans. Report at 33, n.118. Certain assumptions, however, may concern legal matters, e.g., compliance by a decision maker in approving a transaction with any applicable fiduciary duties. See Bus. Trans. Report at 46; TriBar LLC Report § 5.0, 61 Bus. Law. at 690.
12 Current practice is generally to assume, without so stating in the opinion letter, that all signatures on executed documents are genuine, even those of the opinion giver’s client. But see the Dechert decision (discussed in note 13 and the accompanying text).
Nevertheless, many California opinion givers separately state some or all of the foregoing general assumptions, whether from an abundance of caution or a belief that, if they do not, a court that is unfamiliar with customary legal opinion practice may not invoke the assumption. See Sample Corporate Closing Opinion at n.15. Moreover, the decision in *Fortress Credit Corp. v. Dechert*, 934 N.Y.S.2d 119 (2011), may encourage some opinion givers to state expressly some or all of the assumptions of general applicability. In particular, an assumption regarding compliance with fiduciary duties may be expressly stated in circumstances where fiduciary issues are sensitive, such as in M&A transactions or “down round” issuances of preferred stock. Alternatively, the opinion may include a qualification that no opinion is expressed with respect to compliance with fiduciary duties.

The BLS, through its Corporations Committee, has adopted the view, consistent with TriBar, that assumptions of general applicability, such as those listed in the first paragraph under § B(1) of this report, need not be stated but are implicit in all opinion letters. Bus. Trans. Report at 21, n.85, and at 31–32; TriBar Report § 2.3(a), 53 Bus. Law. at 615. As noted, however, an opinion giver may not rely on an assumption if reliance is unreasonable under the circumstances in which the opinion is rendered. Bus. Trans. Report at 21, n.85.

2. Express Assumptions Required for Particular Opinions

In addition to assumptions of general applicability, opinion givers sometimes include express assumptions about matters that are not generally applicable to all opinions but are necessary for the particular opinions being given if the opinion preparers do not conduct an investigation of the facts being assumed. An express statement of these assumptions is required if they are to be relied on. Their inclusion shifts to the recipient the burden of confirming the matters assumed or taking the risk that they are not accurate. See TriBar Report § 2.3(b)–(c), 53 Bus. Law. at 615–616. For example, the Sample Opinion includes three such factual assumptions concerning the lender in ¶ B (Certain Assumptions). Each of these assumptions pertains to the lender’s eligibility for an exemption from California’s usury laws and is stated to facilitate the rendering of an opinion that the loan documents are enforceable (which, unless an exception is taken, addresses compliance by the loan documents with California’s usury laws).

Assumptions that may be expressed in legal opinions concerning LLCs or LPs include assumptions that:

- **The manager(s) and members of Borrower, and the General Partner of Guarantor, each have the legal capacity or entity power and authority to be manager(s) and members, as the case may be, of Borrower and the General Partner of Guarantor.**

- **The manager(s) and members of Borrower, and the General Partner of Guarantor, that are entities have taken whatever internal entity action (such as obtaining board or member or manager or General Partner approval) as necessary to enable them to act**

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13 The *Dechert* case involved a fraudulent $50 million loan transaction arranged by Marc Dreier. The defendant law firm (Dechert LLP) delivered a legal opinion that the loan documents had been duly executed and delivered and that the loan was a valid and binding obligation of the borrowers. The plaintiff/lenders sued Dechert after Dreier’s arrest, asserting that they relied on Dechert’s opinion. However, the New York appellate division of the supreme court (New York’s trial court) dismissed the plaintiffs’ complaint, finding, *inter alia*, that “[t]he opinion was clearly and unequivocally circumscribed by the qualifications that defendant assumed the genuineness of all signatures and the authenticity of the documents, made no independent inquiry into the accuracy of the factual representations or certificates, and undertook no independent investigation in ascertaining those facts.” 89 App. Div. 3d at 617.

14 The TriBar Report § 3.5.2(b), 53 Bus. Law. at 629, states that opinion preparers are not, as a matter of customary diligence, required to investigate whether those approving the transaction have violated their fiduciary duties or have an undisclosed conflict of interest, unless the opinion expressly covers those issues.

15 For a sample qualification concerning fiduciary duties, see § VII(C) and IV(H) of this report. See also § IV(C)(1) of this report.

16 For further discussion of how to address usury in a remedies or enforceability opinion, see § VII(B)(13) of this report. The factual assumptions in ¶ B of the Sample Opinion need not be stated if the opinion preparers are familiar with or independently ascertain the facts or matters stated by the assumptions.

17 See, e.g., § IV(B), (C) of this report.
on behalf of Borrower and/or Guarantor, as
the case may be. The

These assumptions are widely accepted and therefore may be assumed by the opinion preparers without stating the assumptions in the opinion letter. See TriBar LLC Report § 4.0 n.52, 61 Bus. Law. at 689. The Real Estate Bar takes a more circumscribed view. See ABA Section of Real Property, Trust and Estate Law, Committee on Legal Opinions in Real Estate Transactions, American College of Real Estate Lawyers, Attorneys’ Opinions Committee, and American College of Mortgage Attorneys, Opinions Committee, Real Estate Finance Opinion Report of 2012 § 3.3(b) (opinion giver should expressly state the extent to which they have or have not reviewed and verified any necessary consents throughout the tiers of ownership or at specified levels of the organizational hierarchy).

3. Negative Assurance

Sometimes, when an express assumption is made by the opinion giver, the recipient may request negative assurance to the effect that the opinion giver is not aware of any information that would render the assumption invalid. A negative assurance is not a legal opinion, but rather is a statement concerning the knowledge or belief of the opinion preparers. See generally § VI (“Confirmations”) of this report. An expression of this type of negative assurance is generally not necessary, given the principle that reliance on stated assumptions is qualified by the limitation on rendering misleading opinions. See TriBar Report § 2.3(c), 53 Bus. Law. at 616, and § 1.4(d), 53 Bus. Law. at 602–603. Accordingly, recipients should not request negative assurance with respect to stated assumptions, and opinion givers may properly resist giving such negative assurance.

III. SAMPLE OPINION

Set forth below are specific opinions from a sample LLC and LP closing opinion (“Sample Opinion”). Each specific opinion is addressed in detail in § IV of this report. The Sample Opinion is reproduced in its entirety in Appendix C to this report. The Sample Opinion is intended as a sample only; it is not intended to be a model or a preferred form that lawyers should use.

The Sample Opinion involves, as a client, a California limited liability company (formed after January 1, 2014) as “Borrower” in connection with a loan agreement between Borrower and a national bank. To illustrate a closing opinion rendered on behalf of both an LLC and an LP, the loan to the Borrower is guaranteed by a “Guarantor” that is a California limited partnership.

One of the specific sample opinions below is the remedies or enforceability opinion on the loan documents to which the Borrower or Guarantor is a party. See generally § IV(D) of this report. In structured finance transactions, investment banking firms, lenders, and rating agencies also may request a remedies or enforceability opinion on the borrower’s operating or partnership agreement out of concern over the enforceability of certain provisions thereof. See TriBar LLC Report § 6.0, 61 Bus. Law. at 692–694. The Committees address this additional remedies opinion in § VII(B)(15) of this report.

Purchasers of LLC or LP interests may request a closing opinion from issuer’s counsel on the validity of the issuance of the LLC or LP interests, the admission of the purchasers of the LLC or LP interests as members of the LLC or as limited partners of the LP, and, as a related opinion, on the obligations, if any, of the members (or limited partners) to make further payments for their interests or further capital contributions to the issuer. These opinions are not typically included in a closing opinion delivered by a borrower to its lender. Nevertheless, for completeness, the Committees also present and discuss, in §§ IV(G) and (H) of this report, these “valid issuance, “admission” and “obligations” opinions, covering membership interests issued by an LLC to its members or partnership interests issued by an LP to its partners.

Sample LLC and LP Closing Opinions

Status

The Borrower is a duly formed limited liability company and is [validly] existing and in good standing under the laws of the State of California.

18 Id.
19 RULLCA applies generally to all LLCs formed after January 1, 2014. See text accompanying note 6.
The Guarantor is a duly formed limited partnership and is [validly] existing and in good standing under the laws of the State of California.

Power to Enter Into and Perform Obligations

The Borrower has the limited liability company power to enter into and perform its obligations under each of the Loan Documents to which it is a party.

The Guarantor has the limited partnership power to enter into and perform the Guaranty.

Due Authorization, Execution and Delivery

The Borrower has taken all limited liability company action necessary to authorize the execution and delivery of, and the performance of its obligations under, each of the Loan Documents to which it is a party; and the Borrower has duly executed and delivered the Loan Documents to which it is a party.

The Guarantor has taken all limited partnership action necessary to authorize the execution and delivery of, and the performance of its obligations under, the Guaranty; and the Guarantor has duly executed and delivered the Guaranty.

Remedies or Enforceability Opinion

Each of the Loan Documents to which the Borrower or Guarantor is a party is a valid and binding obligation of the Borrower or the Guarantor, as the case may be, enforceable against it in accordance with its terms.

Consents and Approvals

All consents, approvals, authorizations or orders of, and filings, registrations and qualifications on the part of the Borrower or the Guarantor with, any United States federal or California state regulatory authority or governmental body pursuant to any Covered Law required to execute and deliver, and perform their respective obligations under, the Loan Documents have been obtained or made.\(^\text{20}\)

No Breach or Default

The execution and delivery by Borrower or the Guarantor of the Loan Documents to which it is a party do not, and the performance by them of their respective obligations under those Loan Documents will not:

(a) violate the Articles of Organization or the Operating Agreement of the Borrower or the Certificate of Limited Partnership or the Limited Partnership Agreement of the Guarantor;

(b) result in a breach of, or constitute a default under, any Borrower Material Agreement or Guarantor Material Agreement or result in the creation of a security interest in, or lien upon, any of the Borrower’s or the Guarantor’s properties or assets under any Borrower Material Agreement or Guarantor Material Agreement, but excluding (i) financial covenants and similar provisions therein requiring financial calculations or determinations to ascertain compliance, or (ii) provisions relating to the occurrence of a “material adverse event” or “material adverse change” or words or concepts to similar effect;

(c) violate any judgment, order or decree of any court or arbitrator [identified on Schedule __ to the Loan Agreement] [or] [applicable to either of them and known to us]; or

(d) violate any statute (or rule or regulation thereunder) under the Covered Law to which Borrower or Guarantor is subject.

Additional Closing Opinions

Valid Issuance of LLC/LP Interests: Admission of Members/Limited Partners

The Membership [LP] Interests issued by the Company to the purchasers thereof (“Purchasers”) have been validly issued; and the Purchasers have been admitted as members [limited partners] of the Company in compliance with the requirements of the California Revised Uniform Limited Liability Company Act [Uniform Limited Partnership Act of 2008] and

\(^{20}\) For the definition and a discussion of “Covered Law,” see § VII(A)(1) of this report.
the Company’s Operating [Limited Partnership] Agreement.

Obligations of Members/Limited Partners

The members [limited partners] of the Company have no obligation under RULLCA [the LP Act], to make further payments for their purchase of LLC [LP] Interests or further contributions to the Company solely by reason of their status as members [limited partners] of the Company, except as provided in their Subscription Agreements or the Operating [Limited Partnership] Agreement.21

IV. DISCUSSION OF SPECIFIC OPINIONS

A. Status

As set forth in the Sample Opinion, a typical status opinion for an LLC or LP takes this form:

The Borrower is a duly formed limited liability company and is [validly] existing and in good standing under the laws of the State of California.

The Guarantor is a duly formed limited partnership and is [validly] existing and in good standing under the laws of the State of California.

Prior Reports. The sample status opinions set forth above are unchanged from the forms of status opinions suggested in the Prior Reports (the form of opinions in the Prior Reports excluded “[validly]”). 2000 Report at 2; 1998 Report at 9.

What It Means. “Duly Formed.” The “dually formed” component of the status opinion means that the LLC or LP has complied with the statutory requirements under the relevant act to become a California LLC or LP at the time of its formation. The formation of a California LLC or LP is evidenced by the filing of articles of organization or a certificate of limited partnership, as the case may be, with the California Secretary of State. See RULLCA, Corp. Code § 17702.01(d), (e); Beverly-Killea Act, former Corp. Code § 17050(c); LP Act, Corp. Code § 15902.01(c).22

Although the customary form of the status opinion uses the word “dually” before “formed,” as noted by TriBar, “an opinion on formation is understood to have the same meaning whether or not it uses the word ‘dually’ . . . .” TriBar LLC Report § 2.0, 61 Bus. Law. at 683 n.24.23

Neither RULLCA nor the Beverly-Killea Act requires that an operating agreement be in force at the time the entity is formed by the filing of its articles of organization with the Secretary of State. See RULLCA, Corp. Code § 17702.01(a); Beverly-Killea Act, former Corp. Code § 17050(a). Nor is it generally believed that the LLC statutes require the existence of members at the time the LLC’s articles of organization are filed.

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21 See § IV(H) of this report.
22 As noted in the text accompanying note 6, RULLCA applies to all LLCs, whether formed after or before January 1, 2014, but the Beverly-Killea Act continues to apply to all acts or transactions by a limited liability company or by the members or managers of the limited liability company occurring, or an operating agreement or other contracts entered into by the limited liability company or by the members or managers of the limited liability company, prior to that date. RULLCA, Corp. Code § 17713.04(b). See also Kennedy v. Kennedy, 235 Cal. App. 4th 1474, 1485–1491, 186 Cal. Rptr. 3d 198, 206–211 (2015); American Master Lease LLC v. Idanta Partners, Ltd., 225 Cal. App. 4th 1451, 1480 & n.18, 171 Cal. Rptr. 3d 548, 570 & n.18 (2014) (as modified). Accordingly, whether an LLC formed prior to January 1, 2014 has been “dually formed” will depend on its compliance with the relevant provisions of the Beverly-Killea Act.
23 The form of the status opinion where “dually” is not used could thus take this form:

The Borrower is a limited liability company formed and [validly] existing and in good standing under the laws of the State of California.
with the Secretary of State. 24 For an LLC, therefore, the “duly formed” component of the status opinion is predicated solely on a copy of the filed Form LLC-1, Articles of Organization of a Limited Liability Company (LLC), certified by the Secretary of State, although, as noted in note 22, the full status opinion for an LLC requires consideration of those additional components addressed below under “Validly Existing” and “In Good Standing,” including, for an LLC, the adoption of an operating agreement by at least one member.

For LPs, the certificate of limited partnership filed with the Secretary of State must set forth the name and address of each general partner. LP Act, Corp. Code § 15902.01(a)(4). Because an LP must have one or more general partners and one or more limited partners (who cannot be the same person) (LP Act, Corp. Code § 15901.02(q) (definition of limited partnership)), a California LP is therefore not “duly formed” or “formed” unless it has at least one general partner and one limited partner. In making the determination that the LP has at least one general partner and one limited partner, opinions preparers will satisfy themselves (or expressly assume) that any conditions set forth in the partnership agreement for becoming a general partner and a limited partner, as the case may be, have been satisfied, and that each such partner qualifies as a “person” within the meaning of the LP Act, Corp. Code § 15901.02(y). 25

Section 15902.01(a) of the LP Act provides that, in order to form a limited partnership, a certificate of limited partnership must be filed with, and on a form prescribed by, the Secretary of State and, either before or after the filing of the certificate, the partners shall have entered into a partnership agreement. The Committees therefore believe that the steps required to form an LP for purposes of the status opinion (i.e., the filing of the certificate of limited partnership with the Secretary of State, the entering into of a limited partnership agreement by at least one general partner and one limited partner, and the satisfaction of the conditions for becoming a general partner and a limited partner under the terms of the limited partnership agreement) need not all occur at or prior to the date of filing of the certificate of limited partnership with the Secretary of State.

24 RULLCA contains no explicit requirement that an LLC have any members at the time of its formation. See RULLCA, Corp. Code § 17701.02(k) (definition of “limited liability company”); RULLCA, Corp. Code § 17702.01(a), (d) (forming an LLC). But see RULLCA, Corp. Code § 17704.01, implying that an LLC must have at least one member (who may be the organizer of the LLC); and the Secretary of State’s “Tips” included in his instructions for completing the articles of organization (Form LLC-1) for an LLC, which include the statement that every LLC is required to have at least one member, and that if no manager is appointed or elected, all members are managers. Although the Beverly-Killea Act, former Corp. Code § 17050(b), requires that an LLC “shall have one or more members,” members are not required for formation given former Corp. Code § 17050(c), which provides that the articles of organization duly certified by the Secretary of State “is conclusive evidence of the formation of a limited liability company and prima facie evidence of its existence.” See also RULLCA, Corp. Code § 17702.01(e) (filing of articles of organization conclusive proof that the organizer has satisfied all conditions to the formation of the LLC). Contrast these provisions with § 201 of Delaware’s LLC Act, Del. Code tit. 6, § 18-201, which provides that a Delaware LLC is formed at the time of the filing of its initial certificate of formation with the Delaware Secretary of State “if there has been substantial compliance with the requirements of that section, including the entering into of an LLC agreement before, after or at the time of the filing of the certificate of formation.

25 The LP Act generally provides that a person becomes a general partner or limited partner “as provided in the partnership agreement . . . .” LP Act, Corp. Code §§ 15904.01(a), 15903.01(a). The permissible forms of a contribution to an LP are set forth in LP Act, Corp. Code § 15905.01, and include money, services performed, promissory notes, other agreements to contribute cash or property, contracts for services to be performed, tangible or intangible property, or the provision of any “other benefit” to the LP. The partnership agreement may require a specific form of contribution (e.g., cash). Because an LP need have only one general partner and one limited partner to qualify as a limited partnership under the LP Act, opinion preparers, for purposes of determining the “due formation” of an LP, need only satisfy themselves (or expressly assume) that at least one general partner and at least one limited partner have been admitted to the LP; they need not make that determination (or assumption) with respect to all general partners and all limited partners for purposes of the due formation component of the status opinion. See TriBar LLC Report § 2.0, 61 Bus. Law. at 685 n.32. However, because the LP Act, Corp. Code § 15902.01(a) (4), and the Secretary of State’s Form LP-1 require the listing of the name and address of each general partner, if the LP has more than one general partner, opinion preparers satisfy themselves that each of the general partners has met the conditions set forth in the partnership agreement for becoming a general partner and that each such general partner qualifies as a person within the meaning of the LP Act.

Because of the need to determine whether an LP has at least one general partner and at least one limited partner, and because that determination generally entails an examination of the partnership agreement to determine whether the circumstances for admission as a general partner and a limited partner have been satisfied, as a practical matter the giving of a status opinion on the formation of a California LP will normally require that a limited partnership agreement be in place.
certificate of limited partnership with the Secretary of State. 26

The articles of organization of an LLC and the certificate of limited partnership of an LP can be cancelled by the Secretary of State for issuance of a bad check in payment of the requisite filing fees. See RULLCA, Corp. Code § 17702.01(f); Beverly-Killea Act, former Corp. Code § 17051(e); LP Act, Corp. Code § 15902.01(f). Opinion preparers are entitled to assume, without so stating and without further inquiry, that no such proceeding by the Secretary of State has been initiated or that any payment of applicable filing fees will be honored. 27

“Validly Existing.” As noted in the Bus. Trans. Report, “validly existing,” when used with respect to a California corporation, means that the corporation has not dissolved or ceased to exist, and that the corporation is a de jure corporation and not merely a de facto corporation. 28 The opinion also means that no dissolution proceedings have been initiated by resolution of the board of directors or the filing of a Certificate of Election to Wind Up and Dissolve with the Secretary of State. Bus. Trans. Report at 41. As the TriBar Report notes, opinion givers sometimes omit the adverb “validly,” but, as a matter of customary usage, that omission is understood not to change the meaning of the “validly existing” opinion with respect to a corporation. TriBar Report § 6.1.3 and n.113, 53 Bus. Law. at 643.

Consistent with customary usage in the corporate context and with the TriBar Report, the Committees believe that “validly” can be omitted from the LLC or partnership status opinion without affecting the meaning of the opinion.

As addressed under the “duly formed” component of the status opinion above, an LLC operating agreement need not be in place and the LLC need not have any members at the time of formation in order to be conclusively presumed to be “formed” under RULLCA or the Beverly-Killea Act. Nevertheless, explicitly under the Beverly-Killea Act, former Corp. Code § 17050(a), (b), and implicitly under RULLCA, a California LLC is not considered “validly existing” or “existing” without an operating agreement and at least one member. 29 Accordingly, to give the “validly existing” component of the status opinion, the opinion preparers will satisfy themselves (or expressly assume) that an operating agreement has been entered into by at least one member of the LLC, that the member is a “person” within the meaning of the relevant statute, 30 and that the member has satisfied the conditions for becoming a member set forth in the operating agreement, including the making of any

26 The Committees are of this view notwithstanding LP Act § 15902.01(c), which provides that “a limited partnership is formed when the Secretary of State files the certificate of limited partnership.”

27 The assumption cannot be taken, of course, if the opinion preparers know it to be untrue, e.g., they are aware that the Secretary of State has provided notice to the LLC of the cancellation of its articles of organization under RULLCA, Corp. Code § 17702.01(f). See Bus. Trans. Report at 21 n.85; TriBar Report § 2.3(c), 53 Bus. Law. at 616.


29 As noted, RULLCA does not explicitly require that an operating agreement be in place to the formation of an LLC. See RULLCA, Corp. Code § 17702.01(a), (d) (requirements for organizing an LLC). However, RULLCA defines “operating agreement” to include an agreement to organize an LLC, and the agreement may be oral. RULLCA, Corp. Code § 17701.02(s). Thus, even an informal operating agreement may in fact exist at the time of the LLC’s organization. Further, RULLCA does not explicitly require that the LLC have at least one member as a condition to the formation of an LLC. See RULLCA, Corp. Code § 17702.01(a), (d). However, § 17704.01(a) (addressing when a person becomes a member of an LLC) implies that an LLC must have at least one initial member upon formation, and that the organizer is that initial member if the organizer and the initial member are not different persons.

30 E.g., RULLCA, Corp. Code § 17701.02(v), provides that a “person” is “an individual, partnership, limited partnership, trust, estate, association, corporation, limited liability company, or other entity, whether domestic or foreign.”
contribution called for by the operating agreement for becoming a member of the LLC.  

With respect to limited partnerships, as discussed under the “duly formed” component of the status opinion above, to form a limited partnership, either before or after the filing of the certificate of limited partnership, the partners shall have entered into a partnership agreement. LP Act, Corp. Code § 15901.01(a). Accordingly, to give the “validly existing” component of the status opinion for a limited partnership, the opinion preparers will satisfy themselves (or expressly assume) that a partnership agreement has been entered into by at least one general partner and one limited partner, and that the partners have satisfied the conditions for becoming partners as set forth in the partnership agreement, including the making of any contribution called for by the partnership agreement for becoming a partner of the LP.

In determining whether an LLC has an operating agreement, as noted by the TriBar Opinion Committee, “the opinion preparers must satisfy themselves or assume expressly that the prerequisites for creating an operating agreement in the state in which the LLC is formed have been met.” TriBar LLC Report § 2.0, 61 Bus. Law. at 686. But this does not mean that the opinion preparers must satisfy themselves that all of the terms of the operating agreement are enforceable. When an opinion recipient wants an opinion on the enforceability of an operating agreement (or particular terms of an operating agreement), it should ask for that opinion expressly. The same principles apply to LP partnership agreements. For discussion of opinions on the enforceability of operating and partnership agreements, see § VII(B)(15) of this report.

“In Good Standing.” A California LLC is in good standing when its articles of organization have not been suspended or forfeited, which can occur from a failure to (i) pay state taxes, (ii) file tax returns with the Franchise Tax Board, or (iii) file a biennial statement of information with the Secretary of State. See RULLCA, Corp. Code § 17713.10; Beverly-Killea Act, former Corp. Code § 17654; Cal. Rev. & Tax. Code §§ 23301, 23301.5, and 23775.

The LP Act does not require the filing of statements of information by LP’s. While LPs pay an annual franchise tax, the Revenue and Taxation Code does not provide for the suspension or forfeiture of the “powers, rights and privileges” of an LP that is delinquent in the payment of its franchise taxes. Accordingly, it is not apparent what an opinion on the “good standing” of a California LP signifies (or what a certificate to this effect from the California Secretary of State signifies) other than that its certificate of limited partnership has not been canceled upon dissolution and winding up or upon its merger or conversion. That opinion, however, is subsumed in the “[validly] existing” component of the status opinion.

The status opinion addresses an LLC’s or LP’s status as an LLC or LP; it does not addresses the liability of the members or partners for the entity’s obligations. TriBar LLC Report § 2.0, 61 Bus. Law. at 687. For further discussion of this issue, see § VII(B)(15) of this report.

Comparison to Corporate Form of Opinion. A common corporate form of the status opinion is that “the Borrower is duly incorporated, validly existing and in good standing under the laws of the State of California.”

Besides the obvious reason for not using “incorporated” in the LLC or LP status opinion, the use of “formed” in the LLC or LP status opinion is based directly on the relevant statutes. See, e.g., RULLCA, Corp. Code § 17702.01(d) (limited liability company is “formed” when the Secretary of State has filed the articles of organization). See also Beverly-Killea Act, former Corp. Code § 17050(c); LP Act, Corp. Code § 15902.01(c).

“Duly Formed” vs. “Duly Organized.” The Sample Opinion refers to the LLC or LP as “duly formed” rather than “duly organized.” As noted by the Bus. Trans. Report, historically the term “duly organized” has been understood to refer to the initial corporate actions taken after a company has been

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31 See RULLCA, Corp. Code §§ 17701.02(p) (definition of member), 17701.02(v) (definition of person), 17704.01 (when a person becomes a member of an LLC); Beverly-Killea Act, former Corp. Code §§ 17001(s) (definition of member), 17001(ac) (definition of person), 17100 (when a person becomes a member of an LLC). Permissible contributions are defined broadly, as in the LP Act, and are set forth in RULLCA, Corp. Code § 17704.02, and Beverly-Killea Act, former Corp. Code § 17200(a).
organized: the appointment of initial directors, the adoption of bylaws, the election of officers, and the authorization and issuance of shares of the corporation. Moreover, the duly organized opinion must be based on the laws that existed at the time the corporation was organized. Bus. Trans. Report at 40–41. In the context of LLCs and partnerships, the “duly organized” opinion would presumably encompass the due adoption of an operating agreement or partnership agreement, the appointment of one or more managers of the LLC (if the LLC is to be manager-managed), the election of officers of the entity (if the operating agreement or partnership agreement provides for the conduct of the business of the LLC through officers elected by the members), and the issuance of membership or partnership interests by the entity.

Accordingly, unless the opinion giver recently organized the entity, the Committees believe that the sample form of status opinion is the more customary form and that it would be appropriate for opinion givers to decline to give the more expansive “duly organized” opinion for an LLC or LP.

**Status Opinion Without Reference to Formation.** A simpler form of the status opinion that is increasingly accepted is one that excludes the reference to the entity’s due formation. It states that the entity is “[validly] existing and in good standing under the laws of the State of California.” This is the form used in the Sample Corporate Closing Opinion and in the Sample VC Closing Opinion. See also Donald W. Glazer and Stanley Keller, *A Streamlined Form of Closing Opinion Based Upon the ABA Legal Opinion Principles*, 61 Bus. Law. 389, 394 (2005). As explained in the Bus. Trans. Report, given that a “duly incorporated” opinion is based solely on a copy of the articles of incorporation certified by the Secretary of State, such an opinion adds little of practical value to the status opinion. The same holds true for the status opinion given on behalf of an LLC. See, e.g., RULLCA, Corp. Code § 17702.01(e); Beverly-Killea Act, former Corp. Code § 17050(c). See Bus. Trans. Report at 40–41; TriBar Report § 6.1.3(b), 53 Bus. Law. at 643; TriBar LLC Report § 2.0, 61 Bus. Law. at 687.

Accordingly, the simpler form of status opinion would be appropriate where the opinion giver has not recently organized the entity on whose behalf the opinion is delivered.

**Information Relied Upon to Render the Status Opinion.** To deliver the status opinion, opinion givers normally rely on: (i) a certified copy of the articles of organization or a certificate of limited partnership, as the case may be, as filed with the Secretary of State; (ii) the operating or partnership agreement of the entity, together with all amendments, often with an officer’s certificate confirming the accuracy and completeness of the copy provided, (iii) a good standing certificate for the entity issued by the Secretary of State; and (iv) a review of the proceedings taken by the members or partners of the entity to ensure that no dissolution proceedings have commenced or an officer’s certificate to the effect that no dissolution proceedings have commenced. The opinion preparers will also satisfy themselves that the LLC has at least one member and the LP at least one general partner and one limited partner, in each instance meeting the criteria established by the relevant statute and operating or partnership agreement.

Determining that an LLC’s existence is not terminated can be more challenging than determining whether a corporation’s existence is terminated, because there are many ways in which the existence of an LLC can cease. For example, the operating agreement may specify a termination date or provide that the LLC will dissolve on the happening of a particular event, e.g., a failure to achieve specified financial or other goals by a certain time or the resignation of a manager. The LLC may also terminate by operation of law, e.g., after an event that triggers dissolution of the LLC or upon a merger or conversion. As a consequence, to render a “validly existing” opinion for an LLC, the opinion preparers will review and consider the various ways that an LLC may dissolve under RULLCA and

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32 The LP Act provides only that a “limited partnership is formed when the Secretary of State files the certificate of limited partnership.” LP Act, Corp. Code § 15902.01(c). It does not contain the “conclusive evidence” statement found in the two LLC Acts cited. But, for the reasons discussed in the text of this section above, because a California LP must have, at the time of formation, at least one general partner and one limited partner, the “due formation” or “formation” component of the status opinion for a California LP requires more than reliance only on a certified copy of the certificate of limited partnership.

33 On the use of officer’s certificates to establish factual matters, see Bus. Trans. Report at 28–31; TriBar Report § 2.5, 53 Bus. Law. at 617–618. See also the Sample Officer's Certificates in Appendix D of this report.

34 See notes 22–27 and accompanying text.
under the LLC’s articles of organization and operating agreement, and satisfy themselves (or expressly assume) that those events have not occurred. See TriBar LLC Report § 2.0, 61 Bus. Law. at 686–687. For a sample qualification that would be appropriate if the entity has dissolved, see § VII(C) of this report.

Other Reports. For further discussion of the status opinion for LLCs, see TriBar LLC Report § 2.0, 61 Bus. Law. at 683–689. For a discussion of the status opinion with respect to corporations, see Bus. Trans. Report at 40–42; TriBar Report §§ 6.1–6.1.4, 53 Bus. Law. at 641–646.

B. Power to Enter Into and Perform Obligations

As set forth in the Sample Opinion, a typical opinion on the power of an LLC or LP to enter into and perform its obligations under the relevant documents in a loan transaction takes this form:

The Borrower has the limited liability company power to enter into and perform its obligations under each of the Loan Documents to which it is a party.

The Guarantor has the limited partnership power to enter into and perform its obligations under the Guaranty.

Prior Reports. The sample power opinions set forth above vary from the forms of these opinions in the Prior Reports in that they do not contain the word “authority,” which was in brackets after the word “power” in the Prior Reports, and they add the phrase “its obligations under” after the word “perform.” 2000 Report at 9; 1998 Report at 18. The reference to “authority” in addition to “power” has been deleted because of a concern that this reference could lead to a more expansive interpretation of the scope of the opinion and to better reflect current practice. See Sample Corporate Closing Opinion, With Notes, at 8 n.18, citing Bus. Trans. Report at 44.

