

Third-Party Closing Opinions: Limited Partnerships

By the TriBar Opinion Committee*

The TriBar Opinion Committee has published two reports on opinions on limited liability companies (“LLCs”).¹ This report addresses opinions on limited partnerships.² Its purpose is to provide guidance on the wording and meaning of those opinions and the work required to support them.

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

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

1. TriBar Opinion Comm., *Third-Party Closing Opinions: Limited Liability Companies*, 61 BUS. LAW. 679 (2006) [hereinafter *TriBar 2006 LLC Report*]; TriBar Opinion Comm., *Supplemental TriBar LLC Opinion Report: Opinions on LLC Membership Interests*, 66 BUS. LAW. 1065 (2011) [hereinafter *TriBar 2011 Supplemental LLC Report*] (collectively with the *TriBar 2006 LLC Report*, *TriBar LLC Reports*). The Committee also has published a more comprehensive report on opinions to third parties in business transactions. TriBar Opinion Comm., *Third-Party “Closing” Opinions: A Report of the TriBar Opinion Committee*, 53 BUS. LAW. 591 (1998) [hereinafter *TriBar 1998 Report*] (discussing, *inter alia*, opinions on corporations).

2. Because of the widespread practice of organizing limited partnerships in Delaware, this report uses Delaware limited partnership law as a paradigm for its analysis and provides extensive citations to the Delaware Revised Uniform Limited Partnership Act, DEL. CODE ANN. tit. 6, §§ 17-101–1111 (West, Westlaw through 2018) [hereinafter Delaware LP Act]. Because the Delaware LP Act has many unique provisions, the discussion in this report is unlikely to apply in all respects to opinions on limited partnerships organized under the limited partnership statutes of other states, even states whose limited partnership statutes are based, like the Delaware LP Act, on the now superseded 1985 version of the Revised Uniform Limited Partnership Act. See *infra* note 102.

Opinion letters on Delaware limited partnerships sometimes state that their coverage is limited to the Delaware LP Act. Like references to the Delaware Limited Liability Company Act, DEL. CODE ANN. tit. 6, §§ 18-101–1109 (West 2017), in opinion letters on Delaware LLCs, references to the Delaware LP Act in opinion letters on Delaware limited partnerships should be understood to encompass, unless expressly excluded, not only the Delaware LP Act but also relevant reported judicial decisions and Delaware contract law issues applicable to the opinions being given. A partnership agreement is the principal source of the rules governing a limited partnership, and the enforceability and interpretation of a partnership agreement are a function of both partnership law and contract law. Cf. *TriBar 2006 LLC Report*, *supra* note 1, at 681–83 & n.18 (noting that the contract law issues covered by the LLC status, power, and action opinions ordinarily are not difficult and that the law governing

The formation of a limited partnership requires the filing of a document—in Delaware, a certificate of limited partnership—with the appropriate governmental office in the state³ under whose laws the limited partnership is being formed.⁴ In addition, in Delaware and many other states for a limited partnership to be formed it must have an agreement of limited partnership (referred to in this report as a “partnership agreement”) between at least one general partner and one different limited partner.⁵ Although a partnership agreement may be oral,⁶ to eliminate uncertainty, lawyers ordinarily insist that an oral partnership agreement be reduced to writing before they will give the opinions discussed in this report.⁷

those issues does not vary significantly from state to state; observing in the case of Delaware specifically that knowledge of traditional contract law principles will be all that is required to give those opinions).

Section 1.0 of the *TriBar 2006 LLC Report*, *supra* note 1, discusses opinions by non-Delaware lawyers on Delaware LLCs. That discussion also applies to opinions by non-Delaware lawyers on Delaware limited partnerships.

For purposes of the Delaware LP Act, the term “limited partnership” means “a partnership formed under the laws of the State of Delaware consisting of 2 or more persons and having 1 or more general partners and 1 or more limited partners.” *See* Delaware LP Act § 17-101(9). In Delaware, a person can be both a general partner and a limited partner at the same time. *See, e.g.*, Delaware LP Act § 17-404. However, to be formed as a Delaware limited partnership, an entity must have at least one general partner that is different from at least one limited partner.

3. Ordinarily, the appropriate governmental office is the office of the Secretary of State. As used in this report, the word “state” refers not only to a state of the United States but also to other jurisdictions such as the District of Columbia and Puerto Rico.

4. *See, e.g.*, Delaware LP Act § 17-201(b). This contrasts with general partnerships, which, in states that have adopted the Revised Uniform Partnership Act, can be formed pursuant to section 15-202 of that Act without any filing. This report does not address opinions on general partnerships or limited liability partnerships (which usually are general partnerships with additional features such as limits on a partner’s liability for the liabilities of the partnership).

5. Freedom of contract is a core feature of limited partnerships, with limited partnership statutes providing default rules on matters as to which a partnership agreement is silent. *See, e.g.*, Delaware LP Act § 17-1101(c) (policy is to give maximum effect to principle of freedom of contract and to enforceability of partnership agreements); *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 170 (Del. 2002). Some states impose more limitations than others on the extent to which a partnership agreement can modify provisions in the state’s limited partnership statute. Reports of state bar associations can provide guidance on how those limitations may be dealt with in opinions on limited partnerships formed in those states.

Partnership agreements often address all or at least some of the following: admission of partners as general and limited partners; purposes, powers, and management structure; contributions by partners; allocation of profits and losses; distributions to partners; partners’ access to books and records; reporting of information to partners; fiduciary duties of partners; related party transactions; exculpation and indemnification of partners; assignment of partnership interests; resignation and removal of partners; admission of substituted partners and additional partners; dissolution, winding up, and termination of limited partnership; amendment of the partnership agreement; governing law; and dispute resolution.

6. The Delaware LP Act defines a “partnership agreement” to be “any agreement, written, oral, or implied, of the partners as to the affairs of a limited partnership and the conduct of its business.” *See* Delaware LP Act § 17-101(12).

7. Limited partnership statutes typically require the filing with the Secretary of State of only a barebones document, often called a certificate of limited partnership. In Delaware a certificate of limited partnership discloses the limited partnership’s name, its registered office, the name and address of its registered agent, and the name and address of each of its general partners. Limited partnership statutes typically do not require that the partnership agreement be filed with the Secretary of State. A partnership agreement may consist of a single document or multiple documents. Opinion preparers

The opinions typically given on a limited partnership cover its: (i) formation and existence; (ii) power to enter into and perform its obligations under the transaction documents; and (iii) authorization, execution, and delivery of those documents. In addition, when a limited partnership is issuing limited partner interests (“LP Interests”), purchasers of those LP Interests sometimes request opinions covering: (i) the issuance of their LP Interests; (ii) their admission as limited partners of the limited partnership; (iii) their obligation to make payments in connection with their purchase and ownership of LP Interests; and (iv) their liability as limited partners for obligations of the limited partnership. This report addresses all these opinions.⁸

1.0 THE STATUS OPINION: FORMATION AND EXISTENCE

A closing opinion for a transaction in which a limited partnership is a party often contains an opinion that the limited partnership has been “duly formed” and is “validly existing” under the law of the state of its formation.⁹ If the Secretary of State of the state in which the limited partnership was formed issues “good standing” certificates for limited partnerships, the opinion also may cover the limited partnership’s “good standing” in that state.¹⁰

FORMATION

An opinion that a limited partnership has been duly formed means that the requirements for forming the limited partnership under the applicable limited

ordinarily obtain a copy of the partnership agreement from a representative of the general partner of the limited partnership or another appropriate source.

8. Sometimes, opinions also are requested on the enforceability of a general partner’s (and less often a limited partner’s) obligations under the partnership agreement. The Committee is not addressing those opinions in this report.

9. Closing opinions seldom expressly cover due formation without also expressly covering valid existence. They do, however, sometimes expressly cover valid existence without also expressly covering due formation, even though a limited partnership cannot be validly existing without also having been duly formed. See the subsection titled “Existence” in this Section 1.0.

10. When the opinion covers good standing, the phrase “in good standing” normally is added after the phrase “validly existing.” The Committee’s comments on “good standing” opinions on corporations and LLCs also apply to “good standing” opinions on limited partnerships. See *TriBar 1998 Report*, *supra* note 1, § 6.1.4, at 645–46 (noting that good standing opinions normally are based solely on a Secretary of State’s certificate and usually add little of value analytically); see also *TriBar 2006 LLC Report*, *supra* note 1, § 2.0, at 684.

Section 17-201(b) of the Delaware LP Act provides that “[a] limited partnership formed under [the Delaware LP Act] shall be a separate legal entity, the existence of which as a separate legal entity shall continue until cancellation of the limited partnership’s certificate of limited partnership.” In addition to a limited partnership’s voluntary filing of a certificate of cancellation, the Delaware Secretary of State can cancel a certificate of limited partnership for various reasons, including: (i) a limited partnership’s failure to pay annual taxes (and penalties and interest); (ii) the resignation of its registered agent for non-payment of annual registered agent fees; (iii) its failure to provide the registered agent with a current communications contact as required by section 17-104(g) of the Delaware LP Act; and (iv) its conversion into another form of entity or participation in a merger in which it is not the survivor. See Delaware LP Act §§ 17-1109, 17-1110. If the Delaware Secretary of State cancels a limited partnership’s certificate of limited partnership, the limited partnership ceases to exist. (The limited partnership, however, may subsequently be revived in accordance with section 17-1111 of the Delaware LP Act.)