What It Means. This opinion is intended to assure the recipient that the LLC or LP has the power to enter into and perform its obligations under the applicable LLC or LP statute and, as applicable, either the LLC’s articles of organization and operating agreement or the LP’s certificate of limited partnership and limited partnership agreement (collectively, “Governing Documents”). For an LLC, this means that the LLC has the power to enter into and perform its obligations under RULLCA (or the Beverly-Killea Act, if applicable, as discussed below), its articles of organization, and its operating agreement. For an LP, this means that the LP has the power to enter into and perform its obligations under the LP Act, its certificate of limited partnership, and its partnership agreement.

What the Opinion Does Not Cover. It is generally understood that this opinion does not address restrictions on an LLC’s or an LP’s power that do not derive from the applicable LLC or LP statute or Governing Documents, such as laws requiring licenses or permits to engage in specific activities. Similarly, this opinion does not address whether the LLC or LP has obtained the regulatory approvals that may be required for it to enter into the relevant documents. TriBar LLC Report § 3.0, 61 Bus. Law. at 688. Finally, the power opinion is not an opinion that the LLC or LP has obtained internal approvals or third-party consents as may be required under the applicable LLC or LP statute, Governing Documents, or other relevant agreements; those matters are covered

35 As one example of how a California LLC can be terminated by operation of law, RULLCA, Corp. Code § 17707.01(c), states that an LLC is dissolved after the passage of 90 consecutive days during which the LLC has no members (with an exception if the sole member is a natural person and his or her membership interest passes to his or her heirs, successors, or assigns).

36 The Prior Reports also include and discuss a variation of this opinion that either states separately or adds the power [and authority] of the entity to “own its properties and assets and to carry on its business [as it is currently conducted].” 2000 Report at 5–9; 1998 Report at 13–18. The rationale for this opinion for an LLC is that “[t]he opinion recipients normally want to know that the business of the limited liability company is one that can be lawfully carried on by the limited liability company as a matter of limited liability company law.” 2000 Report at 5–6. However, as the 2000 Report states, “because the opinion is so fact-sensitive and relies necessarily on the certificate of the client rather than independent investigation of counsel, an opinion recipient cannot reasonably rely on such an opinion to any material extent.” 2000 Report at 7. Although this opinion has become less common, it is sometimes given in special circumstances, such as in a venture capital financing or for a special purpose entity or an entity engaged in a regulated industry. See, e.g. Sample VC Closing Opinion ¶ (C)(2) and n.45, 70 Bus. Law. at 190–191.

37 The opinion covers both the obligations set forth in the documents addressed by the opinion that the client is to perform at the closing and the obligations it is required to perform in the future. See Sample VC Closing Opinion ¶ (C)(2) & n.46, 70 Bus. Law. at 191; TriBar Report § 6.3 n.139, 53 Bus. Law. at 652.
by the opinion covering authorization, execution, and delivery discussed in § IV(C) of this report and the opinion covering consents and approvals discussed in § IV(E) of this report.

Comparison to Corporate Form of Opinion.
This formulation of the sample power opinion is consistent with the wording in the Sample Corporate Closing Opinion ¶ (C)(2), and the Sample VC Closing Opinion ¶ (C)(2), but substitutes the words “limited liability company” and “limited partnership” for “corporate.”

Information Relied Upon to Render the Opinion.

Limited Liability Companies

RULLCA will generally govern the power of an LLC to enter into the transaction that is the subject of the power opinion. However, the Beverly-Killea Act continues to govern all acts or transactions by an LLC or by the members or managers occurring, or operating agreements or other contracts entered into by the LLC or by the members or managers, prior to January 1, 2014. RULLCA, Corp. Code § 17713.04(b). See also text accompanying note 6. Accordingly, the Beverly-Killea Act may continue to have relevance to opinion practice for a period of time.

Although the applicable statutes must be examined, the powers of an LLC under RULLCA and under the Beverly-Killea Act are very broad and are virtually identical. Compare RULLCA, Corp. Code §§ 17701.05, with Beverly-Killea Act, former Corp. Code § 17003. In addition, the business activities of LLCs permitted by RULLCA are also broad and are similar to the activities permitted by the Beverly-Killea Act. Compare RULLCA, Corp. Code §§ 17701.04(b), with Beverly-Killea Act, former Corp. Code § 17002. It is unlikely that either would preclude the delivery of the power opinion.

Opinion preparers can determine whether an LLC has the power to enter into and perform its obligations under the relevant documents by reviewing a copy of its articles of organization certified by the Secretary of State and a copy of its operating agreement certified by one or more managers or members, as appropriate. Normally, the articles of organization will not address the LLC’s powers. See California Secretary of State Form LLC-1 (Articles of Organization). LLCs are often formed for a particular purpose and, in such event, may be limited by their operating agreements to the powers necessary to accomplish that purpose. Among the provisions of the operating agreement to be reviewed are those that deal with the purpose of the LLC, the powers granted to the LLC, and any limitations on the purposes and powers of the LLC.

In some situations, one or more of the documents addressed by the opinion do not fit squarely within the express purpose of the LLC, or the contemplated transaction is not expressly included in the various authorizations contained in the operating agreement. Depending on the degree of uncertainty involved, the opinion preparers may in some cases be justified in relying on a certificate of one or more managers or members, as appropriate, which states the intentions and understanding of the parties in forming the LLC and defining its scope. It is also not unusual for opinion preparers to require that the operating agreement be amended to clarify its meaning before rendering an opinion.

Limited Partnerships

The purpose and powers of an LP in the LP Act also are very broad. See LP Act, Corp. Code §§ 15901.04, 15901.05. Opinion preparers may therefore determine that an LP has the limited partnership power to enter into and perform its obligations under the relevant documents by reviewing a copy of its certificate of limited partnership certified by the Secretary of State and a copy of its partnership agreement certified by the general partner.

In some situations, one or more of the documents addressed by the opinion do not fit squarely within the express purpose of the LP or the contemplated transaction is not expressly included in

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38 Omission of the words “limited liability company” and “limited partnership” from this opinion, like omission of the word “corporate” from a corporate power opinion, is understood not to change its meaning. TriBar LLC Report § 3.0, 61 Bus. Law. at 687.

39 It should be noted that LPs that were formed before July 1, 1984, the date that the California Revised Limited Partnership Act, the predecessor to the LP Act, became effective, could file with the Secretary of State a “long form” certificate of limited partnership, which officially formed the LP and served as its partnership agreement.
the various authorizations contained in the partnership agreement. Depending on the degree of uncertainty involved, the opinion preparers may in some cases be justified in relying on a certificate of one or more of the general partners, as appropriate, which states the intentions and understanding of the parties in forming the LP and defining its scope. It is also not unusual for opinion preparers to require that the partners amend the partnership agreement before rendering an opinion.

Other Reports. For a discussion of this opinion for LLCs, see TriBar LLC Report § 3.0, 61 Bus. Law. at 687–689.

C. Authorization, Execution and Delivery

As set forth in the Sample Opinion, a typical opinion on the authorization by an LLC or an LP to execute, deliver, and perform its obligations under the relevant documents (“authorization opinion”) takes this form:

The Borrower has taken all limited liability company action necessary to authorize the execution and delivery of, and the performance of its obligations under, each of the Loan Documents to which it is a party; and the Borrower has duly executed and delivered the Loan Documents to which it is a party.

The Guarantor has taken all limited partnership action necessary to authorize the execution and delivery of, and the performance of its obligations under, the Guaranty; and the Guarantor has duly executed and delivered the Guaranty.

Assuming that an LLC or an LP has the power to enter into and perform its obligations under the relevant documents, the opinion recipient will also want to know that all necessary action has been taken to approve the execution, delivery and performance of these documents, and that they have been properly executed and delivered.

1. Authorization

Prior Reports. The sample authorization opinion stated above varies from the form of authorization opinion in the Prior Reports, which reads “The [agreement] has been duly authorized by all necessary [limited liability company/limited partnership] action on the part of the [entity].” 2000 Report at 11; 1998 Report at 20. The authorization opinion in the Bus. Trans. Report uses the same formulation as those in the Prior Reports. See, e.g., Bus. Trans. Report, at 45. The Committees’ formulation is consistent with the wording of the authorization opinion in the Sample Corporate Closing Opinion, which states that it was not intended to have any meaning different from the formulation in the Bus. Trans. Report. See Sample Corporate Closing Opinion, With Notes, at 9 n.19.

What it Means. The authorization opinion means that the steps required of the LLC or LP under the LLC or LP statute, as the case may be, and their respective Governing Documents, have been taken to authorize the execution and delivery of, and the performance of their obligations under, the documents addressed by the opinion.

For an LLC, this means that: (i) neither RULLCA (nor, if applicable, the Beverly-Killea Act), nor the articles of organization, nor the operating agreement restrict the power or authority of the officers, members or managers who are executing the relevant documents; (ii) any conditions underlying any such restrictions have been met; and (iii) the officers, members or managers, as applicable, have complied with any applicable procedural requirements of RULLCA (or the Beverly-Killea Act), the articles of organization, the operating agreement, and any delegation of authority adopted by resolution of the managers or members in executing and delivering the relevant documents.

For an LP, this means that: (i) neither the LP Act, nor the certificate of limited partnership, nor the partnership agreement restrict the power of the partners who are executing the relevant documents; (ii) any conditions underlying any such restrictions have been met; and (iii) the general and limited partners have complied with any applicable procedural requirements of the LP Act, the certificate of limited partnership and the partnership agreement in executing and delivering the relevant documents.
Managers, managing members, and general partners are subject to fiduciary duties. See RULLCA, Corp. Code § 17704.09; Beverly-Killea Act, former Corp. Code § 17153; LP Act, Corp. Code § 15904.08. Opinion givers generally rely on an assumption, which is ordinarily unstated, that such persons are in compliance with their fiduciary duties in approving the documents addressed by the opinion. As a matter of prudence, opinion preparers may choose to expressly disclaim any opinion as to compliance with fiduciary duties. See, e.g., the sample exception set forth in § VII(C)(2) of this report. If, however, opinion preparers are aware of facts that question this disclaimer or assumption, further examination may be appropriate. See §§ II(B)(1) and VII(C) of this report. For further discussion of the relevance of fiduciary duties in rendering these opinions, see TriBar LLC Report § 5.0; 61 Bus. Law. at 690–692; Bus. Trans. Report at 46; VC Opinions Report § IV.I, 65 Bus. Law. at 189–190.

Information Relied Upon to Render the Authorization Opinion

Limited Liability Companies

LLCs adopt different approaches to decision making. They may adopt the corporate model, requiring approval of both members and managers for major transactions and managers alone for other transactions. Or they may adopt the limited partnership model, in which a single individual or entity has sole power and authority over all management decisions, or the general partnership model, in which all members are entitled to participate in management. Often less formality is required than with corporations, so that the investigation of LLC actions by the opinion preparers can often be more complicated and time consuming.

Analysis. RULLCA generally applies to votes or consents taken, acts or transactions occurring, and operating agreements or other contracts entered into on or after January 1, 2014. RULLCA, Corp. Code § 17713.04(b), (c). For time periods before January 1, 2014, the Beverly-Killea Act continues to apply.40 See text accompanying note 6. Although the Beverly-Killea Act will continue to have relevance to an authorization opinion if relevant acts occurred before January 1, 2014, the following discussion focuses on RULLCA.

Which RULLCA provisions are applicable to an authorization opinion will largely depend on whether the LLC is member-managed or manager-managed.41 If the LLC is member-managed, RULLCA’s default rule is that the members have equal rights in the management and conduct of the LLC’s activities and equal voting rights in proportion to their interests in the current profits of the LLC. RULLCA, Corp. Code § 17704.07(b), (r). Different voting rights can be provided for in the articles of organization or the operating agreement and, in the absence of such a voting provision, certain additional rules will apply. See RULLCA, Corp. Code § 17704.07(r)–(t). Any difference arising among members concerning a matter “in the ordinary course of the activities” of the LLC must be decided by a majority of the members, and an act “outside the ordinary course of the activities” of the LLC may be undertaken only with the consent of all members. RULLCA, Corp. Code § 17704.07(b) (3), (4). What is or is not in the “ordinary course”

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40 If the Beverly-Killea Act is applicable to the authorization opinion, the relevant Beverly-Killea Act provisions comparable to the RULLCA provisions discussed in this section are as follows:

<table>
<thead>
<tr>
<th>RULLCA §</th>
<th>Beverly-Killea §</th>
</tr>
</thead>
<tbody>
<tr>
<td>17702.01(b)</td>
<td>17151(b)</td>
</tr>
<tr>
<td>17704.07(a)</td>
<td>17150</td>
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<tr>
<td>17704.07(b)</td>
<td>17150, 17157</td>
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<tr>
<td>17704.07(c)</td>
<td>17151, 17156, 17157</td>
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<td>17704.07(r)</td>
<td>17103</td>
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<td>17704.07(u)–(v)</td>
<td>17154(a)–(b)</td>
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<td>17707.01(b)</td>
<td>17350(b)</td>
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<tr>
<td>17710.03(b)</td>
<td>17540.3(b)</td>
</tr>
<tr>
<td>17710.12(a)</td>
<td>17551(a)</td>
</tr>
</tbody>
</table>

41 If the LLC is manager-managed, the articles of organization must contain a statement to that effect. See RULLCA, Corp. Code § 17702.01(b)(5), (6). A LLC is deemed to be member-managed unless the articles of organization contain a statement that it is to be managed by managers. RULLCA, Corp. Code §§ 17702.01(b)(5), 17704.07(a). See also Beverly-Killea Act, former Corp. Code § 17150.
can present an additional complication for opinion preparers.42

If the LLC is manager-managed, RULLCA's default rules provide that (i) except as otherwise expressly provided by RULLCA, any matter relating to the activities of the LLC is decided exclusively by the managers, (ii) each manager has equal rights in the management and conduct of the activities of the LLC, and (iii) a difference among managers as to a matter in the “ordinary course of the activities” of the LLC may be decided by a majority of the managers. See RULLCA, Corp. Code § 17704.07(c). In addition, the consent of all the members is required for certain actions, including the sale of all or substantially all the property of the LLC (with or without goodwill) “outside the ordinary course” of the LLC’s activities, the approval of a merger or conversion and undertaking any other act “outside the ordinary course” of the LLC’s activities. RULLCA, Corp. Code § 17704.07(c)(4).

It is not unusual for LLCs to have officers (in addition to managers and members) who have authority for certain matters. An operating agreement may provide for the appointment of officers with the titles, power and duties as specified in the articles of organization or operating agreement or as determined by the members or managers. RULLCA, Corp. Code § 17704.07(u). Any such officers are to be appointed in accordance with the operating agreement or, if no provision is made in the operating agreement, by the managers and shall serve at the pleasure of the managers, subject to any contract of employment. RULLCA, Corp. Code § 17704.07(v).

Separate voting requirements for members and managers are set forth in RULLCA for a dissolution, a conversion into another business entity, or a merger. See RULLCA, Corp. Code §§ 17707.01(b), 17710.03(b), 17710.12(a).

**Documents Reviewed.** The opinion preparers normally review the articles of organization and operating agreement to determine whether they specify any approvals that might be required or any limitations on the authority of the managers or members to bind the LLC and, if so, whether those approvals have been obtained and any such limitations have been satisfied.

If the transaction involves a disposition or encumbrance of real property, opinion preparers normally also review the articles of organization, if any, recorded in the relevant county pursuant to RULLCA, Corp. Code § 17702.03(c). See also Beverly-Killea Act, former Corp. Code § 17052(f).

Opinion preparers normally consider obtaining or reviewing a separate authorization (including an amendment of the relevant Governing Document) by the members under the following circumstances:

- Neither the articles of organization nor the operating agreement authorizes the transaction or, if authorized, the transaction is different from what was authorized in some material respect;
- The articles of organization or operating agreement prohibit the transaction or restrict the LLC’s power to enter into the transaction;
- RULLCA (or the Beverly-Killea Act), the articles of organization or the operating agreement require approval of the members; or
- In the case of a manager-managed LLC, the transaction is arguably “outside the ordinary course” of the LLC’s activities or otherwise outside the scope of the authority of the managers.

Similarly, opinion preparers normally consider obtaining or reviewing a separate authorization (including an amendment of the relevant Governing Document) by the managers in the following circumstances:

- Neither the articles of organization nor the operating agreement authorizes the transaction or, if authorized, the transaction is different from what was authorized in some material respect;

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42 What may be considered to be “in the ordinary course of the activities” for this purpose is primarily a factual question. For cases dealing with whether agreements or instruments are in the ordinary or usual course of business, compare Ellis v. Mihelis, 60 Cal. 2d 206, 32 Cal. Rptr. 415 (1963) (sale of ranch not in ordinary course of business of partnership that operated the ranch) and Elias Real Estate, LLC v. Tseng, 156 Cal. App. 4th 425, 67 Cal. Rptr. 3d 360 (2007) (sale of real estate was outside ordinary course of partnership’s clothing business) with Thompson v. Williams, 190 Cal. App. 2d 56, 12 Cal. Rptr. 9 (1961) (promissory note executed by one partner was within ordinary course of partnership’s business).
• RULLCA (or the Beverly-Killea Act), the articles of organization or the operating agreement require approval of the managers; or
• The LLC has more than one manager and the operating agreement is silent on the power of a single manager to enter into the transaction or there is a difference among managers regarding whether the transaction is in the ordinary course of the activities of the LLC.

Unless they have personal knowledge of the following, opinion preparers normally obtain a separate certificate of the members or managers (or both) certifying that:

• The copies of the articles of organization and any operating agreement reviewed and relied on by the opinion giver, are complete and correct, and that such articles of organization and operating agreement have not been amended, revoked, or otherwise modified since the date of their execution;
• The copies of any resolutions, consents, or authorizations reviewed and relied on by the opinion giver were duly adopted, are true, complete, and correct, and such resolutions, consents or authorizations have not been amended, rescinded, or revoked since the date adopted; and
• If applicable, the managers or officers acting on behalf of the LLC were duly appointed and incumbent in their offices at the time of all relevant actions and at all relevant times thereafter.

For examples of such a certificate, see the Sample Officer’s Certificates in Appendix D to this report.

When the manager or member approving the relevant documents or transaction is an entity, the question arises whether the opinion also addresses the manager’s or member’s power under the statute applicable to it and its Governing Documents to approve the actions covered by the opinion. Opinion givers normally assume, without so stating, that the manager or member is the type of entity it purports to be and has the power and was duly authorized by its governing body to approve the relevant documents or transaction, and that those acting on its behalf had the approvals required to do so. Some opinion givers choose to include an express assumption to this effect. TriBar LLC Report § 4.0 n.52, 61 Bus. Law. at 689. It is not unusual, however, for the opinion giver to be asked to include a separate opinion covering these matters.

Limited Partnerships

In an LP, one or more general partners have general power and authority to manage the LP’s business and affairs, with some exceptions requiring approval of the limited partners. See LP Act, Corp. Code §§ 15904.02, 15904.06. The analysis is therefore usually less complicated than that required for an LLC.

Analysis. The opinion preparers normally determine whether any provisions of the LP Act restrict the ability of the LP to enter into the documents addressed by the opinion without the consent of its partners, or require a vote other than as set forth in the certificate of limited partnership or partnership agreement. In general, the partnership agreement governs relations among the partners and between the partners and the partnership, and to the extent that the partnership agreement does not otherwise provide, the LP Act governs these relations. LP Act, Corp. Code § 15901.10(a). However, the LP Act lists certain provisions that cannot be varied, eliminated, or restricted by the partnership agreement. See LP Act, Corp. Code § 15901.10(b).

The LP Act provides that each general partner is an agent of the LP for purposes of its activities. An act of the general partner, including the signing of a document in the LP’s name, for apparently “carrying on in the ordinary course” the LP’s activities or activities of the kind carried on by the LP, binds the LP, unless the general partner did not have authority to act for the LP in the particular matter and the person with whom the general partner was dealing knew, had received notification, or had notice, that the general partner lacked authority. LP Act, Corp. Code § 15904.02(a). An act of the general partner that is not apparently for “carrying on in the ordinary course” the LP’s activities or activities of the kind carried on by the LP is binding on the LP only if the act was actually authorized by all the other general or limited partners. LP Act, Corp. Code § 15904.02(b). Opinion preparers should note

43 LP Act, Corp. Code § 15901.03(d), defines when a person has “notice” of a matter.
that the partnership agreement may alter the default rules set forth in LP Act, Corp. Code § 15904.02. See LP Act, Corp. Code § 15901.10.

Each general partner has equal rights in the management and conduct of the LP’s activities and, except as expressly provided in the LP Act, any matter relating to the activities of the LP may be exclusively decided by the general partner or, if there is more than one general partner, by a majority of the general partners. LP Act, Corp. Code § 15904.06(a). Section 15904.06(b) of the LP Act sets forth various actions for which the consent of each general and limited partner is necessary. In addition, separate voting requirements for the partners are set forth in the LP Act for a dissolution, a conversion into another business entity, or a merger. See LP Act, Corp. Code §§ 15908.01(b), 15911.03(b), 15911.12(a). The partnership agreement may change the default rules set forth in LP Act, Corp. Code §§ 15904.06 and 15908.01; however, the agreement cannot restrict the right of a partner to approve a conversion or merger. See LP Act, Corp. Code § 15901.10(b)(12).

**Documents Reviewed.** The opinion preparers normally review a copy of the LP’s certificate of limited partnership certified by the Secretary of State and a copy of its partnership agreement certified by the general partner to determine whether they include any provision limiting or restricting the ability of the LP to enter into the contemplated transaction, any limitation on the authority of the general partner to bind the LP, or any provision requiring special approvals for certain types of transactions. The opinion preparers normally determine whether the partnership agreement requires any special action by the partners, such as a vote or consent of the limited partners, to authorize the transaction, and, if so, whether that action has been taken.

If the transaction involves a disposition or encumbrance of real property, the opinion preparers normally also review the certificate of limited partnership, if any, recorded in the relevant county pursuant to LP Act, Corp. Code § 15902.01(e).

The opinion preparers may conclude that the contemplated transaction is authorized by the partnership agreement, in which event no partner approval other than execution by the GP(s) may be required for the LP to enter into the transaction. If further partner consent is required, then the opinion preparers will determine whether such approvals have been obtained, which may include obtaining a certificate from the general partner to that effect. If the partnership agreement has been amended to authorize the specific transaction, the opinion preparers normally determine that the procedures for the amendment set forth in the partnership agreement have been followed, obtain a certificate to that effect, or state an explicit assumption as to the approval of the amendment.

When a partner approving the relevant documents or transaction is an entity, the question arises whether the opinion also addresses the partner’s power under the statute applicable to it and its Governing Documents to take or approve the actions covered by the opinion. Opinion givers customarily assume, without so stating, that the partner is the type of entity it purports to be, has the power and was duly authorized by its governing body to approve the relevant documents or transaction, and that those acting on its behalf had the approvals they required. Some opinion givers choose to include an express assumption to that effect. It is not unusual for the opinion giver to be asked to include a separate opinion covering these matters.

**Spousal Consent.** In general, the consent of a member’s or partner’s spouse is not required with respect to any LLC or LP transaction, even if that transaction could affect a membership or partnership interest that is, in whole or in part, community property. Although a member may have an obligation to give prior notice to his or her spouse before disposing of a business or interest, failure to do so will not invalidate the transaction. For a discussion of when the consent of a spouse or domestic partner may be required, see California Law of Contracts § 4.43 (Cal CEB 2016).

**Other Reports.** For a discussion of the authorization opinion for LLCs, see TriBar LLC Report § 4.0, 61 Bus. Law. at 689–690; and for corporations, see Bus. Trans. Report at 43–45; Sample Corporate Closing Opinion, With Notes, at 8–10 nn.18–22; TriBar Report § 6.4, 53 Bus. Law. at 653–654.

**2. Execution and Delivery**

**Prior Reports.** The execution and delivery language in the sample authorization opinion above varies from the formulation of this opinion in the Prior
Reports, which reads: “The agreement . . . has been duly executed and delivered by the [entity].” 2000 Report at 10–13; 1998 Report at 20–27. The sample authorization opinion is not intended to have any meaning different from the formulation in the Prior Reports. The opinion in the Sample Corporate Closing Opinion uses the same formulation with respect to execution and delivery as the sample authorization opinion above. See Sample Corporate Closing Opinion ¶ (C)(3).

What it Means. The “duly executed” component of the sample authorization opinion above means that the persons who signed the relevant documents were authorized to do so on behalf of the LLC or the LP and that at the time of signing they held the offices or positions stated below their signatures in the relevant documents.

Giving an opinion that an agreement or document has been “duly delivered” means that the signed agreements or documents have been delivered to the other parties.

As a matter of customary usage, therefore, “execution” means the signing of the relevant documents by authorized persons, and “delivery” means the transmission of those documents to the appropriate counter-parties upon execution of the documents or the consummation of the transaction, thus completing the communication of an offer and acceptance as elements of contract formation. Under this customary usage, “execution” alone, without “delivery,” would not result in the formation of a contract.44

Information Relied Upon to Render the Opinion. The authorization of a specific person to execute documents is determined in the same manner as the authority of the LLC or LP to enter into the agreement. Often the actions taken to authorize a transaction will include the authorization of specific persons or class of persons (e.g., the managers or general partners of the Borrower) to execute and deliver documents on behalf of the LLC or LP. If the operating agreement or partnership agreement authorizes the transaction, it may also indicate who is authorized to sign the documents needed to consummate the transaction. If the person taking the action on behalf of a LLC or a LP is not a manager, member, or partner, and is not authorized to take the action by the operating agreement or the partnership agreement, that agreement may authorize the manager, member, or partner, as the case may be, to appoint that person as an agent authorized to sign the documents. In such a case, the opinion giver should examine the written appointment of the agent.

Traditionally, in order to give an opinion that a document has been duly delivered, the opinion giver or a representative would be present at the delivery or otherwise be satisfied with the implementation of procedures for actual delivery. The execution and delivery of documents and closings today often are effected by an electronic exchange of signature pages. When the opinion givers or their representatives do not witness the physical execution of the signature pages, they are permitted, as a matter of customary practice, to assume, without so stating, that all signatures are genuine. See § II(B)(1) of this report and note 12. See also Cal. Civ. Code § 1633.9 (concerning attribution of an electronic signature or record to a person). In addition, customary practice permits opinion givers to assume, without so stating, that an electronic exchange of signature pages, coupled with express or implied authorization to attach them to the relevant documents, is an appropriate procedure to constitute actual delivery.45

Other Reports. For a discussion of the opinion concerning execution and delivery for LLCs, see TriBar LLC Report § 4.0, 61 Bus. Law. at 689–690; and for corporations, see Bus. Trans. Report at 45–48; Sample Corporate Closing Opinion, With Notes, at 9–10, nn.19–22; TriBar Report § 6.4, 53 Bus. Law. at 653–654.

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45 Signature pages transmitted in portable document format (“pdf”) electronically to a closing should be valid whether the Loan Documents expressly authorize such execution and delivery or are silent on the question. See D. Glazer, S. FitzGibbon & S. Weise, Glazer and FitzGibbon on Legal Opinions § 9.4 n.21 (3d ed. 2008) (discussing the validity of electronic signatures under the Uniform Electronic Transactions Act and the Electronic Signatures in Global and National Commerce Act). Some opinion preparers are not comfortable relying on customary practice, however, and instead obtain an officer’s certificate regarding execution and delivery of the relevant documents and describe their reliance in the opinion letter. See Sample VC Closing Opinion ¶ (C)(3) n.49, 70 Bus. Law. at 192–193. The Committees believe that either approach is acceptable.
D. Remedies or Enforceability Opinion

As set forth in ¶ (C)(7) of the Sample Opinion, a typical remedies or enforceability opinion ("remedies opinion") for an LLC or an LP takes this form:

Each of the Loan Documents to which the Borrower or Guarantor is a party is a valid and binding obligation of the Borrower or the Guarantor, as the case may be, enforceable against it in accordance with its terms.46


Comparison to Corporate Form of Opinion. There is no difference between the form of the remedies opinion for an LLC or LP and the form of a remedies opinion for a corporation.

When Should It Be Requested and Given? As detailed in Appendix 4 to the Remedies Report, at 7–8, preparation and negotiation of a remedies opinion may entail significant costs—both economic and non-economic. In each case, a cost/benefit analysis should be performed, in which the cost of diligence and preparation is measured against the benefit of the legal opinion to the opinion recipient in light of the size and complexity of the transaction. A request for a third-party remedies opinion should only be made when the benefit to be obtained by the opinion recipient justifies its cost and there is no more cost-effective alternative. Remedies Report, App. 4, at 14. For a list of possible alternatives, see Remedies Report, App. 4, at 3–4. The Remedies Report notes a trend not to require third-party remedies opinions in most transactions (other than lending transactions) involving less than $10 million, in transactions involving lender-prepared form documents, and in real estate construction loan transactions. Remedies Report, App. 4, at 1 n.4.

What It Means. As discussed in the Remedies Report, at 3, a remedies opinion is intended to provide assurance to its recipient concerning the enforceability of the agreement(s) and other documents that create obligations and are addressed by the opinion. It addresses whether, and subject to what limitations, those documents create valid, binding, and enforceable obligations of the opinion giver’s client.47 By customary usage, the remedies opinion means, with respect to a particular document, (i) that “a contract has been formed,” (ii) a remedy will be available in the event of a breach of the undertakings in the contract (or the undertakings will otherwise be given effect), and (iii) remedies in the contract will be given effect, unless, in the case of (ii) or (iii), expressly or implicitly excluded.48 The undertakings include the client’s affirmative and negative covenants, the provisions for administration and interpretation of the contract, and the mechanisms for dispute resolution, if any.49 Qualifications or limitations on the scope of the remedies opinion will be required if the opinion recipient would not have a remedy for breach of an undertaking by the opinion giver’s client or if one or more of the remedies specified or any other provision of the document would not be given effect by the courts. Common qualifications for a remedies opinion...
are discussed, and sample forms provided, in § VII(B) of this report. For further discussion of the meaning of a remedies opinion, see Remedies Report at 3–4; TriBar Remedies Report, 59 Bus. Law. at 1484.

The opinions concerning status of the LLC or LP, its power to enter into and perform the obligations to be performed by it under the subject documents, and the due authorization, execution, and delivery of those documents are essential predicates of the remedies opinion. See §§ IV(A)–(C) of this report. For an obligation of an LLC or an LP to be created, the LLC or LP must have been duly formed, the LLC or LP must have the power to enter into and perform that obligation, the LLC or LP must have authorized the execution and delivery of the document that created the obligation and must have authorized performance of that obligation, and the LLC or LP must have duly executed and delivered that document. Moreover, the obligation and the document that created that obligation cannot violate any law, rule, regulation, or order that would render the obligation or the document invalid. See Remedies Report at 3. Unlike the opinions that constitute its predicates, a remedies opinion is inherently forward-looking.

Security Interest Opinions Distinguished. A loan may be secured by real property (e.g., a deed of trust and/or assignment of rents) and/or personal property (e.g., a security agreement, deposit or securities account control agreement, and/or pledge of securities). A remedies opinion does not address the effectiveness of any real property liens or personal property security interests. With respect to personal property security interests, there is a clear distinction between:

• A remedies opinion that the covenants and agreements of a security agreement are enforceable against the borrower (or guarantor), and
• An opinion that the security interest created by a security agreement in the personal property collateral of the borrower is enforceable under the UCC as against the borrower and third parties (a “security interest opinion”).

By customary opinion practice, the sample remedies opinion set forth above covers the former; it does not cover the latter—it does not include a security interest opinion. A remedies opinion does not address: (i) whether a security agreement contains language effective to create a security interest, (ii) whether that security interest has attached to particular property or has been perfected, e.g., by filing or possession or control, or (iii) whether that security interest has priority over the interests of third parties in the same property. See UCC Report at 6–7, and authorities cited therein.