partnership statute have been met.¹¹ In Delaware, one such requirement is the filing of a certificate of limited partnership with the Delaware Secretary of State. Another is entry into a partnership agreement by at least one general partner¹² and at least one limited partner who are different “persons,” as defined in the Delaware LP Act, and who meet the other requirements for being a general or limited partner in the Delaware LP Act and the partnership agreement.¹³ In Delaware as in some other states, the requirement that a limited partnership have a partnership agreement need not be satisfied when the certificate of limited partnership is filed,¹⁴ and as a result a limited partnership may be formed long after that filing.¹⁵ An opinion that a limited partnership “has been duly formed” confirms that at some time before the opinion is given the actions taken to form the limited partnership met all the requirements of the applicable limited partnership statute for forming a limited partnership in effect when those requirements were met.¹⁶ The opinion does not indicate what requirements were then in effect or when those requirements were met.

To give a “duly formed” opinion on a Delaware limited partnership, the opinion preparers ordinarily obtain a copy of the certificate of limited partnership certified by the Secretary of State,¹⁷ confirm that the certificate of limited part-

11. Section 17-201(b) of the Delaware LP Act provides that a limited partnership is formed if there has been substantial compliance with the requirements of that section. Thus, insubstantial defects in the formation process will not prevent a Delaware limited partnership from being duly formed.

Some defects in the certificate of limited partnership may be corrected by filing a certificate of correction with the Delaware Secretary of State. See Delaware LP Act § 17-213. A certificate of correction is effective as of the date the certificate it corrects was originally filed except as to any persons substantially and adversely affected by the correction. Alternatively, defects in the certificate of limited partnership may be corrected and a limited partnership may become duly formed as of a date subsequent to the filing of the original certificate of limited partnership by amending, or amending and restating, the certificate pursuant to section 17-202 or section 17-210 of the Delaware LP Act, as the case may be.

12. In Delaware, the term “general partner” means “a person who is named as a general partner in the certificate of limited partnership . . . and who is admitted to the limited partnership as a general partner in accordance with the partnership agreement or [the Delaware LP Act].” See Delaware LP Act § 17-101(5). Section 17-101(14) of the Delaware LP Act defines the term “person” to include not only natural persons but also a broad range of associations, corporations, limited liability companies, and other entities. See *infra* note 76 for the full text of section 17-101(14).

13. In Delaware, the term “limited partner” means a “person” (see definition in *supra* note 12) that has been admitted to a limited partnership as a limited partner as provided in section 17-301 of the Delaware LP Act. See Delaware LP Act § 17-101(8). In Delaware, the requirement that a limited partnership have at least one general partner and one limited partner who are different persons is satisfied when a limited partnership has two general partners who also are the limited partnership’s two limited partners so long as one satisfies the requirements for being a general partner and the other the requirements for being a limited partner.

14. See Delaware LP Act § 17-201(d).

15. The subsection titled “Existence” in this Section 1.0 and in particular *infra* note 33 discuss the significance of the gap that may exist between the date the certificate of limited partnership is filed and the date a limited partnership is duly formed.

16. In Delaware a failure to meet a statutory requirement for forming a limited partnership will not prevent the giving of a “duly formed” opinion if an amendment to the statute eliminating the requirement and having retroactive effect has been adopted before the opinion is given. See Delaware LP Act § 17-1108 (making statutory amendments retroactive unless statute expressly states to the contrary).

17. See *supra* note 7. Opinion preparers also ordinarily obtain a so-called “good standing” certificate from the Delaware Secretary of State, which states, among other things, that the limited partner-

nership complies with the requirements of the Delaware LP Act,¹⁸ and, if the certificate specifies an effective date, confirm that the effective date has occurred.¹⁹ In addition, the opinion preparers ordinarily obtain a copy of the partnership agreement from an appropriate source²⁰ and review it to determine (i) that it purports to have been signed by (or on behalf of) at least one person meeting the requirements for being a general partner and one different person meeting the requirements for being a limited partner, in each case of the statute under which the limited partnership was formed and the partnership agreement²¹ and

ship “is duly formed under the laws of the State of Delaware . . . so far as the records of this office show.” Because the statement that a limited partnership “is duly formed” is limited by the words “so far as the records of this office show,” a “good standing” certificate from the Delaware Secretary of State provides no assurance that the entity named in the certificate has met the requirements for forming a Delaware limited partnership that do not call for a filing with the Delaware Secretary of State (most notably the requirement that a limited partnership have a partnership agreement meeting statutory requirements).

18. Section 17-201(a) of the Delaware LP Act requires that the certificate of limited partnership be executed by all the general partners and that it state the name of the limited partnership, the address of its registered office, the name and address of its registered agent for service of process, and the name and business, residence, or mailing address of each general partner. The definition of “general partner” in the Delaware LP Act requires that each general partner of a Delaware limited partnership be named in the certificate of limited partnership. Thus, admitting a person as a general partner in accordance with the partnership agreement is not enough to satisfy the statutory definition; the person also must be named as a general partner in, and must have executed, the certificate of limited partnership. See *supra* note 12 & *infra* note 22.

19. In Delaware a limited partnership’s formation can be postponed, even if statutory requirements have been satisfied when its certificate of limited partnership is filed, by providing in the certificate of limited partnership that it will not become effective until a specified future date. See Delaware LP Act § 17-201(b).

20. Because a duly formed opinion requires only that the limited partnership had a partnership agreement meeting statutory requirements at some time before the opinion is delivered, the opinion may be based on a version of the partnership agreement that is no longer in effect if that agreement met statutory requirements when the other statutory requirements also were met. See *supra* note 6. In practice, even when they base the opinion on the initial partnership agreement, opinion preparers ordinarily obtain the current version of the partnership agreement as well. That is because the duly formed opinion is typically given together with the validly existing opinion, and as indicated in the subsection titled *Existence* in this Section 1.0, the opinion preparers need to review the current version of the partnership agreement to give the validly existing opinion.

21. See *supra* notes 12 & 13. The requirements include any conditions in the statute or partnership agreement on becoming a general partner or limited partner, as the case may be. For example, if the partnership agreement conditions admission as a limited partner on a person’s making a contribution to the limited partnership or acquiring a partnership interest, the opinion preparers should confirm or expressly assume in the opinion letter that at least one limited partner has satisfied that condition. In Delaware, unless otherwise provided in the partnership agreement, a person may be admitted as a general partner or limited partner (including as the sole general partner or limited partner) without making or incurring an obligation to make a contribution to the limited partnership and without acquiring a partnership interest in the limited partnership. See Delaware LP Act §§ 17-301(d), 17-401(a).

As a matter of customary practice, in giving a due formation opinion, the opinion preparers may rely on unstated assumptions that those shown as having signed the certificate of limited partnership and partnership agreement (i) are, in fact, the persons or entities they purport to be, (ii) if natural persons, had legal capacity, and (iii) if entities, are the types of entities they purport to be and had the entity power and took the required internal actions to authorize those who signed the certificate of limited partnership and partnership agreement on their behalf to sign those documents. Analogous assumptions apply to a signer that is not a natural person or a separate legal entity but nonetheless is a “person” (for example a governmental subdivision) under the statutory definition. See *infra* note 63 and accompanying text. Some opinion preparers include in their opinion letters express assumptions

(ii) that any conditions in the partnership agreement on its becoming effective have been met.²²

EXISTENCE

An opinion that a limited partnership is “validly existing” means that on the date of the opinion letter the limited partnership exists as a limited partnership under the statute under which it was formed.²³

To give a “validly existing” opinion on a Delaware limited partnership, the opinion preparers ordinarily obtain (i) a “good standing” certificate from the Delaware Secretary of State,²⁴ (ii) a copy of the current certificate of limited partner-

regarding some or all of these matters (although express assumptions regarding these matters are not necessary).

An opinion that a limited partnership has been duly formed is not an opinion on the potential liability of limited partners for the limited partnership’s obligations (see discussion at *infra* Section 7.0). It also is not an opinion on the enforceability of the partnership agreement.

22. Once a limited partnership has been duly formed, a subsequent change in the statutory requirements for forming a limited partnership will not change its duly formed status.

In Delaware a limited partnership whose initial formation process was defective will be duly formed once the defects are corrected. Examples of defects in the formation process that, if not corrected, ordinarily would prevent a limited partnership from being duly formed (and also from being validly existing) are: (1) no certificate of limited partnership was filed; (2) the same person is at the same time both the sole general partner and sole limited partner; (3) no partnership agreement (whether written, oral, or implied) exists; (4) the entity named as sole general partner in the certificate of limited partnership does not exist; (5) the name of the limited partnership in the certificate of limited partnership is different from the name of the limited partnership in the partnership agreement; (6) the certificate of limited partnership was not executed by all the general partners (see discussion at *supra* note 18); and (7) the persons purporting to be the partners of the limited partnership are not permitted to be partners under the applicable partnership statute or the partnership agreement.

23. The validly existing opinion can be given on a limited partnership whose existence terminated prior to the date of the opinion letter if the limited partnership has been revived and all the other requirements for a limited partnership to validly exist are satisfied on the date of the opinion letter. Delaware permits a limited partnership whose existence has terminated to be revived in various ways, for example, (i) under section 17-203(b) of the Delaware LP Act, by filing a certificate of correction of a certificate of cancellation; (ii) under section 17-805 of the Delaware LP Act, by petitioning the Court of Chancery; and (iii) under section 17-1111 of the Delaware LP Act, if a limited partnership’s certificate of limited partnership was cancelled as a result of a failure to pay annual taxes, by filing a certificate of revival and paying the required fee and unpaid taxes (including penalties and interest).