Accordingly, this report does not address opinions addressing the effectiveness of real property liens or personal property security interests. Practitioners who have been asked to deliver such opinions should consult the following authorities:


Practitioners who have been asked to deliver a security interest opinion concerning personal property collateral should also review the Opinion Committee’s Sample California Third-Party Legal Opinion for Personal Property Secured Financing Transactions (pending).
Practitioners who have been asked to deliver a remedies opinion but not a security interest opinion in a transaction that includes personal property collateral often include a qualification disclaiming any opinion to the effect that any security interest referenced in the loan documents has been validly created or is enforceable against the borrower or third parties. An example of such a disclaimer follows:

Our opinion in paragraph __ [the Remedies Opinion] does not address, and we express no opinion on, the enforceability of the security interest created by [the Security Agreement] in the collateral described therein against the Company, as debtor, and/or against third parties.

**Qualifications or Exceptions to the Remedies Opinion.** If a remedies opinion is to be given, a number of qualifications or limitations on the scope of the opinion will generally be required, depending on the circumstances of the transaction. Common qualifications to a remedies opinion are discussed, and sample forms of those qualifications are provided, in § VII(B) of this report. See also Remedies Report, §§ VII, VIII, and App. 10.

**Information Relied on to Render the Remedies Opinion.** Giving a legal opinion in general—and giving a remedies opinion in particular—requires that the opinion preparers conduct factual and legal diligence. A good discussion of customary factual diligence can be found in Article II of the TriBar Report. See also Bus. Trans. Report at 24–32. It begins with a review of the whole of each document that is the subject of the remedies opinion and a consideration of the proper characterization of the provisions of each document in view of its language and structure and its relationship to the transaction. Remedies Report, App. 8, at 7–8, App. 10, at 11. Customary legal diligence, addressed in Appendix 8 of the Remedies Report (see also TriBar Report, at § 3.5–3.6.2, 53 Bus. Law. at 627–631), means the process of considering which bodies of law are covered by the remedies opinion and how the law covered by the opinion applies to the documents in question. If a question about the enforceability of a particular provision of a relevant document is identified, the opinion preparers determine whether the opinion will cover the issue, and, if so, whether the issue can be resolved. If the issue cannot be resolved, the opinion preparers include an appropriate exception in the opinion. See Sample Corporate Closing Opinion, With Notes, at 11 n.23; Remedies Report, App. 8, at 7–8. See also TriBar Remedies Report, 59 Bus. Law. at 1486–1489. The task of reviewing the agreement to determine whether particular exceptions should be taken is an important aspect of the diligence process for a remedies opinion. TriBar Report § 3.2, 53 Bus. Law. at 622.


**E. Consents and Approvals**

As set forth in the Sample Opinion, a typical consents and approvals opinion for an LLC or LP takes the following form:

All consents, approvals, authorizations or orders of, and filings, registrations and qualifications on the part of the Borrower or the Guarantor with, any United States federal or California state regulatory authority or governmental body pursuant to any Covered Law required to execute and deliver, and perform their respective obligations under, the Loan Documents have been obtained or made.50

**Prior Reports.** Neither of the Prior Reports included a sample of, or discussed, a consents and approvals opinion. The sample consents and approvals opinion stated above is identical to the consents and approvals opinion included in the Sample Corporate Closing Opinion ¶ C(8). For a discussion of the consents and approvals opinion generally, see Bus. Trans. Report at 61–62; TriBar Report § 6.7, 53 Bus. Law. at 662–663.

**Comparison to Corporate Form of Opinion.** There is no difference between the form of the consents

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50 The term “Covered Law” as used in this form of opinion is defined and discussed in § VII(A)(1) (“Laws Covered”) of this report and in Section E of the Sample Opinion in Appendix C.

The consents and approvals opinion typically does not address third-party consents, such as those that may be required under other agreements of the Borrower or Guarantor. Third-party consents are typically addressed by the “no breach or default” opinion. See § IV(F) of this report.
and approvals opinion recommended for LLCs and LPs and that recommended for corporations.

**What It Means.** As explained by the Bus. Trans. Report, the consents and approval opinion “is intended to give the opinion recipient comfort that the Company has obtained all necessary consents, approvals and orders and has made all filings and obtained all registrations and qualifications required on its part or for it to consummate the transaction.” Bus. Trans. Report at 61. See also TriBar Report § 6.7, 53 Bus. Law. at 662–663 (referring to the consents and approvals that are the focus of this opinion as those required of “governmental bodies” in connection with the execution and delivery of the agreement and, in many cases, the performance of the entity’s obligations under the agreement).

The consents and approvals opinion excludes various items. For example, the opinion does not encompass matters related to the general business of the Borrower or the Guarantor; it only relates to the specific transaction in question. Furthermore, the opinion does not cover local law requirements. TriBar Report § 6.7, 53 Bus. Law. at 662–663.51

The consents and approvals opinion substantially overlaps with the remedies opinion (discussed in § IV(D) of this report) and the no breach or default opinion (discussed in § IV(F) of this report). See Bus. Trans. Report at 61.

**Future Performance.** The typical consents and approvals opinion delivered by borrower’s counsel in a loan transaction addresses not only consents and approvals required to “execute and deliver” the loan documents but also those required for the “performance” by the opinion giver’s client of the loan documents. This is the form used in this report (“... and perform their respective obligations under ... the Loan Documents ...”). Normally, in an unsecured loan transaction, such as that addressed by the Sample Opinion, no governmental consents, approvals, authorizations, orders, or filings are required post-closing to enable the borrower and the guarantor to perform their obligations under the loan documents. Where such matters may be required, such as the filing of UCC financing statements in a personal property secured loan transaction, the opinion is qualified by reference to such filings, e.g.,

**Other than for the filing of a UCC-1 financing statement with the ______ Secretary of State, no consent, approval, authorization, order of or filing with . . . is required . . . .**

In certain transactions, such as venture capital financings, including “future performance” in the consents and approvals opinion raises the question of whether the opinion addresses future consents, approvals, and filings required by the agreements addressed by the opinion. For example, an Investors Rights Agreement may include provisions requiring the future registration of shares under the federal securities laws. Because of such concerns, an alternative form of the consents and approvals opinion excludes a reference to the post-closing performance of the transaction documentation:

**All consents, approvals, authorizations or orders of, and filings, registrations and qualifications on the part of the Borrower or the Guarantor with, any United States federal or California state regulatory authority or governmental body required to consummate the transactions contemplated by the Loan Documents have been obtained or made.**

(emphasis added). This is the form of the consents and approvals opinion included in the Bus. Trans. Report at 61. As explained by TriBar:

If the opinion does not refer expressly to performance of the agreement but only to consummation of the transaction, the opinion as a matter of customary usage is understood to cover only approvals and filings required for the Company to enter into the agreement

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51 As TriBar notes, however, where local law is relevant to the transaction, such as in the sale of a business involving city or county permits, then opinion recipients may appropriately request specific opinions on approvals and filings required by local law. TriBar Report § 6.7, 53 Bus. Law. at 663.

52 By customary practice, neither the remedies opinion in § IV(D) of this report nor the consents and approvals opinion covers the enforceability of personal property security interests. As indicated in § IV(D) of this report, security interest opinions are subject to many special considerations that are beyond the scope of this report.
and close the transaction and not those that are required for it to perform its obligations under the agreement after the closing.\textsuperscript{53}

The Committees agree with this expression of customary usage.

\textbf{Information Relied on to Render the Opinion.} A review and understanding of the Loan Documents are necessary to determine what, if any, governmental or regulatory consents and approvals are necessary to consummate the transaction. As noted in the Bus. Trans. Report at 61, “[t]o give this opinion, the opinion preparers usually have, or at least consult with someone who has, an understanding of the laws requiring consents that generally apply to the type of transaction involved and, in appropriate cases, conducts legal research or takes other reasonable steps to identify required consents.”

In preparing this opinion, opinion preparers normally consider these questions:

- Is the company subject to any governmental regulation that requires governmental consent prior to entering into the transaction?
- Is the company subject to any court orders or decrees, such as those of a bankruptcy court?
- Does the company’s performance of its obligations under the agreement require any governmental filings (e.g., a UCC financing statement)?

If the opinion preparers are not familiar with the company’s business, they will normally obtain an understanding of the company’s business through an examination of the company’s reports or discussion with company officers, or obtain an officer’s certificate from the company (i) containing a general description of the type of business in which the company and its subsidiaries are engaged and the jurisdictions in which the businesses are conducted, (ii) specifying those governmental authorities or agencies that regulate the company, any of its subsidiaries, or any of their businesses or assets, and that the company or its subsidiaries report to or deal with, and (iii) disclosing any filings of which they are aware that must be made or consents or approvals that must be obtained in connection with the transaction.

\textsuperscript{53} TriBar Report § 6.7 n.171, 53 Bus. Law. at 663.

\section*{F. No Breach or Default}

As set forth in the Sample Opinion, a typical no breach or default opinion (“no breach opinion”) for an LLC or LP takes this form:

\begin{quote}
The execution and delivery by Borrower or the Guarantor of the Loan Documents to which it is a party do not, and the performance by them of their respective obligations under those Loan Documents will not:

\begin{enumerate}
\item violates the Articles of Organization or the Operating Agreement of the Borrower or the Certificate of Limited Partnership or the Limited Partnership Agreement of the Guarantor;
\item result in a breach of, or constitute a default under, any Borrower Material Agreement or Guarantor Material Agreement or result in the creation of a security interest in, or lien upon, any of the Borrower’s or the Guarantor’s properties or assets under any Borrower Material Agreement or Guarantor Material Agreement, but excluding in any such case (i) financial covenants and similar provisions therein requiring financial calculations or determinations to ascertain compliance, or (ii) provisions relating to the occurrence of a “material adverse event” or “material adverse change” or words or concepts to similar effect;
\item violate any judgment, order or decree of any court or arbitrator [identified on Schedule ___ to the Loan Agreement] [or] [applicable to either of them and known to us]; or
\item violate any statute (or rule or regulation thereunder) under the Covered Law to which Borrower or Guarantor is subject.
\end{enumerate}
\end{quote}

\textbf{Prior Reports.} Neither of the Prior Reports included a sample of, or discussed, a no breach opinion. The sample no breach opinion set forth above is similar to the sample form of no breach opinion included in the Sample Corporate Closing Opinion. See Sample
Corporate Closing Opinion ¶ (C)(9). The leading resource for California attorneys on the no breach opinion is the Bus. Trans. Report at 48–59, which contains an extensive discussion of this opinion and its different aspects, e.g., no violation of articles and bylaws, material agreements, court orders, applicable law, and margin regulations. See also TriBar Report §§ 6.5, 6.6, 53 Bus. Law. at 654–662.

Comparison to Corporate Form of Opinion. There is no difference between the form of the no breach opinion for an LLC or LP and the form of the no breach opinion for a corporation.

What it Means. Paragraph (a) of the sample no breach opinion above with respect to the LLC’s or the LP’s Governing Documents means that the LLC’s or LP’s agreement to enter into and to perform its obligations under the Loan Documents does not violate the entity’s Governing Documents. This component of the opinion is largely duplicative of the opinions regarding the power to enter into and perform obligations, due authorization, and the remedies opinions; those opinions could not be given if the execution or delivery of the Loan Documents would violate the Governing Documents of the entity. Nevertheless, the practice of including a separate opinion to cover no breach of Governing Documents is well established. See Bus. Trans. Report at 49.

The purpose of paragraph (b) of the sample no breach opinion above with respect to identified agreements is to address the concern that neither the execution and delivery nor the performance by the LLC or LP of the Loan Documents results in any fine, penalty or other similar sanction against the LLC or LP under any statute, rule or regulation customarily applicable to the opinion giver’s client, the transaction, or the Loan Documents. See Bus. Trans. Report at 58. The no violation of law opinion in paragraph (d) addresses statutory law (and rules and regulations promulgated thereunder), not common law. The no violation of law opinion does not address the enforceability of the Loan Documents, which is the purview of the remedies opinion. See TriBar Report § 6.6, 53 Bus. Law. at 661–662.

The reference to “statute (or rule or regulation thereunder) under the” in the no violation of law opinion in paragraph (d) is not included in the sample form of no violation of law opinion in the Sample Corporate Closing Opinion, but no difference in the scope of the opinion is intended. The restriction of the no violation of law opinion to statutory law (and rules and regulations promulgated thereunder) is understood as a matter of customary usage.

Future Performance. The no breach opinion in a loan or other business transaction customarily addresses not only whether the execution and delivery of the transactional documents violates the identified agreements, documents, orders, or applicable law, but also whether the client’s future performance of the transactional documents would violate the identified agreements documents, orders, or applicable law. See Bus. Trans. Rept. at 48–59. The focus is on obligations, not rights. The TriBar Report provides the following illustration of this distinction in the context of a “put” right with respect to corporate stock: If the agreement addressed by the opinion is a stock purchase agreement that grants an investor a right to require the company to repurchase its shares, a no breach opinion would require an exception for this provision of the agreement if the company were party to another agreement that prohibited the company from repurchasing its stock. On the other hand, no exception need be taken if, instead of granting the investor a put, the stock purchase agreement granted the company a right to call the investor’s shares “because the [no breach] opinion covers performance by the Company of its obligations not the exercise by the Company of its rights under the agreement.” TriBar Report § 6.5.4, 53 Bus. Law. at 657.

In addition, the future performance aspect of the no breach opinion does not require an exception if
the company’s performance of an obligation under the agreement addressed by the opinion might be breached based upon future circumstances. Returning to the example of the common stock purchase agreement in which the investor is granted a put right, the opinion giver would not be required to take an exception for a negative covenant in another agreement if that covenant only prohibited stock repurchases if specified financial covenants were not met at the time of any repurchase by the company of its shares.

For a discussion of the issue of future performance in context of the consents and approvals opinion, see § IV(E) of this report.

Information Relied Upon to Render the No Breach Opinion. To deliver paragraph (a) of the sample no breach opinion above, opinion preparers generally review and rely on a certified copy of the articles of organization or certificate of limited partnership, as the case may be, as filed with the Secretary of State, and a copy of the operating agreement or limited partnership agreement certified by an appropriate officer of the LLC or LP.

To render paragraph (b) of the sample no breach opinion above, the LLC or LP representative generally prepares a list of agreements to be covered by the opinion. If such a list has not been prepared, opinion preparers often will obtain an officer’s certificate identifying the agreements listed. A review of the listed agreements is necessary to determine whether a breach or default by the company would occur by entering into or performing the agreements listed in the opinion letter. Where one or more of the agreements reviewed designates as its chosen law the law of a state other than California, opinion givers may state the following assumption:

With regard to the Material Agreements governed by laws other than those of the State of California, we have assumed that they would be interpreted in accordance with their plain meaning.


To deliver paragraph (c) of the no breach opinion above, opinion preparers will rely on a schedule identifying any judgments, orders, or decrees of any court or other forum affecting the LLC or LP. If such a schedule has not been approved by the opinion recipient, then the opinion preparers will often obtain an officer’s certificate to the effect that there are no judgments, orders, or decrees of any court or other forum affecting the LLC or LP, or a listing of them in such a certificate or on a schedule thereto. A search of court or administrative agency records is usually not conducted for the purpose of giving this opinion. See Bus. Trans. Report at 53–54.

To render paragraph (d) of the no breach opinion above, opinion preparers generally have an understanding of the statutory law that applies to these types of transactions and to the LLC or LP, or, under appropriate circumstances, conduct legal research or take other reasonable steps to achieve comfort on issues they recognize as relevant to the opinion. See Bus. Trans. Report at 55-56.

The reference to statutory law in the no breach opinion is customarily understood to cover “only law that a lawyer of the jurisdiction(s) whose law is being covered by the opinion letter … exercising customary professional diligence would reasonably be expected to recognize as being applicable to the entity, transaction or agreement to which the opinion letter relates.” ABA Legal Opinion Principles II(B), 53 Bus. Law. at 832. Nevertheless, some opinion givers state an exception with respect to the laws covered by the opinion letter, including the laws addressed by the no breach opinion. For example, the Sample Corporate Closing Opinion ¶ (E), at 15–16 (“Certain Qualifications”) and the Sample Opinion include the following exception:

[w]e express no opinion with respect to compliance with any law, rule or regulation that as a matter of customary practice is understood to be covered only when an opinion refers to it expressly. Without limiting the generality of the foregoing [and except as specifically stated herein], we express no opinion on local or municipal law, antitrust, unfair competition, environmental, land use, antifraud, securities, tax, pension, labor, employee benefit, health care, margin, insolvency, fraudulent transfer, antiterrorism, money laundering, racketeering, criminal and civil forfeiture, foreign corrupt practices act, foreign asset or trading control, or investment company laws and regulations.
What the Opinion Does Not Cover. The no breach opinion is not an opinion that no adverse consequences will result from the LLC’s or LP’s entering into (and, if covered, performing its obligations under) the Loan Documents. When the opinion covers performance of the Loan Documents, performance, as discussed above, is not meant to cover whether (i) the Borrower’s future performance of its obligations under the Loan Documents will satisfy all conditions in the Loan Documents, (ii) facts that may exist at a future time could make the Borrower’s future performance of its obligations a violation of the Loan Documents, (iii) future changes in the law could make the Borrower’s future performance of its obligations under the Loan Documents a violation of then applicable law, or (iv) the enforceability of the terms of the Loan Documents. See Bus. Trans. Report at 49–52.

G. Valid Issuance and Admission

As set forth in the introduction to this report, opinions on the valid issuance of equity interests and the due admission of members or limited partners are not typically included in the closing opinions given by borrower’s counsel to a lender. Purchasers of LLC or LP interests directly from the LLC or LP may request these opinions in connection with their acquisition of interests in the LLC or LP. Accordingly, this report includes samples of such opinions, as well as a discussion of their meaning and the diligence usually performed to give them.

As set forth in the Sample Opinion, typical valid issuance and admission opinions for an LLC or LP take the following form:54

The Membership [LP] Interests issued by the Company to the purchasers thereof ("Purchasers") have been validly issued; and

The Purchasers have been admitted as members [limited partners] of the Company in compliance with the requirements of the California Revised Uniform Limited Liability Company Act [Uniform Limited Partnership Act of 2008] and the Company’s Operating [Limited Partnership] Agreement.55

If these opinions are given at a closing when all steps necessary to issue the interests have not been completed, the opinions would take this form:

The Membership [LP] Interests to be issued by the Company to the purchasers thereof ("Purchasers"), when issued and sold in accordance with the terms of the respective subscription agreements between the Company and the Purchasers, will have been validly issued; and

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54 The issuer is referred to as the “Company” rather than the “Borrower” or “Guarantor” because this opinion is not typically given in loan transactions. See the first sentence of this § IV(G). The valid issuance and admission opinions may also be combined into one opinion.

55 The issuance of LLC membership interests occurring prior to January 1, 2014 is governed by the Beverly-Killea Act and not by RULLCA. RULLCA, Corp. Code § 17713.04(b). See note 6 and accompanying text. The term “issuance” as applied to equity interests in LLCs and LPs has been carried over from corporate opinion practice. Usage of this term is customary in LLC and LP issuance opinions, and therefore has been preserved in this report, even though the term “issuance” is not used in RULLCA, the Beverly-Killea Act, or the LP Act. Similarly, usage of the term “admission” with respect to members of LLCs and limited partners of LPs is customary in LLC and LP opinions, and therefore has been preserved in this report, even though the term “admission” is not found in the current statutes. The forms of valid issuance opinions in the text do not include reference to the membership or LP interests being “duly authorized,” following the customary form of this opinion. As explained by TriBar, “[u]nlike corporation statutes . . . LLC statutes do not provide for authorized capital or specify their 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.” TriBar LLC Membership Interests Report § 1.0, 66 Bus. Law. 1068. See also note 61.

As used in this report, the term “issuance” refers to the original issuance of the interests; it does not refer to an interest that has been assigned or transferred by a member or a limited partner to an assignee or transferee. The term “admission” refers to the procedure by which a person becomes a member of an LLC or a limited partner of an LP. See RULLCA, Corp. Code § 17704.01; Beverly-Killea Act, former Corp. Code § 17100; LP Act, Corp. Code § 15903.01.

The interests of the LLC or LP that are the focus of this opinion are the interests that carry LLC membership or limited partner rights and duties associated with the ownership of the interests as a member or limited partner, including rights to receive distributions from the LLC or LP, to vote and participate in management, and to receive information concerning the LLC or LP. See RULLCA, Corp. Code § 17701.02(z) (definition of “membership interest”); Beverly-Killea Act, former Corp. Code § 17001(z); LP Act, Corp. Code §§ 15901.02(z) (definition of “limited partner”), 15901.02(ak) (definition of “transferable interest”), 15907.01–15907.04 (transferable interests and rights of transferees and creditors). See “Valid Issuance and Admission – The Substantive Element of the Valid Issuance Opinion” in this section for the elements of LLC membership and LP limited partner rights addressed by the substantive element of the opinion.
Upon the issuance and sale of the Membership [LP] Interests to the Purchasers in accordance with the terms of the respective subscription agreements between the Company and the Purchasers, the Purchasers will have been admitted as members [limited partners] of the Company in compliance with the requirements of the California Revised Uniform Limited Liability Company Act [Uniform Limited Partnership Act of 2008] and the Company’s Operating [Limited Partnership] Agreement.

Prior Reports. The Prior Reports do not include a sample of, and do not discuss, the valid issuance and admission opinions. The valid issuance opinion is addressed in the corporate context in the Bus. Trans. Report at 69–71. A resource for further discussion regarding valid issuance and admission opinions with respect to LLCs is the TriBar LLC Membership Interests Report §§ 1.0 and 2.0, 66 Bus. Law. at 1066–1070.

How Often Are Valid Issuance Opinions Given? While California lawyers who specialize in the representation of private equity, venture capital, and hedge funds often give valid issuance and admission opinions (or only the latter) to purchasers of LLC and LP interests, these funds are typically organized in Delaware. Accordingly, the opinions address valid issuance and admission under Delaware law, not under California law. Some California lawyers experienced in representing investment funds only give the admission opinion and not the valid issuance opinion for the reason that the term “issuance” is not used in the relevant Delaware or California statutes and they believe the valid issuance opinion should only be given with respect to corporations and not for alternative entities. See note 55. The Committees address the valid issuance and admission opinions in this report to provide guidance to opinion givers who may be asked to give these opinions on behalf of California LLCs or LPs.

Valid Issuance Versus Admission. Unlike the issuance of shares of capital stock, in which the purchase and issuance of the shares generally qualifies the purchaser as a shareholder of the corporation, the act of purchasing or acquiring an equity interest normally does not, by itself, make a person a member of an LLC or a limited partner of an LP. The operating agreement or partnership agreement will usually establish requirements for the admission of members or limited partners. This report distinguishes between the valid issuance and admission opinions because some opinion givers will give an admission opinion but decline to give a valid issuance opinion for the reasons stated above. Other opinion givers are prepared to give both opinions and would normally not give either a valid issuance opinion or an admission opinion if they could not provide the other opinion. For example, if the issuance of membership interests requires the consent of the existing members of an LLC, the issuance of membership interests without that consent neither would be validly issued nor could the purchasers be duly admitted as members of the LLC. On the other hand, if the requisite approvals have been secured for the issuance of membership interests, the interests have been paid for in accordance with the LLC’s operating agreement or any resolutions adopted by the members authorizing the issuance of the interests, but the purchasers have yet to sign or adopt the operating agreement when becoming a member under the operating agreement requires such execution or adoption, then the membership interests would be considered validly issued but the purchasers would not be considered duly admitted as members of the LLC.

Coverage of All Outstanding Interests. Purchasers of equity interests may request an opinion from the issuer’s counsel on the valid issuance of all outstanding equity interests, not just those being issued in the current transaction, together with an opinion on the valid grant or issuance of options, warrants, or other rights to acquire equity interests. This opinion would require a factual inquiry, which can be extensive when there have been numerous prior issuances of equity interests, or reliance on officers’ certificates or on explicit assumptions of the facts underlying the opinion. Particularly for clients...
that have been in existence for a long time, these opinions are rarely cost-justified.

**When It Should be Requested and Given.** The valid issuance and admission opinions require a review of the issuance of the equity interests being issued to, and the admission of, each designated member or limited partner. Opinion preparers typically rely on officers’ certificates for factual confirmations, such as the execution or adoption of subscription agreements and the receipt of specified consideration, or rely on explicit assumptions of these facts, e.g., “in rendering our valid issuance and admission opinions stated above, we have assumed, without independent investigation, that each of the members [limited partners] has executed a subscription agreement in the form attached to the manager’s [general partner’s] closing certificate.”

A cost-benefit analysis of rendering these opinions should be performed, in which the cost of the opinion diligence and preparation is measured against the benefit to the opinion recipient of receiving the opinions in light of the size and complexity of the transaction. A request for these opinions should only be made when the benefit to be obtained by the opinion recipient clearly justifies its cost and there is no more cost-effective alternative. See Bus. Trans. Report at 75; TriBar Report § 6.2.5, 53 Bus. Law. at 651–652; ABA Legal Opinion Guidelines § 4.2, 57 Bus. Law. at 880. For a discussion of the use of such opinions in venture capital financings, see VC Opinions Report, 65 Bus. Law. at 167–169.

**What It Means: Valid Issuance Opinion.** The valid issuance opinion confirms that the issuance of the LLC or LP interests satisfies the requirements of the applicable statute, complies with any applicable provisions of the LLC’s articles of organization or the LP’s certificate of limited partnership, and satisfies the requirements of the entity’s operating agreement or partnership agreement and any agreements incorporated into the operating agreement or partnership agreement that are relevant to the issuance of the LLC or LP interests.57 It confirms that the issuance of the LLC or LP interests complied with any conditions on issuance in the resolutions or other action, if any, adopted under the operating agreement or partnership agreement approving the issuance.

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57 As TriBar notes, “[s]ome 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.” TriBar LLC Membership Interests Report § 1.0 n.9, 66 Bus. Law. at 1067 n.9.

Operating agreements and partnership agreements may require that the manager and members or general partner and limited partners approve the issuance of membership or limited partnership interests. If the operating agreement or partnership agreement does not specify the actions required to create or issue LLC or LP interests, the more general default provisions of the applicable act and the more general provisions of the operating agreement or partnership agreement will apply. See, e.g., RULLCA, Corp. Code § 17704.01(c)(3) (where operating agreement is silent, admission of a member after formation of an LLC requires the consent of all members); LP Act, Corp. Code § 15903.01(c) (in the absence of a provision in the partnership agreement, a person generally becomes a limited partner of a limited partnership with the consent of all of the partners). The operating or partnership agreement may also refer to the admission of members or limited partners pursuant to specified subscription or purchase agreements.

Conditions to the admission of members or limited partners set forth in a subscription or purchase agreement are only relevant to the admission opinion if the operating or partnership agreement conditions admission upon compliance with that agreement, because admission of a member or limited partner is generally determined only by reference to the operating or partnership agreement. See, e.g., RULLCA, Corp. Code § 17704.01(c); Beverly-Killea Act, former Corp. Code §17100(a)(1); LP Act, Corp. Code § 15903.01; RULLCA does provide that, if an LLC is to have members upon its formation, persons become members “as agreed by the persons before the formation of the limited liability company.” RULLCA, Corp. Code § 17704.01(b). In such an instance, an examination of the agreement of the parties in a subscription, purchase, or other written agreement existing prior to formation of the LLC may be necessary to determine the valid admission of the persons as members of the LLC. Where no such written agreement exists, the members’ status as members may be confirmed in the LLC’s operating agreement or by a written acknowledgement of the members.
including receipt of the required amount and kind of consideration.58

The valid issuance opinion does not address limitations that may derive from sources other than the relevant LLC or LP statute, for example, compliance with securities, tax, or antitrust laws or the status of the interests under the Uniform Commercial Code. See TriBar LLC Membership Interests Report ¶ 1.0, 66 Bus. Law. at 1068. The valid issuance opinion also does not address whether the rights and obligations associated with the LLC or LP interests, as set forth in the articles of organization, certificate of limited partnership, operating agreement, or partnership agreement, are enforceable – enforceability is addressed by the remedies opinion, see § IV(D) of this report.

**The Substantive Element of the Valid Issuance Opinion.** The valid issuance opinion does address whether the “terms” of the LLC or LP interests are prohibited by or violate the relevant LLC or LP statute or the LLC’s or LP’s Governing Documents.59 (In this report, this element of the valid issuance opinion – whether the terms of the LLC or LP interests are prohibited by or violate the relevant LLC or LP statute or the LLC’s or LP’s Governing Documents – is referred to as the “substantive element” of the valid issuance opinion.) In order to issue membership or limited partnership interests with the terms that are set out in the operating or partnership agreement, the LLC or LP must have the power under the applicable statute and its Governing Documents to create and issue interests with those terms. Accordingly, the valid issuance opinion confirms that the terms of the interests issued by the LLC or LP do not violate the applicable statute or the Governing Documents of the LLC or LP.60

The fullest discussion of the substantive element of the valid issuance opinion is found in TriBar’s Preferred Stock Opinions Report.61 The terms of preferred stock are typically easy to determine: they are set forth in a separate article or articles of the articles of incorporation or a certificate of determination filed by a corporate issuer with the Secretary of State. See

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59 See TriBar LLC Membership Interests Report, ¶ 1.0, 66 Bus. Law. at 1067–1068. This report uses the word “terms” to refer to the rights and obligations associated with equity interests in LLCs or LPs. This usage derives from the TriBar LLC Membership Interests Report, 66 Bus. Law. at 1067–1068, which in turn derives its usage of the word “terms” from the preferred stock terminology used in the TriBar Preferred Stock Opinions Report (which refers to the “rights, powers and preferences” of preferred stock), 63 Bus. Law. at 923–924.

60 See TriBar LLC Membership Interests Report ¶ 1.0, 66 Bus. Law. at 1066–1068; TriBar Report ¶ 4.0; TriBar Preferred Stock Opinions Report, 63 Bus. Law. at 923–924; SEC SLB 19 at 3. Since the terms of the interests issued by an LLC or LP are typically set forth in the operating or partnership agreement, it would be an unusual case for those terms to violate that very agreement; nevertheless, a violation might occur, for example, when the terms are set forth in separate resolutions adopted by the members or partners or by the manager or the general partner pursuant to authority granted to them by the Governing Documents.

61 See 63 Bus. Law. at 923–924. The TriBar Preferred Stock Opinions Report addresses the more complete formulation of the “duly authorized” opinion in connection with the issuance of capital stock: “…the shares have been duly authorized and validly issued and are fully paid and nonassessable.” *Id.* at 921. The focus of that report is on the “duly authorized” component of the opinion and whether it can be given if the terms of the stock violate the “provisions of the corporation statute or the Company’s charter…” *Id.* at 924. That analysis was carried over into the analysis of the “validly issued” opinion in the context of the issuance of LLC and LP interests (see the TriBar reports cited in n.60) because “[a]n opinion that shares have been ‘validly issued’ could not be rendered if the shares were not ‘duly authorized.’” TriBar Report ¶ 6.2.2, 53 Bus. Law. at 649.

Citing the TriBar Report, the Bus. Trans. Report also concludes, in discussing the “duly authorized” opinion for corporate stock, that it “should not be given as to capital stock if the terms of that stock are prohibited by the GCL.” Bus. Trans. Report at 67 and n.202 (citing TriBar Report §§ 6.2.1, 6.2.2, 53 Bus. Law. at 648–650).
Opinion preparers review those terms against the relevant provisions of the corporation statute governing the permissible rights, preferences, and privileges of the stock being addressed by the opinion letter.