24. A “good standing” certificate from the Delaware Secretary of State states, among other things, that the limited partnership has a legal existence “so far as the records of [the Secretary of State] show.” This statement means that the limited partnership’s certificate of limited partnership was filed with the Secretary of State, a certificate of cancellation has not been filed, and, according to the records of the Secretary of State, the limited partnership’s existence has not been cancelled for some other reason. Because the statement in the Secretary of State’s certificate regarding a limited partnership’s legal existence is limited by the words “so far as the records of this office show,” the certificate provides no assurance that the entity that is the subject of the certificate has met the requirements for a Delaware limited partnership to “validly exist” that do not call for a filing with the Delaware Secretary of State. (This is in contrast to the analogous Secretary of State’s certificate for a Delaware corporation, which serves as *prima facie* evidence of a corporation’s existence. See DEL. CODE ANN. tit. 8, § 105 (West 1996).)

A Delaware limited partnership ceases to exist as a limited partnership when a certificate of cancellation is filed with the Delaware Secretary of State. The Delaware Secretary of State will not issue a good standing certificate if a certificate of cancellation has been filed. See Delaware LP Act § 17-203. Besides the filing of a certificate of cancellation, other events also can cause a Delaware limited partnership’s certificate of limited partnership to be cancelled and hence cause it to cease to exist. See

ship certified by the Secretary of State, and (iii) a copy of the current partnership agreement²⁵ from an appropriate source.²⁶ They then confirm that the certificate of limited partnership meets the requirements of the Delaware LP Act²⁷ and that the partnership agreement purports to have been signed by (or on behalf of) at least one person meeting the requirements of the Delaware LP Act and the partnership agreement for being a general partner and at least one different person meeting the requirements for being a limited partner.²⁸

In many states, including Delaware, dissolution of a limited partnership does not in and of itself terminate the existence of a limited partnership. Rather, the limited partnership's existence terminates when its certificate of limited partnership is cancelled. Therefore, in Delaware and many other states, so long as a limited partnership's certificate of limited partnership has not been cancelled, the dissolution of a limited partnership will not in and of itself prevent the giving of a validly existing opinion.²⁹

By analogy to an opinion that a corporation is validly existing,³⁰ an opinion that a Delaware limited partnership is validly existing sometimes states that it is given solely in reliance on a Delaware Secretary of State's "good standing" certificate. The Committee notes, however, that a validly existing opinion on a limited partnership based solely on a Delaware Secretary of State's "good standing"

supra note 10 (last paragraph); see also *TriBar 1998 Report*, *supra* note 1, § 6.1.3(b), at 644–45 (noting that opinion preparers also may obtain an officer's certificate updating the Secretary of State's certificate to the closing).

25. See *supra* note 20.

26. As a matter of customary practice, opinion preparers may assume without so stating that the copy of the partnership agreement furnished to them by an appropriate source is the latest version and is complete.

27. If the certificate complied with the statutory requirements in effect when it was filed but, due to a later change in the statute or the information set forth in the certificate, no longer complies (for example, it does not name a subsequently appointed general partner or a new registered agent as required by the Delaware LP Act), the opinion preparers will need to consider whether they can still give an opinion that the limited partnership is validly existing. Often, rather than spend time puzzling over that issue, the opinion preparers will arrange to have the certificate amended or corrected.

28. See *supra* notes 12 & 13. If the opinion preparers are not giving a due formation opinion, they also should confirm that any conditions in the partnership agreement on its becoming effective have been met. In giving a valid existence opinion, the opinion preparers may rely on the same unstated assumptions they may rely on when giving a due formation opinion. See *supra* note 21.

A valid existence opinion does not address the due authorization, execution, delivery, or enforceability of the partnership agreement. If an opinion recipient is concerned about those matters, it should request a separate opinion covering them.

If the partnership agreement has been amended or amended and restated since the limited partnership's formation, some opinion preparers, although not required to do so (see discussion at *supra* note 21), assume expressly that the current partnership agreement has been duly adopted (or its equivalent, duly authorized, executed, and delivered by the parties).

29. See *supra* note 10 (last paragraph). However, in Delaware and many other states a dissolved limited partnership is subject to a statutory requirement that "its affairs shall be wound up," and whatever activities it then undertakes must be consistent with its winding up. As discussed in Sections 2.0 and 3.0 below, while not preventing the giving of a validly existing opinion, the dissolution of a limited partnership may preclude the giving of the power and action opinions typically included in a closing opinion. When those opinions are not being given and the opinion preparers are aware the limited partnership has dissolved, they should consider whether in the circumstances to bring the dissolution to the attention of the recipient.