The “terms” of LLC or LP interests, however, are not so easily ascertainable. None of RULLCA, the Beverly-Killea Act, or the LP Act uses the word “terms” to describe the rights and obligations of the holders of membership or limited partnership interests. The forms of the valid issuance opinion presented at the beginning of this section of the report refer to “Membership” or “LP” interests. As TriBar notes, “[a]n opinion on an LLC formed in a particular state normally uses the same terminology as is used in that state’s LLC statute.” TriBar LLC Membership Interests Report, 66 Bus. Law. at 1066 n.3. “Membership interest” is defined in RULLCA to mean a member’s rights in the LLC, including the member’s “transferable interest” (i.e., the right to receive distributions), any right to vote or participate in management, and any right to information concerning the business and affairs of the LLC. RULLCA, Corp. Code § 17701.02(r). See also Beverly-Killea Act, former Corp. Code § 17001(z) (same definition). The LP Act does not contain a definition of “limited partnership interest,” but defines “interests of limited partners” to mean the aggregate interests of all limited partners in the current profits of the limited partnership. LP Act, Corp. Code § 15901.02(o).

Another possible source of the meaning of “terms” as applied to LLC or LP interests issued by California LLCs or LPs are those provisions of the relevant statutes providing for the creation of classes of members or limited partners. RULLCA provides for the creation of classes of members, “having those relative rights, powers, and duties” as the articles of organization or operating agreement provide, including “rights, powers, and duties” senior to other classes. RULLCA, Corp. Code § 17712.01. (The Beverly-Killea Act has an identical provision, former Corp. Code § 17102.) An identical provision permitting the creation of classes of limited partnership interests is included in the LP Act, Corp. Code § 15903.07(a), which also refers to the “rights, powers, and duties” of the respective classes of limited partners.

ULLCA, the Beverly-Killea Act, and the LP Act contain numerous limitations on the freedom of members or partners to include provisions of their choice in the operating or partnership agreement. Given the breadth of these restrictive provisions, and the ambiguity in the meaning of the “terms” of LLC or LP interests under the California statutes, the relevant terms of LLC or LP interests for purposes of satisfying the substantive element of the valid issuance opinion could be argued to encompass all of the provisions of the entity’s Governing Documents (i.e., the articles of organization and operating agreement for an LLC, and the certificate of limited partnership and partnership agreement for an LP). Under this interpretation, opinion preparers could be required to review all of these provisions to determine whether any of them violates any restriction imposed by the relevant statute when giving the valid issuance opinion, thereby converting the valid issuance opinion into a kind of

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62 For an example of such a specification of the terms, see Article FOURTH of the Model Amended and Restated Certificate of Incorporation of the National Venture Capital Association at http://www.nvca.org/index.php?option=com_content&view=article&id=108&Itemid=136.b.

63 See RULLCA, Corp. Code § 17701.10; Beverly-Killea Act, former Corp. Code § 17005; LP Act, Corp. Code § 15901.10. Most of these limitations are contained in the cited sections, but limitations can also be found in other sections of the acts. See, e.g., RULLCA, Corp. Code § 17704.10(h) (waivers of LLC members’ information rights are unenforceable).
negative assurance enforceability opinion.\textsuperscript{64} Finally, a comprehensive review of each subsection of RULLCA, Corp. Code § 17701.10 (and all other relevant RULLCA sections, or, if applicable, the Beverly-Killea Act) against all of the provisions of an LLC operating agreement (and any other Governing Documents of that LLC) to determine whether any provision thereof violates any part of RULLCA (or, if applicable, the Beverly-Killea Act) would be time-consuming and in most cases not cost-effective. A similar comprehensive review could also be required for a valid issuance opinion given under the LP Act.\textsuperscript{65}

Even if the broad interpretation of the substantive element of the valid issuance opinion were accepted, the Committees believe that the applicability of many of the broad statutory phrases, such as “informed consent” or “unreasonably reduce,” that are included in the restrictive provisions of RULLCA, the Beverly-Killea Act, and the LP Act call for judgments that are not appropriate subjects of legal opinions. Moreover, the application of certain statutory restrictions would require factual determinations that are not normally the province of legal opinions. (e.g., was the modification of otherwise applicable fiduciary duties secured with the “informed consent” of the members?).

More importantly, the Committees are of the view that the substantive element of the valid issuance opinion on membership and LP interests covered by RULLCA, the Beverly-Killea Act, or the LP Act should be understood as encompassing only the members’ or LPs’ distribution and voting rights and no other possible terms of the membership or LP interests. The

\textsuperscript{64} As a few examples of the many statutory restrictions applicable to California LLC operating agreements, RULLCA, Corp. Code § 17701.10(c)(9) prohibits “unreasonable” restrictions on the right of a member to bring and prosecute a class or derivative action under Article 9 of RULLCA (Corp. Code §§ 17709.01–17709.02); RULLCA, Corp. Code § 17701.10(c)(15) prohibits “unreasonable” reductions of the duty of care; and both RULLCA, Corp. Code § 17701.10(e), and Beverly-Killea Act, former Corp. Code §17005(d), prohibit modifications of the fiduciary duties of LLC managers without the “informed consent” of the members. The LP Act, Corp. Code § 15901.10(b)(4), prohibits a limited partnership agreement from “unreasonably” restricting a limited partner’s information rights, and § 15901.10(b)(6) prohibits the agreement from “unreasonably” reducing the duty of care.

The California statutory restrictions should be contrasted with Delaware’s LLC Act, which contains few such restrictions. Title 6, § 18-1101, of Delaware’s LLC Act articulates Delaware’s policy “to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements” and permits drafters of Delaware LLC operating agreements wide latitude in the provisions they may include in a Delaware LLC agreement, including provisions that restrict or eliminate fiduciary duties. The only restriction in § 18-1101 is that a Delaware operating agreement “may not eliminate the implied contractual covenant of good faith and fair dealing.” Del. Code Ann. tit. 6, § 18-1101(c), (e) (2016).

California’s list of restrictions on the freedom of LLC members to craft an operating agreement of their choice is extensive, but it is not unique. Most of the restrictions in RULLCA, Corp. Code § 17701.10, were based directly on § 110 of the 2006 version of the model Revised Uniform Limited Liability Company Act promulgated by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”). NCCUSL’s model act contains eleven separate restrictions on what may be included in an operating agreement (§ 110(c)), five separate categories of provisions that may be included in an operating agreement if “not manifestly unreasonable” (§ 110(d)), and additional restrictions on the power of members to select operating agreement provisions of their choice (§ 110(e)–(g)). As of March 2016, versions of NCCUSL’s model act have been enacted in 15 states and are pending in four more.

\textsuperscript{65} These statutory reviews, which could be necessitated by an expansive interpretation of the “terms” of the LLC or LP interests that should be addressed in satisfying the substantive element of the valid issuance opinion, would require a careful review and interpretation of the LLC’s operating agreement or the LP’s partnership agreement. These documents are often lengthy and complex, further compounding the opinion preparers’ burden in performing the necessary diligence to satisfy the substantive element of the valid issuance opinion. In their essay on alternative entities, Chief Justice Strine of the Delaware Supreme Court (formerly Chancellor of the Delaware Chancery Court) and Vice Chancellor Laster of the Delaware Chancery Court, who, between them, have over 20 years of experience deciding disputes involving Delaware alternative entities, noted the challenges of reviewing alternative entity governing documents:

Precisely because the [alternative entity] statutes lack mandatory terms and permit great flexibility, a profusion of provisions abounds. Unlike corporate certificates of incorporation and bylaws, which are relatively short, alternative entity agreements typically contain ninety-plus pages of dense, complex, and heavily cross-referenced legalese. To digest the contractual prose, the reader must decode multi-layered sentences, incorporate the meaning of defined terms, and be constantly on the watch for more specific provisions elsewhere in the agreement or language that applies ‘notwithstanding anything to the contrary.’


TriBar itself acknowledges the greater difficulty involved in giving the duly authorized/validly issued opinion on preferred stock when the preferred stock provisions are more complex: “When preferred stock provisions are relatively straightforward, opinion preparers usually have little difficulty giving an unqualified duly authorized opinion. When preferred stock provisions are more complex (as they have become in recent years in some private transactions), opinion preparers may have more difficulty giving an unqualified opinion.” TriBar Preferred Stock Opinions Report, 63 Bus. Law at 925.
Committees come to this view in light of the analysis of the California statutes set forth above, the dearth of customary practice in California on the giving of valid issuance opinions on membership or LP interests issued by California LLCs and LPs, and their judgment as to those provisions of membership and LP interests that are basic to the ownership of these interests. The Committees believe that the substantive element of the valid issuance opinion should only address those “terms” of the membership or LP interests that are fundamental to LLC or LP interests as such, that is, distribution rights and voting rights, in contrast to other terms of LLC and LP Governing Documents, which are more in the nature of contractual obligations.

This understanding of the scope of the substantive element of the valid issuance opinion on alternative entity equity interests also is supported by the belief that the substantive element only covers those terms which, if found violative of the governing statute, would permit the purchasers of the equity interests to rescind their purchases. Conversely, terms of the interests that, if violated, would not permit purchasers to rescind their purchases are not addressed by the substantive element of the valid issuance opinion. The law of rescission supports this bifurcation. See, e.g., Cal. Civ. Code § 1689(b)(4) (permitting rescission of a contract if the consideration for the obligation of the rescinding party fails in a “material” respect); Wyler v. Feuer, 85 Cal. App. 3d 403–404, 149 Cal. Rptr. 66, 633–634 (2d Dist. 1978) (investor not allowed to rescind limited partnership agreement; “[c]ase law has uniformly held that a failure of consideration must be ‘material,’ or go to the ‘essence’ of the contract before rescission is appropriate.”). See generally Cal. Civ. Code §§ 1688–1689, 1690–1693. Limiting the scope of the substantive element to those terms of the interests that are of the “essence” of the interests responds to this principle.

As noted in note 55, “membership interest” is defined in RULLCA and the Beverly-Killea Act to include not only a member’s right to distributions and voting rights but also to information concerning the business and affairs of the LLC. The Committees do not believe that information rights are “fundamental” for purposes of the substantive element because the Committees believe that the absence of those rights would not generally entitle members or limited partners to a right of rescission (i.e., a court could fashion another remedy, such as granting the members or limited partners the statutorily mandated information rights notwithstanding any restriction on such rights set forth in an operating or partnership agreement). Moreover, with respect to LP interests, because the information rights of limited partners may be restricted in a partnership agreement if the restrictions are not unreasonable (see LP Act, Corp. Code §§ 15903.04(b), 15901.10(b)(4)), the Committees are of the view that determining whether any such restrictions are unreasonable is an inappropriate subject of a legal opinion.

Finally, the Committees note that there is controversy among California practitioners concerning the substantive element of the valid issuance opinion on LLC and LP interests. Some practitioners believe that the valid issuance opinion should be understood to address only procedure (i.e., whether issuance of the LLC or LP interests satisfied the requirements for issuance set forth in the relevant statute and in the entity’s Governing Documents) and the consideration paid for the interests (i.e., did the issuer receive the amount and kind of consideration, if any, required by the relevant statute and the entity’s Governing Documents), and should not be understood to address whether the “terms” of the interests are prohibited by or violate the relevant LLC or LP statute or the LLC’s or LP’s Governing Documents. If the substantive element of the valid issuance opinion is to be addressed, so these practitioners argue, it should be addressed in a separate, focused opinion requested by the recipient.

66 See Loew’s Theatres, Inc. v. Commercial Credit Co., 243 A.2d 78, 81 (Del. Ch. 1968) (‘‘. . . a charter provision which seeks to waive a statutory right or requirement is unenforceable’’). In Loew’s Theatres, Commercial Credit defended its refusal to grant a shareholder list request by pointing to its 1912 Certificate of Incorporation permitting only shareholders holding in the aggregate 25% or more of its outstanding capital stock the right to inspect the corporation’s stock ledger, contrary to § 220 of the Delaware General Corporation Law, which grants that right to “any” stockholder for any proper purpose. While Loew’s Theatres was not a case addressing the valid issuance of stock, it demonstrates that one permissible remedy for an invalid charter restriction of statutory rights is for a court to ignore the restriction and grant the rights.

67 Prior to its amendment as of January 1, 2016, RULLCA ostensibly permitted the members to restrict information rights as long as the restrictions were not “unreasonable.” See former Corp. Code § 17701.10(c)(6). That provision was eliminated by A.B. 506, 2015 Cal. Stat. ch. 775, for consistency with RULLCA, Corp. Code § 17704.10(b).
on those terms of the LLC or LP interests that the recipient wishes the opinion giver to address.68

**Suggested Qualifications to the Valid Issuance Opinion.** While the Committees are of the view that the limitation of the scope of the substantive element to distribution rights and voting rights should be understood even if not stated, the Committees recommend that the following express qualification be stated in an opinion letter that includes a valid issuance opinion on membership or LP interests issued by a California LLC or LP:

**Suggested Form of Qualification:**

Our opinion in paragraph __ above [the valid issuance opinion] confirms that the issuance of the Membership [LP] Interests satisfies the requirements of RULLCA [the LP Act] and the Company's Articles of Organization [Certificate of Limited Partnership] and Operating [Limited Partnership] Agreement, including any necessary approvals by the manager[s] and members [general partner[s] and limited partners] of the Company and the receipt of the amount and kind of consideration, if any, required thereunder. The opinion also confirms that the provisions of the Company's Operating [Limited Partnership] Agreement governing distributions do not violate RULLCA [the LP Act] or the Company's Articles of Organization [Certificate of Limited Partnership], and that the Company's Operating [Limited Partnership] Agreement does not purport to deny the manager[s] and members [general partner[s] and limited partners] of the Company any of those non-waivable voting [approval] rights mandated by RULLCA [the LP Act]. The opinion does not otherwise address, and we express no opinion on, whether any of the other provisions of the Operating [Limited Partnership] Agreement violate RULLCA [the LP Act] or the Articles of Organization [Certificate of Limited Partnership].69

For California practitioners who believe that the substantive element should not be construed as subsumed in the valid issuance opinion but rather should be separately stated and if necessary negotiated with opinion recipients, the Committees recommend that the following form of qualification be stated in an opinion letter that includes a valid issuance opinion on membership or LP interests issued by a California LLC or LP:

**Suggested Form of Qualification:**

Our opinion in paragraph ____ above confirms that the issuance of the Membership [LP] Interests satisfies the requirements of RULLCA [the LP Act] and the Company’s [LP’s] Articles of Organization [Certificate of Limited Partnership] and Operating [Limited Partnership] Agreement, including any necessary approvals by the manager[s] and members [general partners[s] and limited partners] of the Company and the receipt of the amount and kind of consideration, if any, required thereunder. The opinion does not address, and we express no

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68 The practice of stating the substantive element of the duly authorized/validly issued opinion in a standalone, separate opinion is acknowledged by the TriBar Opinion Committee in its Preferred Stock Opinions Report, giving, as an example of such an opinion, the following: “The rights, powers and preferences of the preferred stock set forth in the [charter] do not violate [the applicable corporation statute] or the [charter].” TriBar Preferred Stock Opinions Report, 63 Bus. Law. at 924. Alternatively, the recipient may request an enforceability or remedies opinion on the LLC's operating agreement or the LP’s partnership agreement. Broad remedies opinions on operating or partnership agreements are not commonly requested or given. See § VII(B)(15) (“Enforceability of Operating or Partnership Agreement”) of this report. Such an opinion would be even more difficult to give than one on even a broadly-interpreted substantive element of the valid issuance opinion. Remedies opinions are sometimes requested and given on specific provisions of an operating or partnership agreement, such as those addressing provisions of the agreements designed to promote the bankruptcy-remoteness of the entity. See generally TriBar LLC Report § 6.0, 61 Bus. Law. at 692–694.

69 The reference to voting rights in this qualification includes consent rights. See RULLCA, Corp. Code § 17701.02(ac) (the term “vote” includes authorization by written consent); Beverly-Killea Act, former Corp. Code § 17001(aq) (same). The LP Act does not contain a definition of “vote” or “voting” but uses, instead, the term “approve.” See LP Act, Corp. Code §§ 15901.10(b)(12), 15911.03(b), and 15911.12(a). Accordingly, if the suggested form of qualification is used with respect to the issuance of LP interests, the reference to “non-waivable voting rights” should be revised to “non-waivable approval rights . . . .”
opinion on, whether any of the provisions of the Operating [Limited Partnership] Agreement violate RULLCA [the LP Act] or the Articles of Organization [Certificate of Limited Partnership].

The first suggested form of qualification limits expressly the substantive element to the provisions of the Company’s operating or partnership agreement addressing distributions and voting or approval rights (which include consent rights, see note 69). Opinion givers using this form of qualification would thereby confirm that the provisions of the Company’s operating or partnership agreement governing distributions do not violate the relevant LLC or LP statute or the Company’s articles of organization (LLC) or certificate of limited partnership (LP), and that the Company’s operating or limited partnership agreement does not purport to deny the managers or members (of an LLC) or the general or limited partners (of an LP) those non-waivable voting rights mandated by the LLC or LP statute. These opinions are cast in the negative following the guidance of the TriBar Preferred Stock Opinions Report and the TriBar LLC Membership Interests Report. The diligence required to address these two elements of the opinion should not normally be onerous. RULLCA, Corp. Code § 17704.04(a), provides that distributions made by an LLC to its members before its dissolution shall be “in accordance with the operating agreement.” The LP Act, Corp. Code § 15905.03, provides that distributions made by a limited partnership must be shared among the partners on the basis of the value, as stated in the required records when the limited partnership decides to make the distribution, of the contributions the limited partnership has received from each partner. However, the requirements of this section can be modified by the partnership agreement (LP Act, Corp. Code § 15901.10(b)), and, accordingly, the allocation and payment of distributions by a limited partnership will be governed by the partnership agreement (unless the partnership agreement is silent on distributions). As previously noted, the valid issuance opinion does not address limitations that may derive from sources other than the relevant LLC or LP statute, including, as is here relevant, tax laws: the substantive element of the valid issuance opinion, to the extent that it covers distributions, does not address whether those provisions violate (or conform to) the tax allocation or any other provisions of the Internal Revenue Code or California’s Revenue and Taxation Code.

While RULLCA and the LP Act contain numerous provisions addressing the voting and consent rights of members and limited partners, each contains only a few non-waivable, mandated voting or approval rights. For LLCs under RULLCA, these are (i) the right, by the vote of a majority of the members or a greater percentage of the voting interests of the members as may be specified in the articles of organization or in a written operating agreement, to dissolve the LLC (RULLCA, Corp. Code §§ 17707.01(b), 17701.10(c) (8)); (ii) the right, by unanimous vote of the remaining LLC members, to continue the business of the LLC after the filing of a certificate of dissolution (RULLCA, Corp. Code §§ 17707.09, 17701.10(c)(8)); (iii) the right by a vote of not less than a majority of the members to amend the articles of organization (RULLCA, Corp. Code §§17704.07(s), 17701.10(d)(4)); and (iv) the right of members to vote on a conversion or a merger of the LLC (RULLCA, Corp. Code §§ 17704.07(t), 17710.03(b), 17710.12(b), 17710.10(c)(12), 17710.10(d)(4)). For LPs under the LP Act, the only non-waivable, mandated approval rights granted to limited partners by the LP Act is the right to approve a conversion or a merger. See

70 Any qualification, including the Committees’ suggested forms of qualification in the text, would likely not be accepted in an Exhibit 5 opinion required in connection with the issuance of LLC or LP interests in an SEC-registered offering of the same. See SEC SLB 19 at 3, 11. The Committees note that historically alternative entities that have registered their offerings of equity interests have been Delaware alternative entities. Given the amounts inevitably involved in an SEC-registered offering, the necessary diligence required to give the Exhibit 5 opinion may very well be cost-justified even if the relevant “terms” to be addressed by the opinion is given the broadest interpretation and the registrant were a California LLC or LP.

71 If the opinion giver addresses whether the provisions of the Company’s operating or limited partnership agreement governing the “making, allocation, and payment” of distributions violate the entity’s Governing Documents or the applicable statute (RULLCA or the LP Act), the opinion giver can assume, without so stating, that the payment of distributions pursuant to the operating or limited partnership agreement would not when made violate any restrictions on the payment of distributions by an insolvent entity. See RULLCA, Corp. Code § 17704.05(a); LP Act, Corp. Code § 15905.08(b).
The Committees’ suggested forms of qualification to the valid issuance opinion clarify that the opinion does not address the full panoply of rights and duties of LLC members or LP limited partners set forth in the entity’s Governing Documents. Including one of these express qualifications in the opinion letter also has the benefit of focusing the attention of the recipient and its counsel on whether they want to request the opinion giver to address other provisions of the Governing Documents or the relevant statute, thereby permitting the parties to address the scope of and diligence for the opinion and to reach a mutually satisfactory agreement.

Whether to include one of the Committees’ suggested qualifications is a matter to be decided on a case-by-case basis. For example, when the transaction involving the issuance of LLC or LP interests is substantial in monetary terms, and assuming that the opinion giver does not want to take the risk that an unqualified opinion would be interpreted to cover all or most provisions of the Governing Documents and the applicable statute, the size of the transaction may justify the diligence required of the opinion preparers to assure themselves (or to require modifications to the issuer’s operating or partnership agreement to provide such assurance) that they can provide the valid issuance opinion without qualification. Moreover, the diligence and cost of a broader interpretation of the opinion may not be great if the operating or partnership agreement was recently drafted by the opinion preparers and they are confident that none of its provisions fall within the restrictions of the relevant statute. Once focused on the validity of the provisions of the operating or partnership agreement, a recipient might accept an express qualification to the valid issuance opinion but request a separate opinion on the enforceability of particular rights that it has negotiated with the issuer. Alternatively, through discussion, the opinion preparers and the recipient may agree to expressly narrow the scope of the qualification to exclude from coverage of the valid issuance opinion only those provisions of the operating or partnership agreement that raise the most difficult interpretive issues. Including one of the Committees’ suggested qualifications in an early draft of the opinion letter provided to the recipient can thus have the salutary effect of focusing the parties’ attention on the scope of the opinion and, if the recipient objects, allowing the parties to address how the qualification can be narrowed in ways and at a cost acceptable to the opinion giver and its client.

Opinion givers that do not include one of the Committees’ suggested forms of qualification, or a qualification to like effect, should be aware of the possibly broader scope that might be ascribed to the valid issuance opinion.

**What It Means: Admission Opinion.** The admission opinion confirms the admission of the holders of the LLC or LP interests as members or limited partners. Acquiring an LLC or LP interest does not by itself cause a person to become a member or a limited partner. A subscriber/purchaser of an LLC or LP interest is admitted as a member or limited partner only as provided in the operating or partnership agreement or, to the extent not addressed in the operating or partnership agreement, as provided in the default provisions of the applicable statute (including the necessary approval from the existing members or partners). The LLC’s operating agreement or the LP’s partnership agreement will often specify conditions for admission of members or partners, such as requiring...

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72 Opinion preparers will want to carefully review any “drag-along” provisions in the operating or partnership agreement for their possible effect on the members’ or limited partners’ rights to vote on a conversion or merger and, if they are addressing voting rights by their valid issuance opinion on LLC or LP interests, consider taking an exception for the effect of any drag-along rights on the members’ or limited partners’ voting or approval rights on a conversion or merger of the entity. See TriBar Preferred Stock Opinions Report, 63 Bus. Law. at 926; VC Opinions Report, 65 Bus. Law. at 185; Sample VC Closing Opinion, 70 Bus. Law. at 207 n.90.

73 If the operating or partnership agreement does not specify the approval requirements for the admission of a new member or partner, the default provisions of the applicable statute will apply. See RULLCA, Corp. Code § 17704.01 (requiring consent of all members to admit a new member). This rule also appears to be the default rule in the absence of a provision in the operating agreement to the contrary for admission of an assignee or transferee of an interest as a full member of the LLC. See RULLCA, Corp. Code § 17705.02 (limiting the rights of transferees); Beverly-Killea Act, former Corp. Code § 17100(a)(1) (approval of a majority in interest of the other members required for admission of a member); Beverly-Killea Act, former Corp. Code § 17303(a) (majority in interest of the other members required to approve admission of an assignee as a member); LP Act, Corp. Code § 15903.01(c) (consent of all of the partners required for admission of a partner); and LP Act, Corp. Code § 15907.02(h) (consent of all general partners and a majority in interest of the limited partners required to approve admission of a transferee as a limited partner).
prospective members or partners to sign the operating or partnership agreement or to adopt the same through a separate writing such as a joinder agreement.

Comparison to Corporate Form of Opinion. A standard corporate opinion provides that shares are “duly authorized and validly issued and are fully paid and non-assessable.” See, e.g., Bus. Trans. Report at 66. The due authorization opinion confirms, among other things, that the shares are part of the corporation’s authorized capital. However, unlike California’s General Corporation Law, neither of the California LLC statutes nor the LP Act specifically provides for the creation of authorized capital. Operating and partnership agreements will generally establish the procedural steps to be followed for the issuance of membership or LP interests and for the admission of members or limited partners but do not typically establish a limit on the number of interests that may be issued.74

The portion of the admissions opinion that corresponds to a “fully paid and non-assessable” corporate opinion is addressed in § IV(H) of this report, concerning the obligations opinion.

What the Opinions Do Not Cover. Opinions that LLC or LP interests have been validly issued and that the specified members or partners have been admitted do not address the enforceability of the provisions of the operating or partnership agreement.75 These opinions do not address whether the LLC or LP or its other members or partners can enforce a member’s or partner’s obligations under the operating or partnership agreement.76 The valid issuance and admissions opinions should also not be construed to address whether the issuance or admission resulted in a breach or default under any contract to which the LLC or LP or any member or limited partner is a party.77 As discussed above, the valid issuance and admission opinions are based on compliance with RULLCA, the Beverly-Killea Act, or the LP Act, and do not address compliance with securities, antitrust, tax, or other laws, or address the status of the interests as general intangibles or securities (certificated or uncertificated) under the Uniform Commercial Code (even if the operating agreement states that the LLC Interests are securities under Division 8 of the Uniform Commercial Code).78 Finally, valid issuance and admission opinions do not address performance by the manager, members, general partner, or other partners of their fiduciary duties in approving issuance of interests and the admission of members.79 These matters, if addressed at all, would be covered in other portions of the opinion letter.

Information Relied on to Render the Opinions. In providing valid issuance and admission opinions for LLC or LP interests, opinion preparers customarily review the relevant provisions of the applicable statutes, the articles of organization or certificate of limited partnership, and the operating or partnership agreement to confirm that the requirements for creating and issuing the interests and admitting a member or limited partner have been satisfied.80 If an LLC is to have members or an LP is to have limited partners upon its formation pursuant to a subscription or purchase agreement, or if a subscription or purchase agreement used for the admission of members or limited partners is incorporated by reference into the operating or partnership agreement, the opinion preparers will need to review the form of the subscription or purchase agreement and determine that any conditions for issuance or admission set forth therein have been satisfied or state in the opinion an assumption that the interests have been issued in compliance with the conditions for issuance or admission stated in the subscription or purchase agreement. Otherwise, an examination of the individual subscription or purchase agreements utilized to issue the interests in the LLC or LP is generally not required for the valid issuance and

74 LLCs and LPs may, of course, mimic the corporate form, designating their membership or limited partnership interests as “shares,” and providing for an authorized number of “shares.” Such a structure is not unusual with publicly-offered LLCs and LPs.
75 See TriBar LLC Membership Interest Report § 1.0, 66 Bus. Law. at 1066–1068. As discussed in the text accompanying notes 59–60, however, the validly issued opinion does address whether the terms of the interests are prohibited by the applicable statute or Governing Documents of the issuer.
76 For a discussion of the remedies or enforceability opinion addressing an operating agreement or partnership agreement, see this report at § IV(D) (“Remedies or Enforceability Opinion – Enforceability of Operating Agreement or Partnership Agreement”).
79 See Bus. Trans. Report at 71. See also §§ VII(C)(2) (“Fiduciary Duties”) of this report.
80 See notes 72–73.
admission opinions. See note 57. If an examination of the subscription or purchase agreement is called for, conditions set forth therein that are not related to the admission of a member or limited partner are not relevant to the valid issuance and admission opinions (e.g., conditions as to the status of investors as accredited investors under Regulation D issued by the Securities and Exchange Commission (SEC) or as qualified institutional buyers under the SEC’s Rule 144A).81

Opinion preparers may be able to address issues that are identified in preparation of the valid issuance and admission opinions by arranging for the adoption of an amendment to the operating agreement or partnership agreement that expressly authorizes issuance of the interests and admission of the designated members or partners. When an approval is required from a member, manager, or partner that is not a natural person, the valid issuance and admission opinions, like the opinion that an agreement has been “duly authorized,” is typically based on the unstated assumption that the member, manager, or partner is the type of entity it purports to be and that the member, manager, or partner and those acting on its behalf have the power and are authorized to take the action they took. As with any unstated assumption, opinion preparers may not rely on this assumption if that reliance is unreasonable under the circumstances in which the opinion is given or if it is known to be false.82

H. The Obligations of Members or Limited Partners

An opinion on the financial obligations of members to an LLC or limited partners to an LP may be requested by institutional purchasers of LLC or LP interests, and will typically be rendered together with the valid issuance and admission opinions. As set forth in the Sample Opinion, a suggested form of an opinion on the financial obligations of the members of an LLC or the limited partners of an LP is as follows:

The members [limited partners] of the Company have no obligation under RULLCA [the LP Act], to make further payments for their purchase of LLC [LP] Interests or further contributions to the Company solely by reason of their status as members [limited partners] of the Company, except as provided in their Subscription Agreements or the Operating [Limited Partnership] Agreement.83

Prior Reports. The Prior Reports neither include a sample of nor discuss the obligations opinion. The Bus. Trans. Report addresses “fully paid” and “nonassessable” opinions with respect to corporate share issuances, but these corporate opinions differ in several material respects from the obligations opinion for LLCs. For further discussion regarding the obligations opinion with respect to LLCs and LPs, see the TriBar LLC Membership Interests Report § 3.0, 66 Bus. Law. at 1070–1077. See also the discussion of the opinion concerning the enforceability of the operating agreement or partnership agreement in § VII(B)(15) of this report.

When It Should Be Requested and Given. As in the case of the valid issuance and admission opinions, a cost-benefit analysis should be conducted before this opinion is requested by the opinion recipient and agreed to be given by the opinion giver. A request for this opinion should only be made when the benefit to be obtained by the opinion recipient clearly justifies the cost of its preparation and there is no more cost-effective alternative. See § IV(G) (“Valid Issuance and Admission – When It Should be Requested and Given”) of this report.

81 Investor representations concerning their sophistication and status would be relevant to any no-registration opinion given by the issuer’s counsel. See generally Bus. Trans. Report at 78–83; Subcommittee on Securities Law Opinions, Committee on Federal Regulation of Securities, ABA Business Law Section, Negative Assurance in Securities Offerings (2008 Revision), 64 Bus. Law. 395 (2009); Sample VC Closing Opinion, Opinion No. 9 and accompanying notes, 70 Bus. Law. at 200–201.
83 Exhibit 5 opinions filed with registration statements registering the issuance of LLC or LP interests must include both the legally (or validly) issued opinion and the obligations opinion (SEC SLB 19 at 3–4) and, in that context, are typically rendered as one opinion, e.g.:

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.