30. See *TriBar 1998 Report*, *supra* note 1, at 644–45.

certificate adds nothing analytically to the limited and incomplete information provided by that certificate.³¹

PERIOD BEFORE DELIVERY OF OPINION

An opinion that a limited partnership has been duly formed means that the limited partnership was duly formed at some time before the opinion is given, and an opinion that a limited partnership is validly existing means that the limited partnership exists at the time the opinion is given.³² Those opinions do not address when the limited partnership was duly formed or whether it existed as a limited partnership on any particular date before the date of the opinion letter. If an opinion recipient is concerned about the status of the limited partnership or the legal consequences of a specific action taken by the limited partnership (whether before or after its formation) before the date of the opinion letter, the recipient should request a separate opinion specifically addressing that concern.³³

31. As discussed in *supra* note 24, a Delaware Secretary of State's "good standing" certificate confirms a limited partnership's legal existence only so far as the records of his office show and, therefore, does not address compliance with the requirements for a Delaware limited partnership to validly exist that do not call for a filing with the Delaware Secretary of State.

Opinion preparers can vary the scope and nature of the work they otherwise would be expected to perform as a matter of customary practice by describing in the opinion letter what they have (or have not) done. See generally *TriBar 1998 Report*, *supra* note 1, at 645, 647 (discussing opinions on the good standing and foreign qualification of corporations based solely on a Secretary of State's certificate).

32. Unlike a corporation, which is formed (assuming satisfaction of statutory requirements) on the date its certificate of incorporation is accepted for filing by the Secretary of State (or on a later date specified in the certificate of incorporation), the date on which a limited partnership is formed will not always be readily apparent. For example, before or after filing a certificate of limited partnership but long before entering into a written partnership agreement, the persons forming a limited partnership may have entered into an oral agreement satisfying statutory requirements. See Delaware LP Act § 17-101(12) (authorizing oral partnership agreements). Moreover, even if the initial partnership agreement was written, it may have been lost or otherwise be unavailable, thus making the precise date of formation difficult, if not impossible, to determine.

33. Sometimes a gap will exist between the filing of a certificate of limited partnership with the Secretary of State and the satisfaction of all of the other requirements for formation of a limited partnership. If the opinion preparers are aware of a gap and also are aware that during the gap the entity engaged in substantial activities (for example, borrowing funds or issuing what purported to be LP Interests), they should consider whether they can give a duly formed opinion (or for that matter deliver an opinion letter at all) without alerting the opinion recipient that the limited partnership was not duly formed substantially contemporaneously with the filing of its certificate of limited partnership. See, e.g., Delaware LP Act § 17-304; see generally *TriBar 1998 Report*, *supra* note 1, § 1.4(d), at 602-03.

Section 17-201(d) of the Delaware LP Act permits a partnership agreement entered into even long after a certificate of limited partnership was filed to provide that it shall be effective retroactively to the date the certificate was filed.

A gap might not exist if an oral or implied partnership agreement between a general partner named in the certificate of limited partnership and a different limited partner existed when the certificate was filed.

2.0 POWER OF LIMITED PARTNERSHIP TO ENTER INTO AND PERFORM ITS OBLIGATIONS UNDER AGREEMENTS BEING ENTERED INTO BY LIMITED PARTNERSHIP

The opinion that a limited partnership has the power to execute and deliver and to perform its obligations under specified agreements being entered into by the limited partnership (the “LP power opinion”) means that the limited partnership exists and has the requisite power, whether by virtue of the limited partnership statute under which it was formed, its partnership agreement, or in some states its certificate of limited partnership.³⁴ By analogy to the corporate power opinion, the LP power opinion often refers to “limited partnership” or “partnership” power, but it is understood to mean the same thing without those qualifiers.

Like an opinion on the power of a corporation or an LLC, an LP power opinion is understood as a matter of customary practice not to address the restrictions on a limited partnership’s power that do not derive from its governing documents or the statute under which the limited partnership was formed. In addition, an LP power opinion is understood as a matter of customary practice not to cover other statutes such as those requiring licenses or permits to engage in specified activities. Compliance with those statutes, even when included among the laws covered by the opinion letter, is addressed, if at all, by another opinion.³⁵

Many limited partnership statutes permit limited partnerships to carry on any lawful business or purpose, subject to limited exceptions,³⁶ and grant limited partnerships broad powers, subject to any limitations in their partnership agreements. Even if the applicable limited partnership statute grants a limited partnership broad powers, the opinion preparers still must confirm that neither its partnership agreement nor its certificate of limited partnership³⁷ prohibits the limited partnership from taking the actions covered by the opinion. In this regard, the relevant considerations are the same as those for corporate and LLC power opinions.³⁸

To give an LP power opinion, the opinion preparers must confirm that the limited partnership’s purposes and powers permit it to take the actions covered by the opinion. A limited partnership’s powers, and any limitations on them, are addressed in the limited partnership statute under which the limited partnership was formed and its partnership agreement.³⁹ Sometimes, a limited partnership is

34. See, e.g., Delaware LP Act § 17-106(b) (permitting Delaware limited partnership to have the powers granted not only by the Delaware LP Act but also by its partnership agreement). Because the legal effect of provisions in a certificate of limited partnership varies from state to state, opinion preparers will need to consider the extent to which they can or are required to take those provisions into account when giving a power opinion. See *infra* note 39.