TriBar LLC Membership Interests Report § 3.1 n.43, 66 Bus. Law. at 1072. See SEC SLB 19 at 3.
What It Means. The obligations opinion addresses the obligation of the specified members or limited partners to make additional payments for their interests or additional capital contributions to the LLC or LP. In addition to any amounts payable for the acquisition of their LLC or LP interests, the purchasers of LLC or LP interests may agree in the subscription agreement, operating agreement, or partnership agreement to make additional capital contributions to the LLC or LP upon the occurrence of certain events, such as calls by the manager or general partner, or to provide funding for a specified investment. The obligations opinion is usually predicated on stated assumptions or a certificate from a qualified officer regarding the type, amount, and timing of amounts previously paid by the members or limited partners in connection with their acquisition of the LLC or LP interests.

Exception for Agreements. The exception in the sample form of obligations opinion for payment and contribution provisions contained in the operating, partnership, and subscription agreements avoids the need for the opinion preparers to identify the specific obligations to make payments and contributions under these agreements. This exception is included because the recipient of the opinion should not require a third-party opinion on factual matters that the recipient (or its counsel) can readily determine for themselves upon a review of the relevant agreements. The opinion preparers bear the responsibility in rendering this opinion to consider whether under RULLCA, the Beverly-Killea Act, or the LP Act, as the case may be, apart from the operating agreement and subscription agreements, purchasers are subject to any requirements following the closing to make payments for their interests or contributions solely by reason of their status as members of the LLC or limited partners of the LP. It leaves to the recipient of the opinion the responsibility of understanding the obligations to make payments and contributions under the subscription agreement and the operating agreement or limited partnership agreement.

Opinion recipients may ask for an opinion that identifies the particular sections creating the obligations to make payments or contributions under the operating, limited partnership, and subscription agreements. If provided, the opinion should refer to the specific sections of the relevant agreements that impose these obligations and expressly note that, except as provided in those identified sections, the agreements create no contribution or payment obligations (“Except as provided in Sections ___ and ___ of the [Operating Agreement] . . .”). If the subscription agreement and the operating agreement or partnership agreement do not impose any obligation to make further payments or contributions, the exception contained in the sample form of obligations opinion may be deleted.

See RULLCA, Corp. Code § 17704.06; Beverly-Killea Act, former Corp. Code § 17254(e); LP Act, Corp. Code § 15905.09.

Exception for Wrongful Distributions. Some opinion givers may choose to include an exception to the obligations opinion for the repayment of wrongful distributions. The form of such an obligations opinion is as follows:

The members [limited partners] of the Company have no obligation under RULLCA [the LP Act], to make further payments for their purchase of LLC [LP] Interests or further contributions to the Company solely by reason of their status as members [limited partners] of the Company, except as provided in their Subscription Agreements or the Operating [Limited Partnership] Agreement [and except for their obligation to repay any funds wrongfully distributed to them and for distributions wrongfully made with their consent].

See TriBar LLC Membership Interests Report § 3.1, 66 Bus. Law. at 1071–1072 and n.42.

The Committees have not included an exception for wrongful distributions (the bracketed language in the opinion above) in the form of obligations opinion included in the sample opinion because they do not regard any obligation under RULLCA, the Beverly-Killea Act, or the LP Act to repay wrongful distributions as being covered by the opinion, given that any such repayment obligation is not “solely” attributable to the status of the holder of the interests as an LLC member or limited partner—repayment obligations depend on a recipient’s knowledge that the distribution is unlawful.84 An express exception for the possible obligation of members and limited partners to repay wrongful distributions is therefore not necessary.
but its inclusion is not objectionable. The additional exception for LLCs for wrongful distributions to which the member consents will apply only if the member consents to a wrongful distribution and is a member of a member-managed LLC (or a manager of a manager-managed LLC) who does not fall within the liability exception for managers or members expressly relieved of the authority and responsibility to consent to distributions pursuant to RULLCA, Corp. Code § 17704.06(b), or the Beverly-Killea Act, former Corp. Code § 17255.

Comparison to Corporate Form of Opinion. A common corporate form of the obligations opinion states that the stock is “fully paid and nonassessable.” Use of this form of opinion in the LLC and LP context is discouraged because it does not clearly convey what it is intended to cover: the words “fully paid and nonassessable” are not defined in RULLCA (or Beverly-Killea) or the LP Act and they do not have a generally understood meaning with respect to LLC or LP interests. Therefore, opinion preparers are encouraged to use the form of opinion set forth at the beginning of this section of the report.

What the Opinion Does Not Cover. The obligations opinion addresses only the matters specifically described above. It does not address the possibility that the members or partners will be subject to other liabilities in connection with their ownership of the interests unless expressly included in the opinion. These other liabilities may include liabilities imposed on controlling owners for the receipt of, or consent to, unlawful distributions (as discussed above) or as a result of a successful piercing of the limited liability protection of the entity. The obligations opinion also does not address the enforceability of the terms of the operating agreement or partnership agreement. An opinion that a person has an outstanding, contingent, or future obligation to pay additional amounts is not an opinion that the LLC or LP or its other members or partners can enforce the member’s or partner’s obligations under the operating agreement, partnership agreement, or subscription agreement, as the case may be, to make such payments. The obligations opinion is based on compliance with RULLCA, the Beverly-Killea Act, or the LP Act and does not address compliance with other laws unless expressly stated, including compliance with securities laws, antitrust laws, or the Uniform Commercial Code, or any repayment obligations arising under statutes such as the Uniform Voidable Transactions Act. It is for this reason that the form of obligations opinion included herein makes specific reference to RULLCA (or the LP Act). The Committees are of the view that this limitation on the scope of the obligations opinion applies, whether a specific reference to RULLCA or the LP Act is stated or not. See TriBar LLC Membership Interests Report § 3.1 n.42, 66 Bus. Law. at 1072. Finally, the obligations opinion does not address issues related to the fiduciary duties of the manager, members, general partner, or other partners, including duties with regard to capital calls. These matters, if addressed at all, would be covered in other portions of the opinion letter.

Some opinion givers include an exception in similar opinions for particular obligations of members or limited partners under the operating agreement or limited partnership agreement, such as the obligation to pay for copies of books and records of the entity if the member or limited partner makes a demand for them, and to pay for costs that the entity may incur to transfer LLC or LP interests to an assignee. Because these obligations are not obligations to make payments for the purchase of LLC or LP interests, or contributions solely by reason of the member’s or limited partner’s status as such, an exception for them is not necessary.

Information Relied on to Render the Obligations Opinion. Members or limited partners may agree to make payments or contributions apart from their subscription agreements and the operating

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85 See text accompanying n.84 (liability for wrongful distributions); RULLCA, Corp. Code § 17703.04(b) (member liability under the alter ego doctrine); Beverly-Killea Act, former Corp. Code § 17101(b) (same); LP Act, Corp. Code § 15903.03 (liability of limited partner for participating in the control of the business); and the following decisions addressing LLC members’ alter ego liability: Misik v. D’Arco, 197 Cal. App. 4th 1065, 130 Cal. Rptr. 3d 123 (2011); People v. Pacific Landmark, LLC, 129 Cal. App. 4th 1203, 29 Cal. Rptr. 3d 193 (2005).

86 See TriBar LLC Membership Interests Report § 1.0, 66 Bus. Law. at 1068.


88 See Bus. Trans. Report at 74. See also § VII(C)(2) ("Fiduciary Duties") of this report.
agreement or partnership agreement in so-called “side” letters. For this reason, opinion givers may include in the opinion letter an express assumption that purchasers are not parties to any side letters or agreements other than their subscription agreements and the operating agreement or partnership agreement that are inconsistent with the opinion, or may 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.

To deliver the obligations opinion, opinion preparers generally obtain an officer’s certificate stating that the LLC or LP has received the consideration agreed upon for the initial issuance of the LP or LLC interests pursuant to the operating agreement or partnership agreement or subscription agreement. This certificate may state that the consideration specified was received prior to or contemporaneously with the issuance of the LP or LLC interests. In addition, the opinion preparers will rely on certified copies of the LLC’s or LP’s Governing Documents and the form of any subscription or purchase agreement utilized by the LLC or LP for its members or limited partners.

Liability to Third Parties. Purchasers of LLC or LP interests may request an opinion that, as members or limited partners, they will have no personal liability to third parties for the debts, obligations, and liabilities of the LLC or LP. As does TriBar, the Committees discourage requesting or giving this opinion. The relevant statutes are clear that members of an LLC and limited partners of an LP do not, solely by reason of their status as members or limited partners, have any liability for the debts, obligations, or liabilities of the entity. See RULLCA, Corp. Code § 17703.04(a); Beverly-Killea Act, former Corp. Code § 17101(a); LP Act, Corp. Code § 15903.03. The exceptions to this general rule are matters that are not the proper scope of legal opinions, such as the doctrine of piercing-the-veil or alter ego, or matters that relate to the individual conduct of a member or limited partner (such as tortious conduct). See TriBar LLC Membership Interests Report § 3.2, 66 Bus. Law. at 1077.

V. OPINIONS FOR GENERAL PARTNERSHIPS AND LLPS

A. General Partnerships

Closing opinions for general partnerships (“GPs”) are given infrequently, and therefore the primary focus of this report is on opinions for LLCs and LPs. When GP opinions are given, they are typically for joint ventures formed as GPs for specific purposes between operating companies, or for GPs formed to hold real estate. Opinions on the power to enter into and perform obligations, due authorization, execution and delivery, remedies or enforceability, consents and approvals, and no breach or default involve many of the same considerations set forth in this report for the same opinions for an LLC or LP, but opinions for GPs will often entail a heavy reliance on a review of the general partnership agreement. Often a closing opinion for a general partnership may be extensively negotiated between the opinion recipient and the opinion giver.

Following is a discussion of the unique aspects of GPs that opinion preparers should take into account when delivering standard closing opinions for a GP.

The Status Opinion. The formation of a GP does not require any filing with the California Secretary of State (or with any other governmental agency). See GP Act, Corp. Code § 16202. Section 16202 defines a partnership as an “association of two or more persons that carry on as co-owners a business for profit … whether or not the persons intend to form a partnership.”

Section 16202 excludes from the definition of a partnership for purposes of the GP Act “associations” formed under other acts, partnerships formed under a statute comparable to the GP Act in another jurisdiction, and relationships such as joint tenancies,
tenancies in common, and others specified in the statute. See GP Act, Corp. Code § 16202(c).

The status opinion is therefore particularly relevant for the recipient of an opinion for a GP because it confirms for the recipient that the GP is indeed a general partnership under the GP Act with the effect that normally follows from that status, i.e., that each of the partners, unless otherwise agreed by the GP’s creditors, is jointly and severally liable for all obligations of the partnership. GP Act, Corp. Code § 16306(a).

A suggested form of status opinion for a California GP is as follows:

The [GP] is a general partnership [and is validly existing] and in good standing under the California Uniform Partnership Act of 1994, as amended.

The Committees do not include in this form of opinion any reference to the GPs being “duly formed” or “duly organized” because the organization of a GP does not require any filing and because the formation of a GP, i.e., an agreement by two or more persons to carry on as co-owners a business for profit, is subsumed in the opinion that the GP is “existing.”

Unlike the form of status opinion for an LLC or LP (see § IV(A) of this report), this form of opinion references explicitly the law under which the GP is existing, i.e., the California Uniform Partnership Act of 1994, as amended. As explained in the discussion of those status opinions (see § IV(A) of this report), the California “law” referenced by those opinions is the relevant act under which the LLC or LP is organized at the time of its formation. The Committees suggest a specific reference in the form of a GP status opinion to the GP Act for clarity, but whether a specific reference is used or the more general reference to California “law” is used, the meaning is the same: the law referred to by the status opinion for a GP refers to the GP Act.

To eliminate ambiguities on the status of an entity as a GP as distinct from other forms of entity, opinion preparers will generally rely on a written partnership agreement that explicitly acknowledges the entity as a GP organized under and governed by the GP Act. The opinion preparers will also generally rely on certificates from the general partners (or from a managing partner or other partner with authority to deliver the certificate) that attest to the authenticity of the partnership agreement, as well as to the GP’s continuing existence (or rely upon an assumption, explicit or implicit, as to the authenticity of the partnership agreement). See the sample officer’s certificates attached to this report as Appendix D.

Statement of Partnership Authority. A Statement of Partnership Authority (“SPA”) containing the information required or permitted by GP Act, Corp. Code § 16303, may be filed with the Secretary of State on Form GP-1 by following the procedures set forth in GP Act, Corp. Code § 16105. Certified copies of the SPA may also be recorded with a county recorder with respect to any real property owned by the GP in that county. GP Act, Corp. Code § 16303(d) (2). The filings are permissive, not mandatory. Among other things, the SPA “may specify the authority, or limitations on the authority, of some or all of the partners to carry on as co-owners a business for profit.” GP Act, Corp. Code § 16303(a)(1).

93 GP Act, Corp. Code § 16202(c)(1) states that, in determining whether a partnership is formed, joint tenancy, tenancy in common, tenancy by the entirety, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property. However, such relationships can constitute a partnership for purposes of the GP Act if other factors are present.

94 The Committees ordinarily omit the phrases “and is validly” and “and in good standing” in this suggested form of opinion for the reasons stated in the discussion of this component of the status opinion under § IV(A) of this report, and because a good standing certificate may not be available for the GP from the California Secretary of State. If, however, the GP has filed with the Secretary of State a Statement of Partnership Authority (Form GP-1), the Secretary of State will issue a good standing certificate with respect to the GP. In that case, if the opinion recipient prefers, the opinion giver may include one or both of the bracketed phrases. If the opinion giver does so, the opinion should include an express qualification that this opinion is based solely on the good standing certificate. In light of the particular certifications in the Secretary of State’s form of good standing certificate for GPs (the form includes the certification that “according to the records of this office, the said general partnership is authorized to exercise all its powers, rights and privileges and is in good standing in the State of California . . .”), the opinion giver may also be able to rely on the good standing certificate as part of the diligence for the due authorization opinion. See § IV(C) of this report.

95 The GP Act applies to all general partnerships, regardless of when organized. GP Act, Corp. Code § 16111(b).

96 The information required to be included in Form GP-1 is set forth in GP Act, Corp. Code § 16303(a)(1). Form GP-1 also permits “additional information” to be set forth on attached pages, which can “specify the authority, or limitations on the authority, of some or all of the partners to enter into other transactions on behalf of the partnership.” GP Act, Corp. Code § 16303(a)(2).
partners to enter into other transactions on behalf of the partnership and any other matter.” GP Act, Corp. Code § 16303(a)(2). These specifications have the effects set forth in GP Act, Corp. Code §§ 16303(d)–(f), including on the right of third parties to rely on grants of authority and the effect of restrictions stated in a SPA on the authority of a partner. Opinion preparers will often review any filed SPA (and, if the opinion addresses the transfer of real property, a recorded SPA) in preparing a due authorization opinion for a GP.

The Remedies Opinion and Individual Partner Liability. As noted above, partners of a GP, other than an LLP, “are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.” GP Act, Corp. Code § 16306(a). The Committees do not believe that the remedies opinion, which addresses the enforceability of an agreement, when given for a GP, should be understood to extend to the enforceability of the agreement against the individual partners of the GP. Any such opinion should be separately requested and given.97 To clarify that the scope of the opinion given on behalf of a GP does not extend to the enforceability of the agreement against the individual partners of the GP, opinion givers may include a qualification such as the following:

Our opinion in paragraph ___ above on the enforceability of the Loan Documents against the [GP] does not address, and we express no opinion on, the enforceability of the Loan Documents against the individual partners of the [GP].

The Committees do not believe that the remedies opinion for a GP should be understood as extending to the enforceability of the agreements addressed against the individual partners of the GP, whether the above qualification is stated in the opinion letter or not.

B. Limited Liability Partnerships

Because their members generally have limited liability and because they are a creature of statute, LLPs have many of the characteristics of LLCs and LPs. Therefore, the principles discussed in §§ IV(A)–(H) of this report with respect to the Sample Opinion apply with equal force to LLPs, with the following distinctions.98

Characteristics of LLPs. In California, an LLP is a type of general partnership that is only available to persons licensed to provide services in certain occupations, currently the professions of architecture, public accountancy, engineering, land surveying, and law. GP Act, Corp. Code § 16101(8)(A). California also recognizes a foreign limited liability partnership formed in another jurisdiction that is denominated or registered as a limited liability partnership under the laws of that jurisdiction and (i) in which each partner is a “licensed person” (defined in GP Act, Corp. Code § 16101(7) to mean a person authorized to provide professional limited liability partnership services in California) or a person licensed or authorized to provide professional LLP services in the foreign jurisdiction, and (ii) which is licensed under the laws of California to engage in the practice of architecture, public accountancy, engineering, land surveying, or law (or to provide related services). GP Act, Corp. Code § 16101(6)(A).99

The general principle of joint and several liability of the partners of a GP does not apply to the partners of an LLP. GP Act, Corp. Code § 16306(c). The partners of an LLP are not liable for the “debts, obligations, or liabilities” of the LLP, “whether arising in tort, contract, or otherwise… by reason of being a partner or acting in the conduct of the business or activities of the partnership.” Id.100 This “liability shield” for an LLP providing legal services does not apply to malpractice claims asserted against such an LLP “unless that partnership has a currently effective certificate of registration issued by the State Bar.” GP

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97 See § VII(B)(15) (“Enforceability of Operating Agreement or Partnership Agreement”) of this report.
98 A California-organized LLP is, by definition, referred to as “registered limited liability partnership.” GP Act, Corp. Code § 16101(8)(A). Although “registered” can be part of the name of a California LLP (GP Act, Corp. Code § 16952), most practitioners refer to LLPs without the “registered” designation.
99 The foreign LLP performing professional services in California may do so only through “licensed persons” as defined in GP Act, Corp. Code § 16101(7).
100 Exceptions to the liability shield available to the partners of a registered LLP are set forth in Corp. Code §§ 16306(d), (e), (f), and (h), and include the liability of a partner “to third parties for that partner’s tortious conduct.” GP Act, Corp. Code § 16306(e).
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Act, Corp. Code § 16306(f). This explicit statutory exception to the liability shield for malpractice claims applies only to LLPs providing legal services.

A domestic or foreign LLP registers by following the procedures set forth in GP Act, Corp. Code §§ 16953 (domestic) or 16959 (foreign), which procedures include completing and filing with the Secretary of State a Form LLP-1 and paying the requisite filing fee, currently $70.101 A partnership becomes a registered LLP at the time of the filing of its registration with the Secretary of State and payment of the required fee. GP Act, Corp. Code §§ 16953(c), (f); 16959(c), (f). The status of a partnership as a registered LLP and the liability of the partners of a registered LLP are not adversely affected by errors or subsequent changes in the information stated in a registration (or amended registration). GP Act, Corp. Code §§ 16953(e), 16959(e).

The LLP registration provisions of Article 10 of the GP Act, Corp. Code §§ 16953 (domestic) and 16859 (foreign), state that the LLP “shall comply with all statutory and administrative registration or filing requirements of the state board, commission, or other agency that prescribes the rules and regulations governing the particular profession in which the partnership proposes to engage . . . ”. GP Act, Corp. Code §§ 16953(h), 16959(a)(1).

LLPs must meet the requirements for providing security for malpractice claims against the LLP pursuant to the provisions of GP Act, Corp. Code § 16956. GP Act, Corp. Code § 16956(a) (“every registered limited liability partnership and foreign limited liability partnership . . . shall be required to provide security for claims . . . ”). This section provides alternatives for meeting the “security for claims” requirement, including by obtaining errors and omissions insurance, providing collateral security for claims, or meeting a minimum net worth test. Partners of an LLP not meeting these “safe harbors” automatically jointly and severally guarantee the LLP’s obligations under claims made against the firm for any deficiency in the security for claims provided by the LLP, but only for the difference between the amount of security actually provided and the maximum amount of the security required under the statute. See, e.g., GP Act, Corp. Code § 16956(a)(2)(C) (lawyers).

The Status Opinion. The Committees do not believe that the status opinion for an LLP should address or be deemed to address matters other than: (i) the organization of the partnership as a general partnership under the GP Act; (ii) its filing of a Form LLP-1 with the Secretary of State and payment of the required filing fee; and (iii) its continued existence in good standing under Article 10 of the GP Act, Corp. Code § 16951 et seq. Because of the complexities involved, the Committees do not believe that the status opinion for an LLP should be understood to include compliance by the LLP with its licensing or certification requirements under the Business and Professions Code and applicable regulations or compliance by the LLP with the security for malpractice claims required of the LLP. Those matters, if addressed at all, should be addressed in a separate opinion, which the Committees believe would rarely be justified in terms of the expense and effort required of the opinion giver. The Committees’ recommended form of status opinion for an LLP is as follows:

**The [LLP] is registered as a limited liability partnership and is [validly] existing in good standing under Article 10, Corp. Code §§ 16951–16962, of the California Uniform Partnership Act of 1994, as amended.**

To clarify the scope of the status opinion for LLPs recommended by the Committees, the Committees suggest that the following qualification be included in the opinion letter:

**Our opinion in paragraph __ above on the status of the [LLP] does not address, and**

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101 Gov’t Code § 12189. Before transacting intrastate business in California, a foreign LLP is required to register pursuant to the provisions of Corp. Code § 16959, completing and filing with the Secretary of State Form LLP-1 and paying a $70 filing fee. A foreign LLP must also submit a certificate of good standing, issued within the prior six months by the agency where the LLP is formed. A foreign LLP transacting intrastate business in California without registration is subject to a penalty of $20 per day, up to a maximum of $10,000. GP Act, Corp. Code § 16959(i). However, a partner of a foreign LLP is not liable for the debts or obligations of the foreign LLP solely by reason of its transacting intrastate business in California without registration. GP Act, Corp. Code § 16959(j).

102 The Committees do not include reference to the LLP’s being “duly formed” or “duly organized” for the reasons stated in support of these omissions in the status opinion for a GP. See § V(A) of this report.
we express no opinion on, compliance by the LLP with the applicable administrative requirements of the [state board governing the LLP, e.g., for lawyers, the California State Bar] or compliance by the LLP with the security for claims requirements of Corporations Code § 16956.

The Committees believe that this qualification, even if not stated, should be understood to apply to the status opinion for LLPs.

In preparing the status opinion for an LLP, opinion preparers should satisfy themselves that:

- The LLP is a general partnership under the GP Act;
- The LLP has registered with the Secretary of State by filing a Form LLP-1;\(^\text{103}\)
- The LLP is in good standing with the Secretary of State; and
- The LLP has not elected to dissolve.

In the discussion of the status opinion for GPs above, this report addresses what inquiries and assurances opinion preparers make and obtain to deliver a status opinion for general partnerships. The same inquiries would be made to determine whether an LLP is a general partnership under the GP Act.

To determine whether a LLP has registered with the Secretary of State, opinion preparers typically obtain a copy of the LLP’s Form LLP-1, as filed and certified by the Secretary of State.

To determine the status of the LLP as “existing”, or “validly existing” and “in good standing” (including a determination that the LLP has not elected to dissolve), opinion preparers would make the same inquiries and determinations they make to deliver these elements of the status opinion for LLCs and LPs. See § IV(A) of this report.

C. Obligations of the Partners of an LLP

Section IV(H) of this report discusses the opinion sometimes requested by institutional purchasers of LLC or LP interests regarding the obligations of the members or limited partners to make further payments for their purchase of interests in or additional capital contributions to the entity solely by reason of their status as members or limited partners. Because LLPs in California are limited to firms rendering professional services, there should be no occasion for a third party to request a comparable opinion for an LLP. Moreover, any such opinion would require opinion preparers to satisfy themselves that the detailed requirements of the security for claims provision, Corp. Code § 16956, are met with respect to the LLP, and possibly that the LLP has met all applicable administrative requirements of the state agency governing the LLP, including the requisite licensing of all partners and other professional employees of the LLP. Accordingly, the Committees believe that an opinion on the obligations of the partners of an LLP to make further capital contributions to the LLP should not be requested and, if requested, should be resisted by counsel.

VI. CONFIRMATIONS

Opinion givers are often requested to deliver an “opinion” on what are essentially factual matters, such as the absence of litigation involving the opinion giver’s client or the opinion giver’s lack of knowledge of any material misstatements or omissions in a securities prospectus or offering circular. These confirmations are better viewed as a form of “negative assurance” and increasingly are not included in the section of the opinion letter setting forth the opinion giver’s opinions, but are stated separately as confirmations. For a discussion, see Bus. Trans. Report at 62–64; ABA Legal Opinion Guidelines § 4.5, 57 Bus. Law. at 880; TriBar Report § 6.8, 53 Bus. Law. at 663–665; Subcommittee on Securities Law Opinions, Committee on Federal Regulation of Securities, ABA Section of Business Law, Negative Assurance in Securities Offerings (2008 Revision), 64 Bus. Law. 395 (2009).

A. No Litigation Confirmation

In the Sample Opinion, the Committees recommend that the confirmation on litigation take the following form (if true):

We are not representing the Borrower or the Guarantor in any action or proceeding that is pending, or overtly threatened in writing

\(^{103}\) If relying on a copy of the Form LLP-1 as certified by the Secretary of State, opinion preparers may presume payment of the required filing fee. See GP Act, Corp. Code § 16953(c), (d).
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by a potential claimant, that seeks to enjoin the transaction or challenge the validity of the Loan Documents or the performance by the Borrower or the Guarantor of their respective obligations thereunder.

This no litigation confirmation is limited to actions and proceedings in which the opinion giver is representing the Borrower or the Guarantor, or both, as the case may be. It does not extend more broadly to claims or proceedings “known” to the opinion giver, or of which the opinion giver has “knowledge.”

Prior Reports. Neither of the Prior Reports included a sample of, or discussed, confirmations.

Alternative Forms of the No Litigation Confirmation. The form of confirmation set forth above reflects the modern trend in no litigation confirmations, and is identical to that set forth in the Sample Corporate Closing Opinion. See Sample Corporate Closing Opinion ¶ (D). See also Sample VC Closing Opinion ¶ (D), 70 Bus. Law. at 202. This form is narrow in scope; it addresses only pending (or overtly threatened in writing) actions or proceedings that seek to enjoin or challenge the validity or performance of the documents that are the subject of the opinion letter.

Broader forms of the no litigation confirmation are still commonly requested and given. One such form is included in the Bus. Trans. Report:

To our knowledge, there is no action or proceeding pending or threatened in writing against the Company [except as set forth in Schedule 2 of this opinion] [Section ___ of the Agreement] [the certificate of an officer of the Company].


An even broader form of the no litigation confirmation is included in the TriBar Report’s illustrative opinion letter for inside counsel delivering an opinion letter on a loan agreement:

Except as listed on Schedule IV hereto, the Company is not a party to any pending [or overtly threatened in writing] action or proceeding known to me that may adversely affect the transactions contemplated by the Credit Agreement or that may have a material adverse effect on the Company.


The broader forms of the no litigation confirmation pose two challenges to opinion preparers: (i) determining whose “knowledge” is relevant in providing the confirmation; and (ii) if the TriBar form of confirmation is used, determining whether a proceeding “may have a material adverse effect on the [Borrower].” Opinion givers often define the phrase “to our knowledge” in their opinion letters to avoid a misunderstanding of the phrase. The following illustration of such a definition is included in the Sample Opinion:

Where a statement is qualified by “to our knowledge” or any similar phrase, that knowledge is limited to the actual knowledge of lawyers currently in this firm who have been involved in representing the Borrower or the Guarantor in connection with the Loan Documents. Except as otherwise expressly indicated, we have not undertaken any independent investigation to determine the accuracy of any such statement, and no inference as to our knowledge of any matters bearing on the accuracy of any such statement should be drawn from the fact of our representation of the Borrower or the Guarantor.

Because of the difficulty in distinguishing between “material” and non-material litigation, the Corporations Committee, in its Bus. Trans. Report, discourages opinion recipients from requesting, and opinion givers from giving, confirmations regarding proceedings that may have a material adverse effect on the opinion giver’s client. See Bus. Trans. Report at 63. TriBar notes that:

[t]he portion of the opinion [confirmation] … that covers litigation generally affecting the Company can be quite challenging. It normally will require the opinion preparers
and counsel for the opinion recipient to work out an objective definition of materiality, such as a specific dollar amount. That definition ordinarily will be set forth in the opinion letter.


These confirmations typically are limited to pending actions or proceedings and those “overtly threatened in writing.” This latter limitation is included because of the difficulty of evaluating the seriousness of oral threats (as well as by lawyer-client privileged communications).104

**When the No Litigation Confirmation Should be Requested and Given.** Because the no litigation confirmation is a confirmation of facts—i.e., whether the opinion giver’s client is subject to pending or overtly threatened actions or proceedings—it arguably adds nothing to the client’s no litigation representation in the relevant transaction agreement. In light of this, opinion recipients and opinion givers should consider whether the confirmation is a necessary component of the opinion letter. The TriBar Opinion Committee concurs that the no litigation confirmation can be omitted in most cases “with no real loss to opinion recipients if opinion recipients were instead to rely directly on the Company or its officers for information regarding litigation affecting the transaction and the Company.” TriBar Report § 6.8, 53 Bus. Law. at 665.

Although the confirmation is factual in nature, recipients and their counsel may believe that lawyers representing clients in business transactions have special knowledge of claims or proceedings, especially threatened claims or proceedings, or are more qualified than their clients to verify the existence or non-existence of such matters. A reasonable compromise in such a situation may be for the client’s in-house counsel, if any, to provide the confirmation, as suggested by TriBar. See TriBar Report § 6.8, 53 Bus. Law. at 664–665, and TriBar’s illustrative inside counsel opinion letter at TriBar Report, App. A-2, 53 Bus. Law. at 669–670.

**What It Does Not Mean.** The no litigation confirmation does not pass on the merits of particular actions or predict their likely outcome. Opinion givers ordinarily should not be asked to express an opinion on the expected outcome of pending or threatened litigation. Bus. Trans. Report at 63; ABA Legal Opinion Guidelines § 4.7, 57 Bus. Law. at 881. In the rare instance where an evaluation of pending litigation is given, it should conform to what the opinion giver would provide in response to an audit inquiry request complying with the ABA’s Statement of Policy Regarding the Lawyers’ Responses to Auditors’ Requests for Information (1975), 31 Bus. Law. 1709 (1976). See Bus. Trans. Report at 63; TriBar Report § 6.8, 53 Bus. Law. at 664.105

**Information Relied Upon to Provide the No Litigation Confirmation.** What opinion preparers do to provide the no litigation confirmation is largely a function of the size of the firm and the client, and the nature of the client’s business. What a multinational law firm with thousands of lawyers giving the broad form of no litigation confirmation for a large international client does to provide the no litigation confirmation would typically be different than what a small firm representing a local client giving the narrow form of no litigation confirmation does. Opinion preparers will review the client’s relevant representations and warranties contained in the documents addressed by the opinion letter, as well as any disclosure schedules, for possible exceptions to the no litigation confirmation. Opinion preparers may also canvass the other lawyers at the firm (or the other lawyers at the firm working on the transaction, depending on the size of the firm and the nature of the no litigation confirmation being given) to confirm whether there are any known pending or overtly threatened claims of the sort addressed by the confirmation. Some opinion preparers rely on an officer’s certificate from the client to the effect that there are no such pending or, to the certifying officer’s knowledge, threatened claims or proceedings. See the sample officer’s certificates in Appendix D to this report.

104 If opinion preparers know of oral threats that would render a confirmation misleading, those threats should be disclosed in an appropriate exception to the confirmation. See Bus. Trans. Report at 10 n.45 (citing Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 57 Cal. App. 3d 105, 128 Cal Rptr. 901 (1976)).

105 The best single source for the ABA’s statement of policy and related commentary is the Auditor’s Letter Handbook (2d ed. 2013), published by the Audit Responses Committee of the ABA Business Law Section.
By customary practice, a review of court records is not necessary to provide a no litigation confirmation. Bus. Trans. Report at 63.

If, during the course of their investigation, the opinion preparers learn of a claim or proceeding overtly threatened but not yet filed against the client, and the threatened claim or proceeding has not been publicly disclosed by the client, then the opinion preparers first confer with the client on the need to make disclosure to the opinion recipient, mindful of their obligation to strictly maintain the confidentiality of information obtained from the client that is not publicly available. See Bus. & Prof. Code § 6068(e) (California attorney’s duty, inter alia, to “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client”). Whether a threatened proceeding should be disclosed will in the first instance depend on the nature of the no litigation representations made by client in the documents addressed by the opinion letter and the form of no litigation confirmation to be given by the opinion giver.106

B. Negative Assurance in Securities Offerings

Because it involves a loan transaction only, the Sample Opinion does not include another form of confirmation, known as “negative assurance,” that is often requested by underwriters or placement agents in connection with registered and certain other securities offerings. As with the no litigation confirmation, negative assurance statements are not legal opinions, but are statements of knowledge or belief of the opinion giver. For further discussion of negative assurance in opinion letters, see Subcommittee on Securities Law Opinions, Committee on Federal Regulation of Securities, ABA Section of Business Law, Negative Assurance in Securities Offerings (2008 Revision), 64 Bus. Law. 395 (2009) (“Negative Assurance Report”); ABA Legal Opinion Guidelines § 4.5, 57 Bus. Law. at 880; Bus. Trans. Report at 16–18.

In a typical negative assurance statement, the opinion giver, after detailing its involvement in the preparation of the registration statement and prospectus (for a registered offering) or the offering memorandum (in an unregistered offering), states:

Nothing has come to our attention that has caused us to believe that the [disclosure document] contains an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements therein [, in the light of the circumstances under which they were made,] not misleading.107


There are very limited situations in which opinion givers should be requested and be willing to provide negative assurance. The most common situation as noted is in connection with underwritten securities offerings, where counsel for the issuer typically will have participated extensively in the preparation of the issuer’s registration statement, including the prospectus, filed with the SEC, and in “all-hands” drafting sessions and other diligence activities in connection with the offering itself.

It is inadvisable for an opinion giver to provide negative assurance other than to assist the opinion recipient in establishing a “due diligence” defense to potential federal securities law claims based on the adequacy of the disclosures to investors in the securities offering. For this reason, with certain limited exceptions, such as in offerings conducted under the SEC’s Rule 144A and Regulation S, opinion givers should not be requested to provide negative assurance in private placements or other securities offerings that are not registered under the Securities Act of 1933 and where the “due diligence” defense is inapplicable.

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107 The bracketed language “[, in the light of the circumstances under which they were made,]” is from Rule 10b-5(b) promulgated under the Securities Exchange Act of 1934, and would be employed in providing negative assurance with respect to a Rule 144A or Regulation S offering circular. The bracketed language is not in Section 11(a) of the Securities Act of 1933; therefore, the form of negative assurance on a registration statement and prospectus may exclude the bracketed language. Rule 10b-5(b) also applies to registration statements and prospectuses, however, and it would not be inappropriate, if requested by underwriters and their counsel, to include the bracketed language in such negative assurance.
VII. QUALIFICATIONS

Opinion letters are often subject to qualifications that operate to narrow the apparent scope of, or to clarify, the opinions given. Qualifications may take the form of factual or legal assumptions or exceptions. Opinions may also be qualified with respect to their scope, particularly if the opinion covers a specialized area of law. As stated in the Bus. Trans. Rept., at 33 n.118, “[e]xceptions, limitations, exclusions and assumptions all fall under the general rubric of qualifications.”

Qualifications may be expressed in various ways, depending on the opinion giver’s preference and the length of the qualification. See Bus. Trans. Report at 33. For further discussion of the role of qualifications in closing opinions, including the issue of whether qualifications should be stated or should be understood as applicable, whether or not stated, see Remedies Report at 9–14 and App. 10; Bus. Trans. Report at 33–38; TriBar Report § 1.2(a), 53 Bus. Law. at 597; TriBar Remedies Report at 1485–1486.

A. Common Qualifications in Opinion Letters For Business Transactions Involving Any Type of Business Entity

Common qualifications to a closing opinion are set forth in the Sample Opinion in Appendix C to this report under § E (Certain Qualifications), and include those discussed in this section. Additional qualifications that will or may be required if the closing opinion includes a remedies opinion are discussed separately in § VII(B) of this report. Qualifications that are unique to opinions on LLCs, LPs, GPs, and LLPs are discussed in § VII(C) of this report.

1. Laws Covered

Opinion givers normally include a statement that limits coverage of their opinion to the law of a particular state, e.g., California. Opinions may also state that they cover federal law. The statement “[w]e express no opinion herein as to the application or effect of the law of any other jurisdiction” is understood even if not stated. Furthermore, by customary practice, an opinion covers only the law of the covered jurisdiction(s) that an attorney exercising customary diligence would reasonably be expected to recognize as applicable to the instant transaction. See Sample Corporate Closing Opinion, With Notes, at 15 nn.30–31; Bus. Trans. Report at 32, 56 and nn.167–168; TriBar Report §§ 3.5.1, 4.1–4.7, 53 Bus. Law. at 627–628 and 631–636. Accordingly, an opinion letter excludes coverage of specialized areas of law such as local or municipal law, antitrust, unfair completion, environmental, land use, antifraud, securities, tax, pension, labor, employee benefit, health care, privacy, margin, insolvency, fraudulent transfer, antiterrorism, money laundering, racketeering, criminal and civil forfeiture, foreign corrupt practices, foreign asset or trading control, and investment company laws and regulations, unless the opinion expressly provides otherwise. Bus. Trans. Report at 32, 56, and nn.167–168. See generally TriBar Report §§ 4.1–4.7, 53 Bus. Law. at 631–636.

108 For discussion of the issues involved in preparation of an opinion on behalf of an LLC or LP organized in Delaware (or another state other than California) but doing business in California, see § VIII of this report.

109 The documents that are the subject of the opinion may include a choice-of-law clause selecting as their governing law a jurisdiction other than California. For example, loan documents of large institutional lenders are often governed by New York law, even if neither the lender nor the borrower is a New York entity or headquartered in New York. In this situation, if the opinion giver is not licensed to practice law in the designated jurisdiction, the opinion giver has two alternatives: The first alternative is for the opinion giver to retain local counsel in that jurisdiction, who will deliver the requested opinion. If local counsel is retained, the preferred and most common current practice is for local counsel to deliver its opinion directly to the opinion recipient. The principal opinion giver then does not render any opinion at all on the matter covered by the local counsel’s opinion. See TriBar Report § 5.2, 53 Bus. Law. at 638. If, instead, the local counsel’s opinion is delivered to the principal counsel, the principal counsel will customarily include a qualification indicating its reliance on the opinion of local counsel, as follows:

In rendering the opinions expressed in paragraphs ____, ____ and ____, we have relied [solely] on the opinion of ________________________ insofar as such opinions relate to the law of ______________, and we have made no independent examination of the laws of that jurisdiction.

See TriBar Report §§ 5.1, 5.4, 53 Bus. Law. at 636–639. The second alternative is for the principal counsel to give an “as if” opinion, i.e., an opinion that assumes the law of California applies to the documents instead of the law chosen. “As if” opinions are discussed further in § VII(B)(2) (“Choice of Law Other Than California; “As If” Remedies Opinions”) of this report. For additional discussion of the issues (including ethical issues) involved when another state’s law governs the transaction documents, see Bus. Trans. Report at 35–38; TriBar Report § 4.6, 53 Bus. Law. at 635–636.
In the Sample Opinion, a statement of the laws covered is included in the first paragraph of ¶ E, as follows:

Our opinions are limited to the federal law of the United States and the law of the State of California, but in each case only to laws that in our experience are typically applicable to transactions of the type exemplified by the Loan Documents. We express no opinion with respect to compliance with any law, rule or regulation that as a matter of customary practice is understood to be covered only when an opinion refers to it expressly. Without limiting the generality of the foregoing [and except as specifically stated herein,] we express no opinion on local or municipal law, antitrust, unfair competition, environmental, land use, antifraud, securities, tax, pension, labor, employee benefit, health care, privacy, margin, insolvency, fraudulent transfer, antiterrorism, money laundering, racketeering, criminal and civil forfeiture, foreign corrupt practices, foreign asset or trading control, or investment company laws and regulations. The law covered by this opinion letter and referred to in this paragraph is referred to herein as the “Covered Law.”

If the opinion recipient insists on receiving an opinion covering an area of law that the opinion giver is not prepared to address, special counsel may need to be engaged. See Bus. Trans. Report at 34; Sample Corporate Closing Opinion, With Notes, at 15 n.30; TriBar Report § 3.5.2(a)(i), 53 Bus. Law. at 628.

2. Opinion Giver’s Knowledge

Specific opinions or factual confirmations may be limited by reference to the opinion preparers’ knowledge, with phrases such as “to our knowledge,” “to the best of our knowledge,” “we are not aware of,” or “nothing has come to our attention that.” All these phrases indicate some lack of factual investigation on the part of the opinion preparers, but their meaning may not be entirely clear. Therefore, opinion givers often include a statement regarding the meaning of the phrases used, such as the following:

Where a statement is qualified by “to our knowledge” or any similar phrase, that knowledge is limited to the actual knowledge of lawyers currently in this firm who have been involved in representing the Borrower or the Guarantor in connection with the Loan Documents. Except as otherwise expressly indicated, we have not undertaken any independent investigation to determine the accuracy of any such statement, and no inference as to our knowledge of any matters bearing on the accuracy of any such statement should be drawn from the fact of our representation of the Borrower or the Guarantor.

See the qualification in ¶ E(2) of the Sample Opinion. This language limits “knowledge” to the actual knowledge of the group of lawyers within the firm who are working on the instant transaction. See generally Bus. Trans. Report at 34–35. This qualification should not be included if none of the specific opinions or confirmations given include “to our knowledge” or any similar phrase.

3. Effective Date of Opinion

The opinion letter is normally delivered at the closing of the transaction that is the subject of the opinion and bears the date of the closing. The opinion letter speaks only as of that date, and does not cover later changes in the law or the facts. See generally Bus. Trans. Report at 21; ABA Legal Opinion Principles § IV, 53 Bus. Law. at 833. By way of clarification, opinion letters often include a limitation concerning the effective date of the opinion, such as the following:

This opinion letter speaks only as of its date. We have no obligation to update this opinion letter for any change in the law or the facts on which we have relied in rendering the opinions expressed herein.

This qualification is understood as a matter of customary practice, whether stated or not. See TriBar Report § 1.2(b), 53 Bus. Law. at 597.

110 The listed exceptions are intended to include, without limitation, the USA Patriot Act (Pub. L. 107–56, 115 Stat. 272).
4. Customary Practice

Many opinions givers now include a statement in their opinion letters to the effect that the letter is to be understood in light of customary practice, such as the following:

It is commonly understood, without any express statement, that opinion letters are necessarily technical and are informed by customary practice and usage. Thus, this opinion letter should not be used or relied upon except in consultation with counsel. ¹¹¹

Regardless whether the opinion letter includes such a statement, an opinion letter should be interpreted in light of customary practice. See Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions, 63 Bus. Law. 1277, 1278 (2008).

5. Parties Entitled to Rely on Opinion

Opinions often include a limitation identifying the party or parties who may rely on the opinion, such as the following:

This opinion letter may be relied on solely by the Lender for use in connection with the transactions contemplated by the Loan Agreement. No other party may rely on this opinion letter or the opinions expressed herein without our prior written consent.

See the last paragraph of the Sample Opinion.

The language above does not limit the ability of the recipient to provide copies to others. If a limitation on the distribution of copies is intended, it can be added using language such as the following:

Copies of this letter may not be furnished to any other party, nor may any portion of this letter be quoted, circulated or referred to in any other document, without our prior written consent.

¹¹¹ References to customary practice are increasingly used and accepted in closing opinions. See, e.g., Boston Bar Assn., Boston Bar Assn. Streamlined Form of Closing Opinions, 61 Bus. Law 389, 397 (2005), which suggests use of the following language in a closing opinion:

This opinion letter shall be interpreted in accordance with the Legal Opinion Principles issued by the Committee on Legal Opinions of the American Bar Association's Section of Business Law as published in 53 Business Lawyer 831 (May 1998).
B. Common Qualifications to the Remedies Opinion

If the opinion will include a remedies or enforceability opinion (see § IV(D) of this report), a number of additional qualifications or exceptions will generally be required, depending on the circumstances of the transaction. These additional qualifications are discussed in this section. See also Remedies Report, §§ VII, VIII, and App. 10.

1. Choice of Law, Generally

By customary opinion practice, a remedies opinion is understood to cover the enforceability of any choice of law clause in the agreement that is the subject of the opinion. See Remedies Report, App. 10, at B-2. The Sample Opinion assumes that each of the Loan Documents states that it is governed by California law and includes in ¶ E a statement limiting the subject of the opinion.


2. Choice of Law Other Than California; “As If” Remedies Opinions

Although some opinion givers are of the view that no remedies opinion should be given when the documents in question select as their governing law the law of a state other than California (and other than a jurisdiction in which the opinion giver practices outside of California), the Remedies Report states that practice “now greatly favors permitting the primary opinion giver to render an opinion to the effect that, if the law of the State of California were held to apply to the agreement, notwithstanding the choice of law of another jurisdiction, the agreement would be enforceable.” Remedies Report, App. 10, at B-2. See also Remedies Report, App. 4, at 12; Bus. Trans. Report at 88–91; TriBar Report § 4.6, 53 Bus. Law. at 635. Such a remedies opinion is commonly referred to as an “as if” remedies opinion.

112 See also Frontier Oil Corp. v. RLI Ins. Co., 153 Cal. App. 4th 1436, 1451 n.7, 63 Cal. Rptr. 3d 816, 827 n.7 (2007) (“If the parties state their intention in an express choice-of-law clause, California courts ordinarily will enforce the parties’ stated intention unless (1) the chosen state has no substantial relationship to the parties or their transaction, and there is no other reasonable basis for the parties’ choice, or (2) the chosen state’s law is contrary to a fundamental policy of the state whose law otherwise would apply, and the latter state has a materially greater interest in the matter than does the chosen state.”)

113 To date, very few cases have even referred to Cal. Civ. Code § 1646.5, and in at least one recent decision, the court overlooked the statute in circumstances where, at least arguably, it should have applied. Without citing the statute, the federal district court in Audio Mktg. Servs., S.A.S. v. Monster Cable Prods., No. C 12-04760 WHA, 2013 U. S. Dist. LEXIS 23383 (N. D. Cal., Feb. 20, 2013), analyzed and enforced the parties’ choice of California law under Nedlloyd principles against a claim that French law should apply to their breach of contract dispute. For other examples of the Nedlloyd analysis, see Bridge Fund Capital Corp. v. Fastbucks Franchise Corp., 622 F.3d 996 (9th Cir. 2010) (Texas choice of law clause in franchise agreement not enforceable against California franchisee); ABF Capital Corp. v. Grove Properties Co., 126 Cal. App. 4th 204, 216, 23 Cal. Rptr. 3d 803, 807–808 (2005), review denied No. S132207, 2005 Cal. LEXIS 4618 (Cal., Apr. 27, 2005) (non-reciprocal attorney fee clause not enforceable in California; parties’ choice of New York law not enforced).
If such an opinion is given (assuming, for example, that the Loan Documents were governed by New York law), then opinion givers may state the remedies opinion as follows:

If a court were to apply the law of California to the interpretation and enforcement of the Loan Documents, rather than the law of New York as provided therein, each of the Loan Documents to which the Borrower or Guarantor is a party would be a valid and binding obligation of the Borrower or the Guarantor, as the case may be, enforceable against it in accordance with its terms.

In addition, although not required, in such an event the opinion giver may modify the statement about the law covered by the opinion by adding to it the following:

We note that the [Loan Documents] provide that they are to be governed by New York law. We are not licensed to practice law in any state other than the State of California. We express no opinion on New York law or the enforceability of the [Loan Documents] under New York law.

The “as if” remedies opinion does not cover the enforceability of the choice of law clause because it assumes that the choice of law clause is not enforced. See TriBar Remedies Report, at 59 Bus. Law 1483, 1497 n.70. Although some opinion givers take an exception to the coverage of an “as if” remedies opinion if the opinion is not intended to address the enforceability under California law of the choice of law provisions of the Loan Documents, this is not required. If an express exception is desired, it may be written in a variety of ways, including by adding to the statement above a statement that no opinion is expressed on “the enforceability under California law of the choice of New York law in the Loan Documents.”

3. Bankruptcy Exception and Equitable Principles Limitation

Exceptions for the possible effect of bankruptcy laws and the possible application of equitable principles to the enforcement by the opinion recipient of its remedies under the transaction documents are universally accepted, standard qualifications to the remedies opinion. See Remedies Report, App. 10, at 3; TriBar Report § 3.3, 53 Bus. Law. at 622–625. The bankruptcy exception and equitable principles limitation, although usually stated in opinion letters containing the remedies opinion, are understood to be applicable whether stated or not. TriBar Report § 3.3.1, 53 Bus. Law. at 623. The following sample form, which incorporates both qualifications, is identical to the sample form suggested in the Sample Corporate Closing Opinion ¶ (E)(1):

Our opinions are subject to (a) bankruptcy, insolvency, reorganization, arrangement, moratorium and other similar laws and judicial decisions of general applicability relating to or affecting creditors’ rights generally; and (b) general principles of equity, including, without limitation, concepts of materiality, reasonableness, good faith and fair dealing, regardless of whether considered in a proceeding in equity or at law.

For a discussion of the customarily understood scope of the bankruptcy exception and equitable principles limitation, see Remedies Report, App. 10, at 4–9; TriBar Report § 3.3, 53 Bus. Law. at 622–625.

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114 If there are sufficient contacts or bases to support the parties’ choice of non-California law, and the Lender requests a specific opinion on the choice-of-law provision, a sample form for such an opinion is as follows:

In a proceeding in a court of the State of California for the enforcement of the Loan Agreement, and based on [describe contacts or bases for choosing law of chosen state], the court should give effect to Section ____ [choice-of-law provision] of the Loan Agreement, except to the extent (i) that any provision of the Loan Agreement is determined by the court to be contrary to a fundamental policy of the state whose law would apply in the absence of that Section, and (ii) that state has a materially greater interest in the determination of the particular issue than does the state whose law is chosen.

See Bus. Trans. Report, at 88–91; Remedies Report, App. 10, at B-1–B-3. This opinion could be given as a supplement to the “as if” remedies opinion. This opinion could also be given as a stand-alone opinion, without any remedies opinion, if the Lender does not request an “as if” remedies opinion. See Bus. Trans. Report, at 90–91.
4. Generic Exception to Remedies Opinion

Remedies opinions sometimes include a so-called “generic exception,” as follows:

The opinion regarding enforceability set forth above is subject to the qualification that certain provisions of the contract covered by this opinion letter may be unenforceable, but such unenforceability will not [, subject to the other exceptions, qualifications and limitations in this opinion letter,] render the contract invalid as a whole or substantially interfere with realization of the principal benefits provided by the contract.115

The Remedies Report notes that opinion recipients often resist inclusion of the generic exception outside its traditional context of real estate secured lending and other complex asset-based financing transactions, on the grounds that it is vague and arguably weakens the remedies opinion to such an extent that the recipient cannot rely on it. See Remedies Report, App. 11 at 2. Nonetheless, the Remedies Report concludes that it may be appropriate to include the generic exception, not only in real estate secured and other complex asset-based financing transactions, but also in other types of complex business transactions. Id. at 3. For a discussion of the meaning of this exception, see TriBar Report § 3.4, 53 Bus. Law. at 626–627.

5. Waivers, Generally

Borrower’s counsel may have concerns about the breadth of waivers or limitations of certain rights or defenses or certain types of damages specified in the loan documents. Although the equitable principles limitation to the remedies opinion is broad in scope and may address at least some of these concerns (see Remedies Report, App. 10 at 6–9; TriBar Report § 3.3.4, 53 Bus. Law. at 625), opinion givers may include express language addressing these concerns, such as the following:

We advise you that, on statutory or public policy grounds, waivers or limitations of the following may not be enforced: (i) broadly or vaguely stated rights, (ii) the benefits of statutory, regulatory or constitutional rights, (iii) statutes of limitations, (iv) unknown future defenses, and (v) rights to one or more types of damages.

See the qualification in ¶ E(3) of the Sample Opinion. This qualification is also understood to cover exculpation clauses, which may be unenforceable under Cal. Civ. Code § 1668. See Remedies Report, App 10 at A-7, B-28. See also Frittelli, Inc. v. 350 North Canon Drive, LP, 202 Cal. App. 4th 35, 135 Cal. Rptr. 3d 761 (2011).

6. Risk Allocation Provisions (Indemnity, Contribution, and Exculpation)

Loan documents that include indemnity, contribution, exculpation, or similar provisions may cause concern by reason of their breadth. For example, they may extend or be construed to extend to providing coverage to the indemnitee or beneficiary of a contribution provision for its gross negligence or willful misconduct. A number of California Civil Code provisions address indemnity agreements. See Cal. Civ. Code §§ 2772–2779. See also Rossmoor Sanitation, Inc. v. Pylon, Inc., 13 Cal. 3d 622, 628, 532 P.2d 97, 100 (1975) (“an indemnity agreement may provide for indemnification against an indemnitee’s own negligence, but such an agreement must be clear and explicit and is strictly construed against the indemnitee”); Remedies Report, App. 10 at B-26–B-29. Indemnification provisions are currently the subject of a pending report by TriBar. The Sample Opinion includes a qualification, identical to that set forth in the Sample Corporate Closing Opinion, concerning

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115 This exception is also sometimes known as the “practical realization” exception, because another common way of expressing the same qualification is as follows:

Certain of the [remedial] provisions in the Agreement may be further limited or rendered unenforceable by applicable law, but in our opinion such law does not make the remedies afforded by the Agreement inadequate for the practical realization of the principal benefits intended to be provided.

TriBar Report, § 3.4, 53 Bus. Law. at 626. The sample form of generic exception set forth in the text of this report is the same as the one set forth in the Remedies Report. See Remedies Report, App. 11 at 1.
any indemnification or contribution provisions of the Loan Documents, as follows:

We express no opinion as to the enforceability of any indemnification or contribution provisions of the Loan Documents (or other provision having an effect similar to any of these types of provisions) to the extent that the enforceability of such provisions is limited by public policy or statutory provisions or to the extent that such indemnification or similar provisions purport to indemnify a party against, or release a party from liability for, its own fraudulent or illegal actions or [gross] negligence.116

7. Attorneys’ Fees Clauses

The loan agreement (and other loan documents) may contain one-sided provisions entitling the lender, in any action to enforce the loan documents, to recover its attorneys’ fees. Under Cal. Civ. Code § 1717, however, a one-sided attorneys’ fee clause is converted to a mutual and reciprocal clause, to allow recovery by the prevailing party even if the contract authorizes only the other party to recover attorneys’ fees. Section 1717 also limits recovery to “reasonable” attorneys’ fees. If a loan document includes such a one-sided attorneys’ fee clause or includes an attorneys’ fee clause without a “reasonableness” limitation, Borrower’s counsel may include the following qualification to its remedies opinion:

The enforcement of Section ___ of [the Loan Agreement], relating to the payment of attorneys’ fees and costs, is subject to Section 1717 of the California Civil Code.

8. Choice of Forum and Choice of Venue Clauses

Commercial agreements often include choice of forum and venue clauses, such as the following:

The parties agree that any action seeking to enforce any provision of, or based on any matter arising out of or in connection with, this Agreement or the transactions contemplated hereby may only be brought in the United States District Court for the Central District of California or any California state court sitting in the County of Los Angeles, California, and each of the parties hereby consents to the exclusive jurisdiction of such courts....

The matter of venue selection must be distinguished from forum selection, although the two may be conflated because contract clauses (such as the one above) often cover both in a single phrase. “Forum” refers to a jurisdictional place—a particular court (e.g., the U.S. District Court for the Central District of California or the Superior Court in and for the County of Los Angeles) or, in the alternative, an arbitration forum. Forum selection clauses in commercial agreements are generally enforceable in California,117 and an exception or qualification is normally not required for opinions in commercial transactions.118 Of course, the parties cannot confer subject matter jurisdiction on a particular court by contract; a valid forum selection clause operates only as an express consent to personal jurisdiction.119

116 See Sample Corporate Closing Opinion, With Notes, § (E)(10) and n.41; Remedies Report, App. 10 at A-7.
117 Smith, Valentino & Smith, Inc. v. Superior Court, 17 Cal. 3rd 491, 496, 131 Cal. Rptr. 374 (1976) (“[F]orum selection clauses are valid and may be given effect, in the court’s discretion and in the absence of a showing that enforcement of such a clause would be unreasonable.”). See also Atlantic Marine Constr. Co., Inc. v. U.S. District Ct., 134 S. Ct. 568 (2013) (“forum-selection clauses should control except in unusual cases”). In addition, California Code of Civil Procedure § 410.40 provides for the enforceability of forum selection clauses that designate California state courts if the transaction involves at least $1 million. For additional discussion of the enforceability of forum selection clauses, see Remedies Report, App. 10, Annex B, at B-13–B-14; California Law of Contracts §§5.44–5.46 (Cal CEB 2016).
118 Despite the case and statutory authority favoring enforceability of forum selection clauses, depending upon the language of the forum selection clause in the loan documents under review, some opinion givers may elect to take an exception covering matters relating to jurisdiction, such as the following:

We express no opinion with respect to any provisions relating to the jurisdiction or venue of courts or service of process. See Gail Merel, et al., Common Qualifications to a Remedies Opinion in U.S. Commercial Loan Transactions, 70 Bus. Law. 121, 138 (Winter 2014–2015).
“Venue” refers to a geographical location (e.g., a particular federal judicial district or a particular county in California). The enforceability of a clause that designates the venue or geographical location where any proceedings to enforce a commercial agreement are to be brought is limited by Cal. Civ. Proc. Code §§ 395 and 395.5 (or, if the proceeding is brought in federal court, by 28 U.S.C. § 1391). In California state courts, venue selection clauses that designate a venue that is not one of the statutorily authorized venues are not enforceable in California, but venue selection clauses that do designate one of the statutorily permitted venues are generally enforceable in commercial transactions. If the opinion preparers have concerns about the validity of a venue selection clause in the loan documents, they may take an express exception to the enforceability of the clause. Paragraph E(5) of the Sample Opinion includes the following qualification:

We express no opinion regarding the enforceability of [Section ___] of the [Loan Agreement], which purports to fix the venue of proceedings relating to the Loan.

9. Jury Trial Waiver

Pre-dispute jury trial waivers are unenforceable in California. Accordingly, if the loan documents contain such a waiver, as they often do, the opinion giver normally includes an exception from the scope of its opinion, such as the following:

We express no opinion regarding the enforceability of [Section ___] of the [Loan Agreement], which purports to waive the parties’ rights to a jury trial.

See the qualification in ¶ E(6) of the Sample Opinion. The exclusion need not be stated if the loan documents do not contain a jury trial waiver.

10. Enforceability of a Guaranty

Guaranties subject to California law are governed by California’s suretyship law, Cal. Civ. Code §§ 2787 et seq. Lenders typically require extensive waivers of the protections accorded guarantors by the suretyship law. Although such waivers are generally enforceable, depending on the nature of the waivers opinion givers may decide to take an exception to their enforceability. See Remedies Report, App. 10, at B-18. Paragraph E(7) of the Sample Opinion includes the following such exception:

We advise you of California statutory provisions and case law to the effect that a guarantor may be discharged, in whole or in part, if the beneficiary of the guaranty alters the obligation of the principal, fails to inform the guarantor of material information pertinent to the principal or any collateral, elects remedies that may impair either the subrogation or reimbursement rights of the guarantor against the principal or the value of any collateral, fails to accord the guarantor the protections afforded a debtor under Division 9 of the California Uniform Commercial Code or otherwise takes any action that prejudices the guarantor, unless, in any such case, the guarantor has effectively waived such rights or the consequences of such action or has consented to such action. While California Civil Code Section 2856 and case law provide that express waivers of a guarantor’s right to be discharged, such as those contained in the Guaranty, are generally enforceable under California law.

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120 Battaglia Enterprises, Inc. v. Superior Court, 215 Cal. App. 4th 309, 318, 154 Cal. Rptr. 3d 907 (2013) (“[W]here . . . two sophisticated parties agree, pursuant to arm’s length negotiations, to litigate an action in one of multiple statutorily permissible venues, they should be held to their agreement.”), distinguishing Alexander v. Superior Court, 114 Cal. App. 4th 723, 8 Cal. Rptr. 3d 111 (2003). As noted in the text, 28 USC § 1391 governs the venue of civil actions brought in federal district court. However, through the doctrine of forum non conveniens, under 28 USC § 1404(a), a case may be transferred to any other federal district to which the parties have agreed by contract or stipulation, and the parties’ contract will control except in extraordinary cases. Atlantic Marine Constr. Co., Inc. v. U.S. District Court, 134 S. Ct. 568, 575 (2013). Thus, the parties’ agreed choice of venue is likely to be given greater weight in federal court than it might in state court.

121 Grafton Partners L.P. v. Superior Court, 36 Cal. 4th 944, 32 Cal. Rptr. 3d 5 (2005). See also County of Orange v. U.S. District Court (In re County of Orange), 784 F.3d 520 (9th Cir., 2015) (notwithstanding that the law governing jury trial waivers in federal court is a matter of federal procedural law, in diversity actions involving a contract governed by California law, California’s policy prohibiting pre-dispute jury trial waivers governs).
law, we express no opinion regarding the effectiveness of the waivers in the Guaranty.

11. Arbitration Clause

Although the enforceability of arbitration agreements in transactions involving interstate commerce has been confirmed by the U.S. Supreme Court in AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011), and its progeny, opinion givers continue to have concerns over arbitration provisions that either address or leave to "California law" the procedures to be followed by the arbitrators or the parties in the arbitration proceeding itself or in any post-arbitration challenge. See Remedies Report, App. 10, B-22–B-24. Moreover, the California Supreme Court decision in Sonic-Calabasas A, Inc. v. Moreno, indicates that unconscionability remains a potential defense to enforcement of an arbitration clause, depending on the facts and circumstances of the case, even after AT&T Mobility LLC v. Concepcion. Accordingly, depending on the text of the arbitration clause, opinion givers may include a qualification such as the following:

[We advise you that a court may refuse to enforce [Section ___ of the Loan Agreement], which provides [for judicial review of arbitration awards/other reason]. We express no opinion regarding the effect of the inclusion of that provision in [the Loan Agreement] upon the enforceability of the parties' agreement to submit disputes to arbitration.] [or] [We express no opinion regarding the enforceability of [Section ___ of the Loan Agreement], which purports to submit disputes to arbitration.]

See the qualification in ¶E(8) of the Sample Opinion. The qualification would not be necessary if no arbitration clause is included in any of the documents and may not be necessary for opinions in commercial transactions.124


California statutes and case law restrict the enforceability of liquidated damages clauses that operate as penalties.125 If the loan documents contain provisions for penalties, liquidated damages, acceleration of amounts due, or default interest, the opinion giver may decide to include the following qualification:

We express no opinion regarding the enforceability of [set out any provision of the Loan Documents determined to provide for a penalty, liquidated damages, acceleration of future amounts due (other than principal) without appropriate discount to present value, late charges, prepayment charges, or increased interest rates upon default] that is determined to be unenforceable for a reason other than one included within [the bankruptcy exception and equitable principles limitation].

See the qualification in ¶E(9) the Sample Opinion.