35. See *TriBar 1998 Report*, *supra* note 1, § 6.6, at 661 (discussing opinion on compliance with statutes, rules, and regulations).

36. See, e.g., Delaware LP Act § 17-106(a) (“A limited partnership may carry on any lawful business, purpose or activity, whether or not for profit, with the exception of the business of banking as defined in § 126 of Title 8.”).

37. See *supra* note 34 & *infra* note 39.

38. See *TriBar 1998 Report*, *supra* note 1, § 6.3, at 653; *TriBar 2006 LLC Report*, *supra* note 1, § 3.0, at 688.

39. Normally, a certificate of limited partnership does not address a limited partnership’s powers. Section 17-208 of the Delaware LP Act provides that the filing of a certificate of limited partnership in

formed for a particular purpose and its partnership agreement grants it only limited powers. When the opinion preparers cannot conclude with the requisite confidence that the actions covered by the LP power opinion are within the limited partnership's purposes and powers, they often require that the partnership agreement be amended in a manner that permits them to give the opinion.

Under the Delaware LP Act, a dissolved Delaware limited partnership continues to exist until its certificate of limited partnership is cancelled.⁴⁰ Once a Delaware limited partnership has dissolved, however, the Delaware LP Act (like many other limited partnership statutes) provides that the limited partnership's affairs "shall be wound up." Therefore, a power opinion cannot be given on a dissolved limited partnership unless the actions covered by the opinion are consistent with the winding up of the limited partnership's affairs.⁴¹

Partnership agreements often provide for a limited partnership to dissolve on a specified date or on the occurrence of a specified event, such as the sale by the limited partnership of particular assets or substantially all its assets.⁴² Limited partnership statutes also often specify events of dissolution, including some that relate to the general partner or a former general partner rather than the limited partnership itself. For example, the Delaware LP Act provides that a limited partnership will dissolve upon "an event of withdrawal of a general partner"⁴³ or upon the limited partnership's ceasing to have any limited partners.⁴⁴ Whatever

the Delaware Secretary of State's office provides notice that the entity named in the certificate is a limited partnership and is notice of all other facts required by the Delaware LP Act to be set forth in the certificate. When a provision not required to be set forth in the certificate of limited partnership, for example, a provision limiting the limited partnership's power to engage in specified activities, is inconsistent with a provision in the partnership agreement and relates to a matter covered by the opinion, opinion preparers may seek to put to rest any question raised by the inconsistency by arranging for the provision to be deleted or amended to conform with the partnership agreement or by arranging for other action to be taken to resolve the inconsistency.

40. See *supra* note 10 (last paragraph).

41. See Delaware LP Act § 17-801; *supra* note 29; see also *Paciaroni v. Crane*, 408 A.2d 946 (Del. Ch. 1979). Section 17-803(b) of the Delaware LP Act expressly permits the persons winding up a limited partnership's affairs to "gradually settle and close the limited partnership's business."

42. See Delaware LP Act § 17-801(5).

43. In Delaware, an "event of withdrawal of a general partner" means an event that causes a person to cease to be a general partner as provided in section 17-402 of the Delaware LP Act. See Delaware LP Act § 17-101(3). Section 17-402(a) of the Delaware LP Act lists twelve events of withdrawal of a general partner. Among those are: (i) voluntary withdrawal of a general partner; (ii) assignment by a general partner of its entire partnership interest; (iii) removal of a general partner; (iv) death or dissolution and commencement of winding up of a general partner; and (v) unless otherwise provided in a partnership agreement, the bankruptcy of a general partner. Under section 17-801(3) of the Delaware LP Act, notwithstanding "an event of withdrawal of a general partner," a limited partnership will not dissolve if the limited partnership has at least one other general partner (and at least one different limited partner) and the partnership agreement permits the business of the limited partnership to be carried on by that general partner (and that partner undertakes to do so) or other conditions are satisfied (principally relating to action by the partners to continue the limited partnership's business and appoint a successor general partner). In general, action by the partners is necessary to cure a dissolution retroactively. See Delaware LP Act §§ 17-402, 17-801(3); see also Delaware LP Act § 17-806 (relating to revocation of dissolution).

44. Under section 17-801(4) of the Delaware LP Act, a limited partnership is dissolved and its affairs are required to be wound up when it has no limited partners unless a person is admitted as a limited partner effective as of the date of the event that caused the last remaining limited partner to cease to be a limited partner.

the reason for dissolution, limited partnership statutes ordinarily do not require public notice of a limited partnership's dissolution or a filing with a Secretary of State or another governmental authority.