123 57 Cal. 4th 1109, 163 Cal. Rptr. 3d 1109 (2013). The California Supreme Court relied on the Federal Arbitration Act section that provides that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In a subsequent decision, the Court ruled that class action waivers in arbitration agreements are fully enforceable. Iskanian v. CLS Transportation Los Angeles, LLC, 59 Cal. 4th 348, 173 Cal. Rptr. 3d 289 (2014). See also Sanchez v. Valencia Holding Co., 61 Cal. 4th 899, 190 Cal. Rptr. 3d 812 (2015) (accord).

124 See Dasteel, note 122. See also Sample Corporate Closing Opinion, With Notes, at 18 n.39.

13. Usury

Paragraph B of the Sample Opinion includes three express assumptions concerning the lender. These assumptions are included because, as a matter of customary usage, the remedies opinion by borrower’s counsel on a loan agreement covers usury laws and, by these assumptions, the opinion preparers can conclude that California’s usury law will not apply to Borrower’s obligation to pay interest under the Loan Agreement. See TriBar Report § 3.5.2(a)(iii), 53 Bus. Law. at 628.

The three express assumptions follow:

(a) the Lender is (i) a subsidiary of a bank holding company (as such terms are defined in Section 1287 of the California Financial Code) or is a bank organized under the laws of the United States or any State thereof, (ii) a foreign (other nation) bank described in Section 1768 of the California Financial Code meeting the criteria for exemption set forth therein, (iii) licensed under the California Finance Lenders Law (Cal. Fin. Code § 22000 et seq.), or (iv) a lending institution otherwise belonging to an exempt class of persons and, as a result thereof, that the Lender is exempt from the restrictions of Section 1 of Article XV of the Constitution of the State of California relating to rates of interest upon the loan of money;

(b) the Loan will be made by the Lender for its own account or for the account of another person that qualifies for an exemption from the interest rate limitations of California law; and

(c) there is no agreement by the Lender to sell participations or any other interest in the Loan to be made under the Loan Agreement to any person other than a person that qualifies for an exemption from the interest rate limitations of California law.

Some opinion preparers omit one or all of these assumptions on the ground that it is reasonable to assume these matters without expressly stating them. Depending on the facts of a particular transaction, it may also be possible to rely on an exemption from the California usury laws based on the nature of the transaction or the borrower under the California Corporations Code, rather than the exempt status of the lender under Article XV, § 1 of the California Constitution and Cal. Fin. Code § 3805. See Corp. Code §§ 25116–25118. For example, § 25118 exempts a transaction involving one or more evidences of indebtedness aggregating at least $300,000 under certain circumstances. If an exemption from usury laws is based on one of these statutory transaction exemptions, the opinion preparers would replace the assumptions in the Sample Opinion with assumptions supporting the basis for the chosen exemption. See Sample Corporate Closing Opinion, With Notes, at 7–8 n.16.

126 For a case applying Corp. Code § 25118 and finding no usury, see Heritage Networks, LLC v. Stone Canyon Entmt’s, LLC (In re Heritage Media Group), No. 06-32591 HDH-7, 2009 Bankr. LEXIS 1212 (Bankr. N.D. Tex. Apr. 21, 2009).

If the lender does not qualify for any exemption from California’s usury laws, then, depending upon the interest rate provisions of the loan agreement, the opinion giver may choose to take an exception from the scope of its remedies opinion, such as the following:

Our opinion in paragraph __ [the remedies opinion] above does not address, and we express no opinion on, the enforceability of Borrower’s obligation to pay interest pursuant to the terms of the Loan Agreement under California’s usury laws.

The opinion giver may decide to include this qualification even if the stated interest rate does not exceed the usury ceiling because of the possibility that charges or other consideration together with the stated interest may exceed the usury ceiling. If the opinion preparers conclude that, in their professional judgment, the loan is usurious, the opinion preparers should consider whether giving any remedies opinion at all is appropriate. See, e.g., Bus. Trans. Report at 20; Sample Corporate Closing Opinion, With Notes, at 7–8 n.16.

14. Other, Separately Stated Qualifications

Additional separately stated qualifications may be appropriate for a remedies opinion. In 2001, the
Opinions Committee surveyed customary practice with respect to many common contractual provisions to determine whether and to what extent opinion preparers take specific exceptions to such provisions. For the survey results, see Remedies Report at 9–13, and App. 10. Sample forms for all of the specific, separately stated exceptions relating to the contractual provisions surveyed are set forth in the Remedies Report, App. 10, at A-6–A-8. Opinion preparers should keep in mind, however, that opinion practice in California has continued to evolve since 2001 in response to changes in applicable law and other factors.

To determine whether an exception should be taken, the TriBar Remedies Report suggests that opinion preparers consider the following questions:

- Do any of the undertakings by the opinion giver's client raise legal issues of concern?
- If so, does the legal issue arise under the law covered by the opinion?
- Is the legal issue covered by the opinion?
- Can the legal issue be resolved by factual inquiry?
- Can the legal issue be avoided by restructuring the transaction or revising the agreement?


If the opinion preparers conclude that an express exception should be taken, they should so advise counsel for the opinion recipient. The opinion recipient may either accept the opinion as qualified or ask the opinion preparers to investigate the matter further. Alternatively, the parties may agree to revise the terms of the agreement or restructure the transaction to eliminate the issue. TriBar Remedies Report, 59 Bus. Law. at 1489.

15. Enforceability of Operating Agreement or Partnership Agreement

A remedies opinion concerning an LLC's operating agreement or an LP's partnership agreement—i.e., an opinion that the operating or partnership agreement is binding and enforceable—is not ordinarily requested or given in a conventional bank loan transactions or in other commonly given legal opinions on behalf of LLCs or LPs. It may be requested, however, if the opinion recipient is acquiring a membership or partnership interest or if investment banking firms, lenders, or rating agencies in complex financing transactions are concerned about the enforceability of certain provisions of the agreement. See TriBar LLC Report § 6.0, 61 Bus. Law. at 692–694. See also the discussion of an opinion covering the obligations of members or limited partners above in § IV(H) of this report. As noted in the TriBar LLC Report, an opinion concerning the enforceability of the operating or partnership agreement is often more difficult to give than the status, power, and authorities opinions because the opinion covers all provisions of the operating or partnership agreement and the opinion preparers must consider more complex issues of state contract law.

A remedies opinion covering an operating or partnership agreement means that the rights and obligations of the entity, its members or partners, and its managers as set forth in the agreement, the provisions for remedies in the event of breach, and the management provisions will be given legal effect, subject to the standard bankruptcy and equitable principles qualifications and any other exceptions expressly stated or understood to apply as a matter of customary practice. For further discussion of the meaning of a remedies opinion addressing an operating agreement or partnership agreement, see TriBar LLC Report § 6.0, 61 Bus. Law. at 692–694; TriBar LP Report § 8.0.

16. Separate Enforceability of Loan Documents Against General Partner or Manager

The loan documents may include one or more covenants by the borrower itself or by the manager of an LLC borrower or the general partner of an LP borrower (or both), e.g., to deliver to the lender specified financial statements of the borrower. Normally a remedies opinion given on behalf of the borrower (or guarantor) does not address the enforceability of the loan documents separately against the managers or members of an LLC or the

127 Counsel should note that, as of early 2016, Appendix 10 of the Remedies Report is in the process of being updated.
general partner of an LP. Nor should there generally be any reason for a recipient to request such an opinion. Legal entities can only act through their agents. If a recipient wants recourse against an agent for breach of an agreement, that recourse should be requested in the form of a guaranty or, in certain instances, may exist as a matter of law (for example, recourse against a general partner for limited partnership debts). See, e.g., LP Act, Corp. Code § 15904.04(a).

If an opinion recipient wants assurance with respect to the liability of, e.g., a general partner of an LP for the LP’s obligations under a loan agreement, then that opinion should be separately requested and given.

C. Qualifications Unique to Opinions on LLCs, LPs, GPs, and LLPs

Certain qualifications are unique to opinions on LLCs, LPs, GPs, and LLPs and may be appropriate to consider taking in an opinion letter delivered for these entities, depending on the context. These qualifications include the following:

1. Entity in Dissolution

If an LLC or LP has dissolved, its power is limited to actions that are appropriate to the winding-up process. See RULLCA, Corp. Code § 17707.06(a); Beverly-Killea Act, former Corp. Code § 17354(a); LP Act § 15908.03. An opinion giver may, in giving a closing opinion for a dissolved LLC or LP, decide not to address whether the documents that are the subject of the opinion are necessary to the winding-up of the entity. An example of a disclaimer to that effect for an LLC follows:

We note that the Company has dissolved. We render no opinion regarding whether the present conduct of the Company’s business [or the instant transaction] is consistent with the limitation on the authority of the members or the manager(s), as applicable, to those actions that are necessary to wind up the Company’s affairs, prosecute and defend actions in order to collect and
discharge its obligations, dispose of and convey its property, or collect and divide its assets within the meaning of Cal. Corp. Code § 17707.06(a).128

2. Fiduciary Duties

As discussed in §§ II(B)(1), IV(C)(1), and IV(H) of this report, if fiduciary issues are especially sensitive, it may be appropriate to include an express assumption that the members, managers, or partners (as the case may be) have complied with their fiduciary duties in connection with the transaction. In the alternative, the opinion may include the following qualification that the opinion giver is expressing no opinion on compliance with fiduciary duties:

No opinion is expressed herein with respect to the compliance on the part of any individual or entity with any fiduciary duty or obligation.

VIII. OPINIONS ON BEHALF OF DELAWARE LLCs AND LPs

Delaware is increasingly the forum of choice for the organization of LLCs and LPs by venture capital, private equity, and hedge fund managers and by other institutional money managers and investors. This may account for the significant number of formations of LLCs in Delaware as compared with California.129 California lawyers routinely organize Delaware LLCs and LPs and act as their counsel. For those California lawyers not admitted to practice in Delaware or whose firms do not have an office in Delaware, an issue arises as to whether they may deliver closing opinions for Delaware entities.

A California lawyer may properly advise a client on the law of another jurisdiction, as long as the lawyer has adequate familiarity with the relevant law. Bus. Trans. Report at 87, quoting from the Restatement (Third) of the Law Governing Lawyers § 3, cmt. e (2000). The question is one of competency. Lawyers not admitted to practice in Delaware customarily render opinions on routine entity questions, such as the entity’s due

128 To the extent that relevant acts or transactions occurred prior to January 1, 2014, the Beverly-Killea Act, former Corp. Code § 17354(a), would be cited. For an LP, the relevant language would be taken from Corp. Code § 15908.03(b).
129 See note 4 and accompanying text.
organization under Delaware law, when the lawyers represent Delaware entities on a regular basis and follow developments in that law such that they regard themselves as competent to address the issues raised by those opinions. Bus. Trans. Report at 92. Non-Delaware lawyers, however, normally do not render opinions on more difficult questions of Delaware entity law or on questions arising under Delaware commercial law. In those circumstances, they usually rely on an opinion of Delaware counsel or deal with the issue in some other way, e.g., by relying on an express assumption. Id.

The Committees concur with the TriBar Opinion Committee in noting that non-Delaware lawyers who represent Delaware LLCs and LPs “routinely give status, power, and action opinions on Delaware LLCs [and LPs].” TriBar LLC Report § 1.0, 61 Bus. Law. at 681. (These opinions are addressed in §§ IV(A)–(C) of this report (“Status,” “Power to Enter Into and Perform Obligations,” and “Due Authorization, Execution and Delivery”). Non-Delaware lawyers giving such opinions typically state that their opinions are limited to the Delaware LLC (or LP) Act. Note, however, that a reference to the Delaware LLC or LP Act is generally understood to refer both to the statute and to reported Delaware decisions interpreting those provisions. Bus. Trans. Report at 92. See also TriBar LLC Report § 1.0, 61 Bus. Law. at 681–683 (“Opinions on LLCs Organized in Delaware”).

The TriBar LLC Report notes that because LLC (and LP) acts rely heavily on the operating (or limited partnership) agreement, the enforceability of which is governed by contract law, the question arises as to whether the status, power, and action (i.e., due authorization, execution, and delivery) opinions for a Delaware LLC (or LP) can be given without addressing the operating (or limited partnership) agreement. The TriBar LLC Report concludes that a statement in an opinion letter limiting coverage to the Delaware LLC [or LP] act “should not be read to exclude from the coverage of the status, power and action opinions those Delaware contract law issues that are applicable to the matters covered by those opinions.” TriBar LLC Report § 1, 61 Bus. Law at 682.130 The TriBar LLC Report notes, however, that the contract law issues applicable to those particular opinions “ordinarily will not be difficult and will not vary significantly from state to state.” Id.131 The Committees concur in these observations.

There is no easily discernable line between questions that are routine and those that are not under the Delaware Limited Liability Company Act or the Delaware Revised Uniform Limited Partnership Act. The line must be drawn by the opinion preparers, exercising their professional judgment. If the opinion preparers recognize that an opinion they have been asked to give involves an issue they do not believe they are competent to address, then the opinion preparers should consider obtaining an opinion from Delaware counsel, addressed directly to the opinion recipient, that covers that issue, and either rely on the Delaware opinion in giving their own opinion or include an express exception or assumption regarding that issue in their own opinion. See Bus. Trans. Report at 35–38. A preliminary call to Delaware counsel to discuss the requested opinion may help the opinion preparers to determine whether they should retain local counsel to address the issue in question.

130 The TriBar LLC Report cites, as examples of contract issues that might be relevant to the covered opinions, provisions such as those in an operating agreement limiting the LLC’s power to engage in particular activities or those requiring members’ approval of transactions that fall within specified categories. TriBar LLC Report § 1, 61 Bus. Law. at 682 n.19.
A separate issue is the enforceability of the operating agreement as a contract under Delaware law. As noted by the TriBar LLC Report, if “the opinion preparers are not willing to address Delaware contract law generally, they should not give an opinion on the enforceability of the operating agreement.” TriBar LLC Report § 1, 61 Bus. Law. at 683 (footnote omitted).
131 An exception, however, is the law relating to fiduciary duties.
Appendix A

Members of the Working Group, Partnerships and Limited Liability Companies Committee, and Opinions Committee
APPENDIX A

Members of the Working Group of the Partnerships and Limited Liability Companies Committee and the Opinions Committee

This report has been prepared by a working group composed of members or former members of the Partnerships and Limited Liability Companies Committee and the Opinions Committee of Business Law Section of the State Bar of California (the “Working Group”). The members of and consultants to the Working Group are the following:

Working Group

Co-Chairs: James F. Fotenos
Suzanne L. Weakley

Secretary: Whitney M. Skala

Members: Neal H. Brockmeyer
Christopher Chediak
Richard N. Frasch
Nina L. Hong
Timothy G. Hoxie
Donald M. Scotten
Dale E. Short
Teri L.K. Shugart

Consultant: Richard G. Burt
Drafts of the Working Group’s report were reviewed by the two sponsoring Committees, and the final draft of the report was approved by each Committee. The composition of the two sponsoring Committees for 2016–2017 was as follows:

**Partnerships and Limited Liability Companies Committee**

Chair: Teri L. K. Shugart  
Vice Chair: Soyeun D. Choi  
Secretary: Nina L. Hong  
Members: Loryn Dunn Arkow  
Michael Burns  
Christopher Chediak  
Michael O. Glass  
Stephen Halper  
Phillip L. Jelsma  
Haleh Naimi  
Christopher Russell  
Whitney M. Skala  
Holden Stein  
Robert L. Wernli, Jr.
# Opinions Committee

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- Peter S. Szurley

**Vice Chair:**
- Kenneth J. Carl

**Vice Chair, Communications:**
- Carol K. Lucas

**Vice Chair, Social Media:**
- Richard N. Frasch

**Secretary:**
- Suzanne L. Weakley

**Steering Committee:**
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- James F. Fotenos
- Richard N. Frasch
- Jerome A. Grossman
- Timothy G. Hoxie
- Moshe J. Kupietzky
- Douglas F. Landrum
- Carol K. Lucas
- John B. Power
- Peter S. Szurley
- Ann Yvonne Walker
- Suzanne L. Weakley
- Steven O. Weise

**Other Members:**
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- John L. Babala
- Kenneth J. Baronsky
- Mark A. Bonenfant
- Thomas G. Brockington
- Peter H. Carson
- James S. Cochran
- Nelson D. Crandall
- Charles L. Crouch III
- Henry D. Evans, Jr.
- Ethan J. Falk
- Herbert P. Fockler
Opinions Committee

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Nora L. Gibson
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Thomas Klaus Gump
Morris W. Hirsch
John M. Jameson
David Johnson
F. Daniel Leventhal
Kenneth A. Linhares
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Susan Cooper Philpot
David M. Pike
Cherie S. Raidy
Bradley J. Rock
Steven E. Sherman
Richard Vernon Smith
Brooks Stough
Jeffrey E. Sultan
Robert A. Thompson
Jack Welch
Benzion (Benny) Westreich
Nancy H. Wojtas

Out-of-State Representative:
James J. Rosenhauer

Advisor:
Meredith S. Jackson
Appendix B

CA Secretary of State Data
on Entity Formation
(2000-2016)
APPENDIX B
Entity Formations
(2000 — 2016)

The following data is from the California Secretary of State, Business Programs Division, and identifies the number of entities, by category, formed in the year specified. Except for limited liability partnerships (LLPs), the data includes only California entities, not foreign entities registered to do business in California. The data for LLPs includes both domestic and foreign filings. The data for CA Corps include only for profit corporations.

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* Prior to 2003, LP and LLC formation statistics were not maintained specific to domestic formations. For those years, foreign and domestic formations were combined into one total.
Appendix C

Sample California Third-Party Legal Opinion
for LLCs and LPs
SAMPLE CALIFORNIA THIRD-PARTY LEGAL OPINION FOR LLCS AND LPS

The sample opinion that follows is included as an Appendix to the report on Third-Party Closing Opinions: Limited Liability Companies & Partnerships, dated December 9, 2016 (the “Report”), prepared by the Partnerships and Limited Liability Companies Committee and the Opinions Committee (the “Committees”) of the Business Law Section (“Business Law Section”) of the State Bar of California. The opinions expressed in the sample opinion are the focus of the Report. They are reproduced in the Report at pages 6–8, and each is then addressed in detail in the balance of the Report. (In addition, the Report addresses opinions for general partnerships and LLPs, and opinions on behalf of Delaware LLCs and LPs.) Users of the sample opinion are therefore encouraged to review the Report for its explanation of the opinions expressed in the sample opinion.

As its name designates, the sample opinion is just that: an illustration of what an opinion letter following the precepts of the Report and the other opinion reports of the Business Law Section might look like. There is not a single form of closing opinion for LLCs or LPs that can be viewed as the “sole” or the “best” or “preferred” form that opinion givers should use. The sample opinion is not intended to be a prescriptive model and it should not be viewed as such. Much of the text and form of the opinions in the sample opinion not specific to LLCs or LPs have been taken from the Sample California Third-Party Legal Opinion for Business Transactions (the “Transactional Sample Opinion”) prepared by the Opinions Committee of the Business Law Section (revised August 2014, originally published May 2010). As with the Transactional Sample Opinion, the Committees chose as their transactional model, and therefore the subject of the opinions expressed in the sample opinion, an unsecured lending transaction involving a California LLC as the borrower and a California limited partnership as the guarantor, with California law as the law chosen by the parties to govern the loan documents. As noted by the Opinions Committee in the preface to the Transactional Sample Opinion, a lending transaction was selected as the object of the sample opinion because lenders, particularly institutional lenders, often request third-party closing opinions as a condition to closing loan transactions. With the addition of appropriate assumptions and qualifications, and the deletion of others not germane to the documents addressed, the sample opinion can be used as a basis to prepare closing opinions for LLCs and LPs in other contexts.

The sample opinion is not a static document. The text of the opinion reflects the consensus of the members of the Working Group of the two Committees that drafted the Report and the sample opinion. The Committees will periodically review the sample opinion and may revise it to reflect developments in the law and in opinion practice. Readers are therefore encouraged to visit the Business Law Section’s website, identified in the next paragraph, for the current version of the sample opinion.

For a sample opinion letter for a personal property secured loan transaction, see the Sample California Third-Party Legal Opinion Letter for Personal Property Secured Financing Transactions (February 2016 Exposure Draft), and the report on Legal Opinions in Personal Property Secured Transactions (June 2005) of the Commercial Law Committee (formerly known as the Uniform Commercial Code Committee) of the Business Law Section. For a sample California third-party legal opinion for a venture capital financing transaction, see the Sample California Third-Party Legal Opinion for Venture Capital Financing Transactions prepared by the Opinions Committee of the Business Law Section, published in 70 Bus. Law 177 (2015). These sample opinion that follows, the other sample opinions identified in this paragraph, as well as the opinion reports prepared by the Business Law Section and its substantive committees, can also be found on the Business Law Section’s website (accessible here).

The sample opinion includes, in footnotes, qualifications that some opinion givers may choose to add to their opinion letters as a matter of preference. The matters addressed by such qualifications are understood as a matter of customary practice, whether stated or not, and thus are not included in the text of the sample opinion itself.
Note 30 to the sample opinion includes a statement that some opinion givers may choose to include in their opinion letters concerning the role of customary practice in the interpretation of third-party closing opinions. As noted in the Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions, 63 Bus. Law 1277 (2008), approved by numerous bar associations and legal opinion groups, including by the Business Law Section, “[c]ustomary practice permits an opinion giver and an opinion recipient (directly or through its counsel) to have common understandings about an opinion without spelling them out. . . . Some closing opinions refer to the application of customary practice. Others do not. Either way, customary practice applies.” 63 Bus. Law. 1277, 1278.

SAMPLE CALIFORNIA THIRD-PARTY LEGAL OPINION
FOR LLCs AND LPs

[Date]

[Name of Lender], a National Banking Association
[Address of Lender]

Ladies and Gentlemen:

We have acted as counsel to [Name of Borrower], a California limited liability company (the “Borrower”), and [Name of Guarantor], a California limited partnership (the “Guarantor”), in connection with the [Name of Agreement] (the “Loan Agreement”), dated as of __________, between the Borrower and [Name of Lender], a National Banking Association (the “Lender”). This opinion is delivered to you pursuant to Section __ of the Loan Agreement. The Borrower and the Guarantor are sometimes referred to in this letter individually as a “Loan Party,” and collectively as the “Loan Parties.” Each capitalized term that is defined in the Loan Agreement and that is used but not defined in this letter has the meaning given to it in the Loan Agreement.

A. DOCUMENTS EXAMINED

We have examined the following documents:

(i) the Loan Agreement;

(ii) the Promissory Note;

(iii) the Guaranty;

(iv) the form of Subscription Agreement pursuant to which each of the members of the Borrower subscribed for and purchased membership interests (the “LLC Interests”) in the Borrower; ¹

(v) the Articles of Organization of the Borrower, certified by the California Secretary of State on ______ and certified to us by an officer of the Borrower as being complete and in full force and effect as of the date of this opinion;

(vi) the Operating Agreement of the Borrower, certified to us by an officer of the Borrower as being complete and in full force and effect as of the date of this opinion;

¹ The Subscription Agreements pursuant to which the members acquired their LLC Interests in the Borrower would not normally be one of the specified documents examined by the opinion preparers to render a closing opinion on a loan agreement, but this item (iv) is included in this sample opinion because, for illustration, this sample opinion includes opinions on the valid issuance of the LLC Interests and the obligations of the members to make further payments for their LLC Interests or further contributions to the Borrower. See Report at 7–8, 28–42.
(vii) records certified to us by an officer of the Borrower as constituting all records of proceedings and actions of the manager(s) and members of the Borrower relating to the Loan;

(viii) a Certificate of Status—Domestic Limited Liability Company with respect to the Borrower, issued by the California Secretary of State on ______;

(ix) the Certificate of Limited Partnership of the Guarantor, certified by the California Secretary of State on ______ and certified to us by an officer of the General Partner of the Guarantor as being complete and in full force and effect as of the date of this opinion;

(x) the Limited Partnership Agreement of the Guarantor dated as of _____, certified to us by an officer of the General Partner of the Guarantor as being in full force and effect as of the date of this opinion;

(xi) records certified to us by an officer of the General Partner of the Guarantor as constituting all records of proceedings and actions of the [General Partner and limited partners] of the Guarantor relating to the Loan;

(xii) a Certificate of Status – Domestic Limited Partnership with respect to the Guarantor, issued by the California Secretary of State on ______;

(xiii) a certificate of the [Chief Financial Officer or other appropriate officer] of the Borrower identifying certain agreements and instruments to which the Borrower is a party or by which the Borrower's properties or assets are bound (the "Borrower's Certificate Relating to Agreements");

(xiv) copies of each of the agreements and instruments identified in the Certificate Relating to Agreements, certified to us as being true and correct copies of the originals (the "Borrower Material Agreements");

(xv) a certificate of the [Chief Financial Officer or other appropriate officer] of the General Partner of the Guarantor identifying certain agreements and instruments to which the Guarantor is a party or by which the Guarantor's properties or assets are bound (the “Guarantor's Certificate Relating to Agreements”);

(xvi) copies of each of the agreements and instruments identified in the Guarantor's Certificate Relating to Agreements, certified to us as being true and correct copies of the originals (the “Guarantor Material Agreements”); and

(xvii) a certificate of each of [the Chief Financial Officer or other appropriate officer] of the Borrower and the General Partner of the Guarantor as to certain factual matters relevant to this opinion.

Each of the documents identified in items (i) through (iii) above is sometimes referred to herein as a “Loan Document.”

We have also examined such other documents and made such further legal and factual examination and investigation as we deem necessary for the purpose of rendering the following opinions.
B. **CERTAIN ASSUMPTIONS**

We have assumed, for purposes of the opinions expressed herein, that:

(a) the Lender is (i) a subsidiary of a bank holding company (as these terms are defined in Section 1287 of the California Financial Code) or is a bank organized under the laws of the United States or any State thereof, (ii) a foreign (other nation) bank described in Section 1768 of the California Financial Code meeting the criteria for exemption set forth therein, (iii) licensed under the California Finance Lenders Law (Cal. Fin. Code § 22000 *et seq.*), or (iv) a lending institution otherwise belonging to an exempt class of persons and, as a result thereof, that the Lender is exempt from the restrictions of Section 1 of Article XV of the Constitution of the State of California relating to rates of interest upon the loan of money;

(b) the Loan will be made by the Lender for its own account or for the account of another person that qualifies for an exemption from the interest rate limitations of California law; and

(c) there is no agreement by the Lender to sell participations or any other interest in the Loan to be made under the Loan Agreement to any person other than a person that qualifies for an exemption from the interest rate limitations of California law.

C. **OPINIONS**

Based on the foregoing, and subject to the qualifications set forth in Section E below (**“Certain Qualifications”**), we are of the opinion that:

1. The Borrower is a duly formed limited liability company and is [validly] existing and in good standing under the laws of the State of California.

2. The Borrower has the limited liability company power to enter into and perform its obligations under each of the Loan Documents to which it is a party.

3. The Borrower has taken all limited liability company action necessary to authorize the execution and delivery of, and the performance of its obligations under, each of the Loan Documents to which it is a party; and the Borrower has duly executed and delivered the Loan Documents to which it is a party.

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2 For discussion of these assumptions, see Report at 59.

Opinion preparers may assume, without so stating, that when managers or members of an LLC, or partners of an LP, are not natural persons, the member, manager, or partner is the type of entity it purports to be, that it was authorized to approve the transaction that is the subject of the opinion letter, and that those acting on its behalf had the necessary entity approvals. See Report at 5–6.

For those opinion preparers who wish to state these assumptions explicitly in their opinion letter, suggested language follows:

- **“The manager(s) and members of Borrower, and the General Partner of Guarantor, each have the legal capacity or entity power and authority to be manager(s) and members, as the case may be, of Borrower and the General Partner of Guarantor;”**

- **“The manager(s) and members of Borrower, and the General Partner of Guarantor, that are entities have taken whatever internal entity action (such as obtaining board or member or manager or General Partner approval) as necessary to enable them to act on behalf of Borrower and/or Guarantor, as the case may be.”**

3 For discussion of assumptions (a) – (c), see Report at 5, 59.

4 See the preface to the sample opinion at page 6 of the Report.

5 For a discussion of this opinion, see Report at 8–13. The Committees believe that “validly” can be omitted from the status opinion without affecting the meaning of the opinion. Report at 10.

As noted in the Report (at 12), a simpler form of the status opinion that is increasingly accepted is one that excludes reference to the entity’s due formation, illustrated by the following:

**“Borrower is [validly] existing and in good standing under the laws of the State of California.”**

6 For a discussion of this opinion, see Report at 13–15.

7 For a discussion of this opinion, see Report at 15–20.
4. The Guarantor is a duly formed limited partnership and is [validly] existing and in good standing under the laws of the State of California.  

5. The Guarantor has the limited partnership power to enter into and perform its obligations under the Guaranty.

6. The Guarantor has taken all limited partnership action necessary to authorize the execution and delivery of, and the performance of its obligations under, the Guaranty; and the Guarantor has duly executed and delivered the Guaranty.

7. Each of the Loan Documents to which the Borrower or the Guarantor is a party is a valid and binding obligation of the Borrower or the Guarantor, as the case may be, enforceable against it in accordance with its terms.

8. All consents, approvals, authorizations or orders of, and filings, registrations and qualifications on the part of the Borrower or the Guarantor with, any United States federal or California state regulatory authority or governmental body pursuant to any Covered Law (as such term is defined in Section E below (“Certain Qualifications”)) required to execute and deliver, and perform their obligations under, the Loan Documents have been obtained or made.

9. The execution and delivery by the Borrower or the Guarantor of the Loan Documents to which it is a party do not, and the performance by them of their respective obligations under those Loan Documents will not:

   (a) violate the Articles of Organization or the Operating Agreement of the Borrower or the Certificate of Limited Partnership or the Limited Partnership Agreement of the Guarantor;

   (b) result in a breach of or constitute a default under any Borrower Material Agreement or Guarantor Material Agreement or result in the creation of a security interest in, or lien upon, any of the Borrower's or the Guarantor's properties or assets under any Borrower Material Agreement or Guarantor Material Agreement, but excluding (i) financial covenants and similar provisions therein requiring financial calculations or determinations to ascertain compliance, or (ii) provisions relating to the occurrence of a “material adverse event” or “material adverse change” or words or concepts to similar effect;

   (c) violate any judgment, order or decree of any court or arbitrator [identified on Schedule __ to the Loan Agreement] [or] [applicable to either of them and known to us]; or

   (d) violate any statute (or rule or regulation thereunder) under the Covered Law to which Borrower or Guarantor is subject.

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8 For a discussion of this opinion, see Report at 8–13. The Committees believe that “validly” can be omitted from the status opinion without affecting the meaning of the opinion. Report at 10. As noted in the Report (at 12), a simpler form of the status opinion that is increasingly accepted is one that excludes reference to the entity's due formation, illustrated by the following:

   "Guarantor is [validly] existing and in good standing under the laws of the State of California."

9 For a discussion of this opinion, see Report at 13–15.

10 For a discussion of this opinion, see Report at 15–20.

11 For a discussion of this opinion, see Report at 21–23.

12 For a discussion of this opinion, see Report at 23–25.

13 For a discussion of this opinion, see Report at 25–28.
Third-Party Closing Opinions: Limited Liability Companies and Partnerships

[Note: the following sample opinions are not typically included in closing opinions for borrowers on a loan agreement but, as noted in the Report, may be requested by purchasers of LLC or LP interests directly from the LLC or LP. Accordingly, the following two sample opinions use the term “Company” for the opinion giver's client and the issuer of interests rather than the term “Borrower.”]

“Valid Issuance,” “Admission” and “Obligations” Closing Opinions

(i) The Membership [LP] Interests issued by the Company to the purchasers thereof (“Purchasers”) have been validly issued;

(ii) The Purchasers have been admitted as members [limited partners] of the Company in compliance with the requirements of the California Revised Uniform Limited Liability Company Act (“RULLCA”) [Uniform Limited Partnership Act of 2008 [the “LP Act”]] and the Company’s Operating [Limited Partnership] Agreement; and

(iii) The members [limited partners] have no obligation under RULLCA [the LP Act] to make further payments for their Membership [LP] Interests or further contributions to the Company solely by reason of their status as members [limited partners] of the Company, except as provided in their Subscription Agreements or the Operating [Limited Partnership] Agreement.

D. CONFIRMATIONS

We are not representing the Borrower or the Guarantor in any action or proceeding that is pending, or overtly threatened in writing by a potential claimant, that seeks to enjoin the transaction or challenge the validity of the Loan Documents or the performance by the Borrower or the Guarantor of their respective obligations thereunder.

E. CERTAIN QUALIFICATIONS

Our opinions are limited to the federal law of the United States and the law of the State of California, but in each case only to laws that in our experience are typically applicable to transactions of the type exemplified by the Loan Documents. We express no opinion with respect to compliance with any law, rule or regulation that as a matter of customary practice is understood to be covered only when an opinion refers to it expressly. Without limiting the generality of the foregoing [and except as specifically stated herein,] we express no opinion on local or municipal law, antitrust, unfair competition, environmental, land use, antifraud, securities, tax, pension, labor, employee benefit, health care, privacy, margin, insolvency, fraudulent transfer, antiterrorism, money laundering, racketeering, criminal and civil forfeiture, foreign corrupt practices, foreign asset or trading control, or investment company laws and regulations. The law covered by this opinion letter and referred to in this paragraph is referred to herein as the “Covered Law.”

Our opinions are subject to the following additional qualifications:

1. Our opinions are subject to (a) bankruptcy, insolvency, reorganization, arrangement, moratorium and other similar laws of general applicability relating to or affecting creditors’ rights generally; and (b) general principles of equity, including, without limitation, concepts of materiality, reasonableness, good faith and fair dealing, regardless of whether considered in a proceeding in equity or at law.

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14 For a discussion of these opinions, see Report at 28–42. For the form of these opinions when not all steps necessary to issue the interests that are the subject of the opinions have not been completed, see Report at 29.
15 See Report at 46–49.
16 See Report at 50–61.
17 For discussion of this qualification, see Report at 54.
(2) [Where a statement is qualified by “to our knowledge” or any similar phrase, that knowledge is limited to the actual knowledge of lawyers currently in this firm who have been involved in representing the Borrower or the Guarantor in connection with the Loan Documents. Except as otherwise expressly indicated, we have not undertaken any independent investigation to determine the accuracy of any such statement, and no inference as to our knowledge of any matters bearing on the accuracy of any such statement should be drawn from the fact of our representation of the Borrower or the Guarantor.] 18

(3) We advise you that, on statutory or public policy grounds, waivers or limitations of the following may not be enforced: (a) broadly or vaguely stated rights, (b) the benefits of statutory, regulatory or constitutional rights, (c) unknown future defenses, and (d) rights to one or more types of damages.19

(4) [The enforcement of Section __ of [the Loan Agreement], relating to the payment of attorneys’ fees and costs, is subject to the limitations of Section 1717 of the California Civil Code.]20

(5) [We express no opinion regarding the enforceability of [Section __] of the [Loan Agreement], which purports to fix the venue of proceedings relating to the Loan.]21

(6) [We express no opinion regarding the enforceability of [Section __] of the [Loan Agreement], which purports to waive the parties’ rights to a jury trial.]22

(7) We advise you of California statutory provisions and case law to the effect that a guarantor may be discharged, in whole or in part, if the beneficiary of the guaranty alters the obligation of the principal, fails to inform the guarantor of material information pertinent to the principal or any collateral, elects remedies that may impair either the subrogation or reimbursement rights of the guarantor against the principal or the value of any collateral, fails to accord the guarantor the protections afforded a debtor under Division 9 of the California Uniform Commercial Code or otherwise takes any action that prejudices the guarantor, unless, in any such case, the guarantor has effectively waived such rights or the consequences of such action or has consented to such action. While California Civil Code Section 2856 and case law provide that express waivers of a guarantor’s right to be discharged, such as those contained in the Guaranty, are generally enforceable under California law, we express no opinion regarding the effectiveness of the waivers in the Guaranty.23

(8) [We advise you that a court may refuse to enforce [Section __ of the Loan Agreement], which provides [for judicial review of arbitration awards/other reason]. We express no opinion regarding the effect of the inclusion of that provision in [the Loan Agreement] upon the enforceability of the parties’ agreement to submit disputes to arbitration.] [or] [We express no opinion regarding the enforceability of [Section ___ of the Loan Agreement], which purports to submit disputes to arbitration.]24

(9) [We express no opinion regarding the enforceability of [set out any provision of the Loan Documents determined to provide for a penalty, liquidated damages, acceleration of future amounts due (other than principal) without appropriate discount to present value, late charges, prepayment charges, or increased

18 For discussion of this qualification, see Report at 51.
19 For discussion of this qualification, see Report at 55. If the Loan Documents contain waivers of statutes of limitations that cause the opinion preparers’ concern, then this qualification would be stated as follows:
   “We advise you that, on statutory or public policy grounds, waivers or limitations of the following may not be enforced:
   (a) broadly or vaguely stated rights, (b) the benefits of statutory, regulatory or constitutional rights, (c) statutes of
   limitations, (d) unknown future defenses, and (e) rights to one or more types of damages.”
20 For discussion of this qualification, see Report at 56.
21 For discussion of this qualification, see Report at 56–57.
22 For discussion of this qualification, see Report at 57.
23 For discussion of this qualification, see Report at 57–58.
24 For discussion of this qualification, see Report at 58.
interest rates upon default that is determined to be unenforceable for a reason other than one included within qualification (1).] 25

(10) We express no opinion as to the enforceability of any indemnification or contribution provisions of the Loan Documents (or other provision having an effect similar to any of these types of provisions) to the extent that the enforceability of such provisions is limited by public policy or statutory provisions or to the extent that such indemnification or similar provisions purport to indemnify a party against, or release a party from liability for, its own fraudulent or illegal actions or [gross] negligence. 26

[Choose one of the following:] 27

(11) Our opinion in paragraph __ above [the valid issuance opinion] confirms that the issuance of the Membership [LP] Interests satisfies the requirements of RULLCA [the LP Act] and the Company's Articles of Organization [Certificate of Limited Partnership] and Operating [Limited Partnership] Agreement, including any necessary approvals by the manager[s] and members [general partner[s] and limited partners] of the Company and the receipt of the amount and kind of consideration, if any, required thereunder. The opinion also confirms that the provisions of the Company's Operating [Limited Partnership] Agreement governing distributions do not violate RULLCA [the LP Act] or the Company's Articles of Organization [Certificate of Limited Partnership], and that the Company's Operating [Limited Partnership] Agreement does not purport to deny the manager[s] and members [general partner[s] and limited partners] of the Company any of those non-waivable voting [approval] rights mandated by RULLCA [the LP Act]. The opinion does not otherwise address, and we express no opinion on, whether any of the other provisions of the Operating [Limited Partnership] Agreement violate RULLCA [the LP Act] or the Articles of Organization [Certificate of Limited Partnership]. 28

OR

(11) Our opinion in paragraph _____ above confirms that the issuance of the Membership [LP] Interests satisfies the requirements of RULLCA [the LP Act] and the Company's [LP's] Articles of Organization [Certificate of Limited Partnership] and Operating [Limited Partnership] Agreement, including any necessary approvals by the manager[s] and members [general partners[s] and limited partners] of the Company and the receipt of the amount and kind of consideration, if any, required thereunder. The opinion does not address, and we express no opinion on, whether any of the provisions of the Operating [Limited Partnership] Agreement violate RULLCA [the LP Act] or the Articles of Organization [Certificate of Limited Partnership]. 29

25 For discussion of this qualification, see Report at 58.
26 For discussion of this qualification, see Report at 55–56.
27 For a discussion of these alternative forms of the Committees' recommended qualification to the valid issuance opinion, see Report at 30–37. One of these qualifications would be included if the opinion letter includes a valid issuance opinion, as illustrated by opinion (i) in the text box on page 6 of this sample opinion.
28 The reference to voting rights in this qualification includes consent rights. See RULLCA, Corp. Code § 17701.02(ac) (the term “vote” includes authorization by written consent); Beverly-Killea Act, former Corp. Code § 17001(aq) (same). The LP Act does not contain a definition of “vote” or “voting” but uses, instead, the term “approve.” See LP Act, Corp. Code §§ 15901.10(b) (12), 15911.03(b), and 15911.12(a). Accordingly, if the suggested form of qualification is used with respect to the issuance of LP interests, the reference to “non-waivable voting rights” should be revised to “non-waivable approval rights . . .”
29 Any qualification, including the Committees' suggested forms of qualification in the text, would likely not be accepted in an Exhibit 5 opinion required in connection with the issuance of LLC or LP interests in an SEC-registered offering of the same. See Report at 36 n.70.
This opinion letter may be relied upon solely by the Lender for use in connection with the transactions contemplated by the Loan Agreement. No other party may rely upon this opinion letter or the opinions expressed herein without our prior written consent.30

Respectfully submitted,

ABLE & BAKER LLP

30 The Report (at 52) includes language often used by opinion preparers, and accepted by opinion recipients, where the opinion giver is requested to allow specified third parties to rely on the opinion, such as in syndicated or securitized loan transactions:

“At your request, we consent to reliance on this letter by any future assignee of your interest in the loans under the Loan Agreement pursuant to an assignment that is made and consented to in accordance with the provisions of Section [___] of the Loan Agreement, on the condition and understanding that (i) this letter speaks only as of the date hereof, (ii) we have no responsibility or obligation to update this letter, to consider its applicability or correctness to other than its addressee(s), or to take into account changes in law, facts or any other developments of which we may later become aware, and (iii) any such reliance by a future assignee must be actual and reasonable under the circumstances existing at the time of assignment, including any changes in law, facts or any other developments known to or reasonably knowable by the assignee at such time. In no event may an assignee rely on this letter to any extent greater than could the original addressee(s).”

It is understood, whether stated or not, that an opinion letter speaks only as of its date, and that an opinion giver has no obligation to update an opinion letter for subsequent events or legal developments. See Report at 51. There follows sample language for those opinion preparers who wish to express these limitations explicitly:

“This opinion letter speaks only as of its date. We have no obligation to update this opinion letter for any change in the law or the facts on which we have relied in rendering the opinions expressed herein.”

While, as noted in the Report (at 52) and in the preface to this sample opinion, whether or not stated, a closing opinion should be interpreted in light of customary practice. For those opinion preparers who wish to include an explicit reference to customary practice in their opinion letter, sample language follows:

“It is commonly understood, without any express statement, that opinion letters are necessarily technical and are informed by customary practice and usage. Thus, this opinion letter should not be used or relied upon except in consultation with counsel.”

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Third-Party Closing Opinions: Limited Liability Companies and Partnerships C-8
Appendix D

Sample Officer’s Certificates
Officer’s Certificate

(Borrower)
Prefatory Note: How opinion preparers determine the facts that underlie their opinions is a matter of judgment, and depends upon the relationship between the opinion giver and the client, the length of time the opinion giver has represented the client, the scope of the engagement and the size of the transaction under consideration, and the demands of the opinion recipient. Facts may be determined by investigation (e.g., reviewing “LLC” records and documents), by discussions with representatives of the client, by relying on client certification of facts, and/or by the use of assumptions, some implicit and others explicit.

There follows a form of Officer's Certificate for delivery by the manager of the Borrower, assumed, in the Report, to be a California limited liability company. For this form it is assumed that the opinion giver does not have a long-standing relationship with the client, and that the opinion preparers are therefore relying upon the certificate to establish many of the key facts underlying the opinions stated in the sample opinion letter included as Appendix C to the Report. Opinion preparers intimately involved in the governance of the client may choose to use a more abbreviated form or may rely on their own knowledge of one or more of the facts specified rather than upon client certification of such fact(s).

In relying upon officer certificates, the opinion preparers should be mindful of the stricture that “[a] lawyer normally may rely on facts provided by corporate officers and other agents of a client that the lawyer reasonably believes to be appropriate sources for such facts without further investigation or specific disclosure, unless the recipient of the opinion objects or the version of the facts provided or other circumstances indicate that further verification is required.” Restatement of the Law Third, The Law Governing Lawyers § 95, comment c (2000).
OFFICER’S CERTIFICATE

(Borrower)

The undersigned is the manager (“Manager”) of [Name of Borrower], a California limited liability company (the “Borrower”), and hereby certifies to Able & Baker LLP (the “Firm”) for purposes of the Firm’s opinion letter (“Opinion”), dated this date, being rendered by the Firm to _____________________, a national banking association, that, to the best of his/her knowledge, after due inquiry and a review of the Opinion, the factual statements and representations set forth in this Certificate are accurate. The undersigned is duly authorized to sign and deliver this Certificate to the Firm for and on behalf of the Borrower. The undersigned understands that the Firm is relying on this Certificate in delivering its Opinion.

All capitalized terms not defined herein shall have the meaning given to them by the Loan Agreement (as defined in the Opinion).

A. Documents

(i) Attached to this Certificate as Exhibit A is a true, correct, and complete copy of the Articles of Organization of Borrower, as amended through this date.

(ii) Attached hereto as Exhibit B is a true, correct, and complete copy of Borrower’s Operating Agreement, as amended through this date (“Operating Agreement”).

(iii) Attached hereto as Exhibit C is a true, correct, and complete copy of the resolutions adopted by Manager authorizing Borrower, and Manager on behalf of Borrower, to enter into and to perform the “Loan Documents” (as defined in the Opinion) to which Borrower is a party.

(iv) Attached hereto as Exhibit D is a true, correct, and complete copy of the resolutions adopted by the members of Borrower, authorizing Borrower, and Manager on behalf of Borrower, to enter into and to perform the Loan Documents to which Borrower is a party.]

(v) Attached hereto as Exhibit E is a true, correct, and complete form of the Subscription Agreement pursuant to which each of the members of Borrower subscribed for and purchased their membership interests (the “Membership Interests”) in Borrower.

(vi) Attached hereto as Exhibit F is a list of those agreements that Manager, after consultation with the Firm, believes are material to the business of Borrower and to Borrower’s entry into and performance of the Loan Documents to which Borrower is a party (the “Borrower Material Agreements”).

B. Organization of Borrower

(vii) The signature of Manager to the Operating Agreement is the authentic signature of Manager.

(viii) The members of Borrower are identified on Schedule ____ to the Operating Agreement. Each of the members of Borrower has signed the Operating Agreement or has adopted the Operating Agreement by signing a Subscription Agreement in the form of Exhibit E to this Certificate. To the knowledge of Manager,

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1 To be attached only if member consent is required to enable Borrower to enter into and perform the Loan Documents.
2 The certifications set forth in clauses (viii) and (ix) would not be appropriate in the event that the opinion is being rendered prior to the issuance of membership interests. See Report at 28–29.
each of the signatures of the members to the Operating Agreement and/or to the Subscription Agreement signed by the member is the authentic signature of the member.

(ix) Schedule ___ to the Operating Agreement sets forth the contributions that have been made to Borrower by Manager and by the members. Borrower has received the contributions called for by Schedule ___ from Manager and from each of the members identified on such Schedule, in the amounts specified.³

C. No Dissolution

(x) Neither Borrower nor Manager on behalf of Borrower has taken any action to dissolve Borrower; to Manager’s knowledge, no event of dissolution has occurred under Article ___ [the Article of the Operating Agreement setting forth Events of Dissolution] of the Operating Agreement; and, to Manager’s knowledge, no third party has taken any action seeking to dissolve Borrower.

D. Absence of Proceedings

(xi) Borrower is not a party to any lawsuit, arbitration, or other proceeding pursuant to which the plaintiff or claimant is seeking to prevent the entry or performance by Borrower of the Loan Documents, or to prevent the occurrence of the transactions contemplated by the Loan Documents, and Manager is not aware of any plaintiff or claimant who has threatened to bring any such lawsuit or proceeding.

[Continued next page]

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³ The Certificate would be modified in the event that the Manager and/or the members are contributing property to or committing to perform services for Borrower. See RULLCA § 17704.02; Beverly-Killea Act § 17200(a) (permissible forms of contribution to an LLC); Report at 30–31, 41–42. In such event this certification would be modified to recite the receipt of the property and that the Schedule to the Operating Agreement sets forth Manager’s and the contributing member’s good faith determination of the fair market value of the contributed property on the date of contribution. With respect to services, the Certificate would recite – if the services had been performed prior to the date of issuance of the membership interests to the member – the value, determined in good faith by Manager and the contributing member, of the services so rendered. (In such event, the parties should understand that the receipt of a membership interest for services rendered will generally represent taxable income.)
E. Loan Agreement; Representations and Warranties

(xii) The Firm may rely upon the representations and warranties of Borrower set forth in the Loan Agreement, to the extent that such representations and warranties contain statements of fact, as if such representations and warranties were addressed by Borrower directly to the Firm.4

F. Incumbency5

(xiii) The following persons constitute the officers of the Borrower, each person identified is duly appointed to the office or offices set forth opposite his or her name, and the signature set forth opposite his or her name is a specimen of his or her genuine signature.

<table>
<thead>
<tr>
<th>Name</th>
<th>Office</th>
<th>Signature</th>
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IN WITNESS WHEREOF, this Certificate has been signed as of this ___ day of __________, 201__.

By: ____________________________

Name: __________________________

[Continued next page]

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4 While this certification (or a like assumption stated in an opinion letter) is not uncommon, its utility is limited since a party’s representations and warranties typically include mixed statements of fact and law (e.g., “Borrower is duly qualified and licensed to do business as a foreign corporation and is in good standing in each jurisdiction in which the property and assets owned, leased or operated by it, or the nature of the business conducted by it, makes such qualification or licensing necessary,…”). Where the client’s representations and warranties in a transaction document contain statements of fact the opinion preparers conclude should underlie one or more of the firm’s opinions, they may choose instead to include an express statement of the relevant fact(s) in the Certificate.

5 This section of the Certificate is for illustrative purposes, and assumes that the Borrower, in addition to its Manager, has officers. The incumbency certification would also be relevant, even if the Borrower has no officers, if the Manager is an entity (in which event the incumbency certification would relate to the officers/authorized agents of the entity), or if Borrower has multiple managers. If Borrower has no officers and its sole manager is an individual, then this section of the Certificate need not be included.
The undersigned, the ______________________________ of Borrower, does hereby certify that ______________ is the duly appointed/elected Manager of Borrower, and that the signature on the prior page is his/her genuine signature.

IN WITNESS WHEREOF, this Certificate has been signed as of this ___ day of ________, 201__.

By: ______________________________
Name: ______________________________
Exhibit A

(Articles of Organization)
Exhibit B

(Operating Agreement)
Exhibit C

(Manager Resolutions)
Exhibit D

(Member Resolutions)
Exhibit E

(Form of Subscription Agreement)
Exhibit F

(List of Borrower Material Agreements)
Officer’s Certificate

(Guarantor)
Prefatory Note: How opinion preparers determine the facts that underlie their opinions is a matter of judgment, and depends upon the relationship between the opinion giver and the client, the length of time the opinion giver has represented the client, the scope of the engagement and the size of the transaction under consideration, and the demands of the opinion recipient. Facts may be determined by investigation (e.g., reviewing “LP” records and documents), by discussions with representatives of the client, by relying on client certification of facts, and/or by the use of assumptions, some implicit and others explicit.

There follows a form of Officer’s Certificate for delivery by the general partner of the Guarantor, assumed, in the Report, to be a California limited partnership. For this form it is assumed that the opinion giver does not have a long-standing relationship with the client, and that the opinion preparers are therefore relying upon the certificate to establish many of the key facts underlying the opinions stated in the sample opinion letter included as Appendix C to the Report. Opinion preparers intimately involved in the governance of the client may choose to use a more abbreviated form or may rely on their own knowledge of one or more of the facts specified rather than upon client certification of such fact(s).

In relying upon officer certificates, the opinion preparers should be mindful of the stricture that “[a] lawyer normally may rely on facts provided by corporate officers and other agents of a client that the lawyer reasonably believes to be appropriate sources for such facts without further investigation or specific disclosure, unless the recipient of the opinion objects or the version of the facts provided or other circumstances indicate that further verification is required.” Restatement of the Law Third, The Law Governing Lawyers § 95, comment c (2000).
OFFICER’S CERTIFICATE

(Guarantor)

The undersigned is the general partner (“General Partner”) of [Name of Guarantor], a California limited partnership (the “Guarantor”), and hereby certifies to Able & Baker LLP (the “Firm”) for purposes of the Firm’s opinion letter (“Opinion”), dated this date, being rendered by the Firm to ___________ , a national banking association, that, to the best of his/her knowledge, after due inquiry and a review of the Opinion, the factual statements and representations set forth in this Certificate are accurate. The undersigned is duly authorized to sign and deliver this Certificate to the Firm for and on behalf of the Guarantor. The undersigned understands that the Firm is relying on this Certificate in delivering its Opinion.

All capitalized terms not defined herein shall have the meaning given to them by the Loan Agreement (as defined in the Opinion).

A. Documents

(i) Attached to this Certificate as Exhibit A is a true, correct, and complete copy of the Certificate of Limited Partnership of Guarantor, as amended through this date.

(ii) Attached hereto as Exhibit B is a true, correct, and complete copy of Guarantor’s Limited Partnership Agreement, as amended through this date (“LP Agreement”).

(iii) Attached hereto as Exhibit C is a true, correct, and complete copy of the resolutions adopted by the General Partner authorizing Guarantor, and the General Partner on behalf of Guarantor, to enter into and to perform the “Guaranty” (as defined in the Opinion).

(iv) Attached hereto as Exhibit D is a true, correct, and complete copy of the resolutions adopted by the limited partners of Guarantor, authorizing Guarantor, and the General Partner on behalf of Guarantor, to enter into and to perform the Guaranty.]1

(v) Attached hereto as Exhibit E is a true, correct, and complete form of Subscription Agreement pursuant to which each of the limited partners of Guarantor subscribed for and purchased their limited partnership interests (the “LP Interests”) in Guarantor.

(vi) Attached hereto as Exhibit F is a list of those agreements that the General Partner, after consultation with the Firm, believes are material to the business of Guarantor and to Guarantor’s entry into and performance of the Guaranty (the “Guarantor Material Agreements”).

B. Organization of Guarantor2

(vii) The signature of the General Partner to the Guaranty is the authentic signature of the General Partner.

(viii) The limited partners of Guarantor are identified on Schedule ____ to the LP Agreement. Each of the limited partners of Guarantor has signed the LP Agreement or has adopted the LP Agreement by signing a Subscription Agreement in the form of Exhibit E to this Certificate. To the knowledge of the General Partner,

1 To be attached only if limited partner consent is required to enable Guarantor to enter into and perform the Guaranty.
2 The certifications set forth in clauses (viii) and (ix) would not be appropriate in the event that the opinion is being rendered prior to the issuance of limited partnership interests. See Report at 28–29.
each of the signatures of the limited partners to the LP Agreement and/or to the Subscription Agreement signed by the limited partners is the authentic signature of the limited partners.

(ix) Schedule ___ to the LP Agreement sets forth the contributions that have been made to Guarantor by the General Partner and by the limited partners. Guarantor has received the contributions called for by Schedule ____ from the General Partner and from each of the limited partners identified on such Schedule, in the amounts specified.³

C. No Dissolution

(x) Neither Guarantor nor the General Partner on behalf of Guarantor has taken any action to dissolve Guarantor; to the General Partner’s knowledge, no event of dissolution has occurred under Article ___ [the Article of the LP Agreement setting forth Events of Dissolution] of the LP Agreement; and, to the General Partner’s knowledge, no third party has taken any action seeking to dissolve Guarantor.

D. Absence of Proceedings

(xi) Guarantor is not a party to any lawsuit, arbitration, or other proceeding pursuant to which the plaintiff or claimant is seeking to prevent the entry or performance by Guarantor of the Guaranty, or to prevent the occurrence of the transactions contemplated by the Loan Documents, and the General Partner is not aware of any plaintiff or claimant who has threatened to bring any such lawsuit or proceeding.

[Continued next page]

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³ The Certificate would be modified in the event that the General Partner and/or the limited partners are contributing property to or committing to perform services for Guarantor. See LP Act § 15905.01 (permissible forms of contribution to an LP); Report at 30–31, 41–42. In such event this certification would be modified to recite the receipt of the property and that the Schedule to the LP Agreement sets forth the General Partner’s and the contributing limited partners’ good faith determination of the fair market value of the contributed property on the date of contribution. With respect to services, the Certificate would recite – if the services had been performed prior to the date of issuance of the limited partnership interests to the limited partner – the value, determined in good faith by the General Partner and the contributing limited partner, of the services so rendered. (In such event, the parties should understand that the receipt of a limited partnership interest for services rendered will generally represent taxable income.)
E. Guaranty; Representations and Warranties

(xii) The Firm may rely upon the representations and warranties of Guarantor set forth in the Guaranty, to the extent that such representations and warranties contain statements of fact, as if such representations and warranties were addressed by Guarantor directly to the Firm.  

F. Incumbency  

(xiii) The following persons constitute the officers of the Guarantor, each person identified is duly appointed to the office or offices set forth opposite his or her name, and the signature set forth opposite his or her name is a specimen of his or her genuine signature.

<table>
<thead>
<tr>
<th>Name</th>
<th>Office</th>
<th>Signature</th>
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</tbody>
</table>

IN WITNESS WHEREOF, this Certificate has been signed as of this ___ day of __________, 201__.

By: __________________________
Name: __________________________

[Continued next page]

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4 While this certification (or a like assumption stated in an opinion letter) is not uncommon, its utility is limited since a party's representations and warranties typically include mixed statements of fact and law (e.g., "Guarantor is duly qualified and licensed to do business as a foreign corporation and is in good standing in each jurisdiction in which the property and assets owned, leased or operated by it, or the nature of the business conducted by it, makes such qualification or licensing necessary,..."). Where the client's representations and warranties in a transaction document contain statements of fact the opinion preparers conclude should underlie one or more of the firm's opinions, they may choose instead to include an express statement of the relevant fact(s) in the Certificate.

5 This section of the Certificate is for illustrative purposes, and assumes that the Guarantor, in addition to its General Partner, has officers. The incumbency certification would also be relevant, even if the Guarantor has no officers, if the General Partner is an entity (in which event the incumbency certification would relate to the officers/authorized agents of the entity), or if Guarantor has multiple general partners. If Guarantor has no officers and its sole general partner is an individual, then this section of the Certificate need not be included.
The undersigned, the ______________________________ of Guarantor, does hereby certify that ______________________________ is the duly appointed/elected General Partner of Guarantor, and that the signature on the prior page is his/her genuine signature.

IN WITNESS WHEREOF, this Certificate has been signed as of this ___ day of _______, 201___.

By: 
Name: ___________________________
Exhibit A

(Certificate of Limited Partnership)
Exhibit B

(Limited Partnership Agreement)
Exhibit C

(General Partner Resolutions)
Exhibit D

(Limited Partner Resolutions)
Exhibit E

(Form of Subscription Agreement)
Exhibit F

(List of Guarantor Material Agreements)
Appendix E

Glossary of Defined Terms
# APPENDIX E

## Glossary of Defined Terms

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<th>Defined Term</th>
<th>Explanation</th>
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<td>“ABA”</td>
<td>American Bar Association</td>
</tr>
<tr>
<td>“ABA Legal Opinions Committee”</td>
<td>Legal Opinions Committee of the Business Law Section of the American Bar Association</td>
</tr>
<tr>
<td>“authorization opinion”</td>
<td>A typical opinion on the authorization by an LLC or an LP to execute, deliver, and perform its obligations under the relevant documents.</td>
</tr>
<tr>
<td>“Beverly-Killea Act”</td>
<td>Beverly-Killea Limited Liability Company Act, former Corp. Code §§ 17000 * et seq.</td>
</tr>
<tr>
<td>“BLS”</td>
<td>Business Law Section of the State Bar of California</td>
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<tr>
<td>Defined Term</td>
<td>Explanation</td>
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<td>---------------------</td>
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</tr>
<tr>
<td>“Committees”</td>
<td>Collectively, the PLLC Committee and the Opinions Committee</td>
</tr>
<tr>
<td>“Governing Documents”</td>
<td>An LLC’s articles of organization and operating agreement, or an LP’s certificate of limited partnership and limited partnership agreement, as the case may be</td>
</tr>
<tr>
<td>“GPs”</td>
<td>California general partnerships</td>
</tr>
<tr>
<td>“LLCs”</td>
<td>California limited liability companies</td>
</tr>
<tr>
<td>“LLPs”</td>
<td>California limited liability partnerships</td>
</tr>
<tr>
<td>“LPs”</td>
<td>California limited partnerships</td>
</tr>
<tr>
<td>“NCCUSL”</td>
<td>National Conference of Commissioners on Uniform State Laws</td>
</tr>
<tr>
<td>“no breach opinion”</td>
<td>A no breach or default opinion</td>
</tr>
<tr>
<td>“Opinions Committee”</td>
<td>Opinions Committee of the Business Law Section, State Bar of California</td>
</tr>
<tr>
<td>“PLLC Committee”</td>
<td>Partnerships and Limited Liability Companies Committee of the Business Law Section of the State Bar of California</td>
</tr>
<tr>
<td>“Prior Reports”</td>
<td>Collectively, the 1998 Report and the 2000 Report</td>
</tr>
<tr>
<td>“remedies opinion”</td>
<td>A remedies or enforceability opinion</td>
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<td>Defined Term</td>
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<tr>
<td>“RULLCA”</td>
<td>California Revised Uniform Limited Liability Company Act, Corp. Code §§ 17701.01 <em>et seq.</em></td>
</tr>
<tr>
<td>“Sample Opinion”</td>
<td>The sample LLC and LP closing opinion included in § III of this report</td>
</tr>
<tr>
<td>“SEC”</td>
<td>Securities and Exchange Commission</td>
</tr>
<tr>
<td>“security interest opinion”</td>
<td>An opinion that the security interest created by a security agreement in personal property collateral is enforceable under the California Uniform Commercial Code as against the borrower and third parties</td>
</tr>
<tr>
<td>“SPA”</td>
<td>Statement of Partnership Authority</td>
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<td>Defined Term</td>
<td>Explanation</td>
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<tr>
<td>“substantive element”</td>
<td>The element of the valid issuance opinion that addresses whether the terms of the LLC or LP interests are prohibited by or violate the relevant LLC or LP statute or the LLC’s or LP’s Governing Documents.</td>
</tr>
<tr>
<td>“TriBar”</td>
<td>The TriBar Opinion Committee. For the composition of this multistate committee, see, e.g., TriBar LLC Membership Interests Report, n. 1.</td>
</tr>
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* These Reports/Sample Opinions are available on the website of the Opinions Committee of the Business Law Section of the California State Bar at http://businesslaw.calbar.ca.gov/publications/opinionresources.aspx (accessible here).
** These reports are available on the website of the Legal Opinions Committee of the Business Law Section of the American Bar Association at http://businesslaw.calbar.ca.gov/publications/opinionresources.aspx and are included in the Collected ABA and TriBar Opinion Reports 2009, ABA Section of Business Law (2009).
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*** Available on the ABA Legal Opinions Committee’s website. See also the October 8, 2014 draft of the update of this Report, Report on No Registration Options – Working Draft (2014 Update), also available on the ABA Legal Opinions Committee’s website.