Because dissolution of a limited partnership ordinarily is not a matter of public record, when giving an LP power opinion on an agreement for a transaction that is inconsistent with the winding up of the limited partnership's affairs, opinion preparers cannot determine from a Secretary of State's certificate whether a limited partnership has dissolved. Instead, they must address that possibility in some other way absent personal knowledge that no event of dissolution has occurred (as they might have, for example, when the limited partnership is formed just before the closing of the transaction they are addressing in the opinion letter). In some circumstances, for example, the opinion preparers may be able to address dissolution by relying on a combination of personal knowledge, an officer's certificate, and factual representations in the partnership agreement or the transaction documents. In other circumstances, they may address the issue by (i) including in the opinion letter an express assumption that no dissolution events have occurred or (ii) stating in the opinion letter that they have not conducted a factual investigation relating to the possibility that the limited partnership has dissolved.⁴⁵

Revocation of dissolution has the effect in Delaware of curing problems that may have arisen as a result of a limited partnership's engaging in activities that are inconsistent with its winding up. Therefore, if the opinion preparers are aware that the limited partnership has dissolved, they may still be able to give the LP power opinion if the dissolution is revoked before the opinion is given. To assure that the limited partnership, especially one formed long before the date of the opinion letter, is not in dissolution, opinion preparers sometimes request that the partnership agreement be amended in a way that revokes any dissolution that may have occurred or arrange for other steps to be taken to revoke any past dissolution.⁴⁶ In Delaware, a limited partnership's dissolution ordinarily can be revoked without a public filing.⁴⁷

Even if the transaction to which the opinion relates is consistent with the winding up of the limited partnership's affairs, opinion preparers, although not required to do so, sometimes point out the limited partnership's dissolved status in the opinion letter.

An LP power opinion is not an opinion that the limited partnership has obtained the approvals required by the applicable limited partnership statute and

45. Dissolution does not present the same issue for opinion preparers when giving a power opinion on a Delaware corporation. Because dissolution of a Delaware corporation requires a filing with the Delaware Secretary of State, the opinion preparers can determine whether a Delaware corporation has dissolved by consulting the public record. In addition, the Secretary of State will not issue a good standing certificate for a dissolved Delaware corporation, and, therefore, opinion preparers will be alerted that a corporation has dissolved when the Secretary of State declines a request for a good standing certificate. In contrast, because dissolution of a Delaware limited partnership does not require a filing with the Secretary of State, it ordinarily is not a matter of public record. Therefore, in the absence of a certificate of cancellation, the Delaware Secretary of State may issue a good standing certificate for a Delaware limited partnership even if it has dissolved.

46. See Delaware LP Act § 17-806.

47. *Id.*

its partnership agreement for it to execute and deliver and perform its obligations under the agreement or agreements that are the subject of the opinion letter.⁴⁸ The opinion that the limited partnership has obtained those approvals is discussed in the following section.

3.0 DUE AUTHORIZATION, EXECUTION, AND DELIVERY OF AGREEMENTS BEING ENTERED INTO BY LIMITED PARTNERSHIP (THE “ACTION” OPINION)

The opinion that an agreement being entered into by a limited partnership has been duly authorized, executed, and delivered by the limited partnership means that (i) the limited partnership exists and, under the limited partnership statute under which the limited partnership was formed and the partnership agreement, the limited partnership has the limited partnership power to enter into the agreement;⁴⁹ (ii) the steps required by the applicable limited partnership statute and the partnership agreement to approve the agreement have been taken;⁵⁰ (iii) the agreement has been executed by a person (usually but not necessarily a general partner) having authority to act on the limited partnership’s behalf;⁵¹ and (iv) the agreement has been executed and delivered in accordance with the requirements of the applicable limited partnership statute and the partnership agreement. In addition, if the law covered by an opinion letter includes a state’s contract law requirements for execution and delivery of the agreement, the opinion covers compliance with those requirements unless compliance is expressly excluded from the opinion’s coverage or expressly assumed.⁵²

Limited partnership statutes allow broad discretion in drafting partnership agreements, although how much discretion they permit varies from state to state.⁵³ As a general rule, partners have discretion to establish in a partnership

48. The opinion does not confirm that the limited partnership’s entering into and performing the obligations it is undertaking will not violate a statute other than the applicable limited partnership statute. Nor does it confirm that the limited partnership has obtained the approvals, if any, required under other statutes. *See supra* note 35.

49. As discussed in Section 2.0 above, in many states, including Delaware, once a limited partnership has dissolved, the only agreements it has the power to enter into are agreements consistent with the winding up of its affairs.

50. When giving an action opinion on a limited partnership, the opinion preparers ordinarily may rely on an unstated assumption regarding compliance with fiduciary duties that is comparable to the unstated assumption they rely on when giving an action opinion on a corporation or an LLC. *See TriBar 1998 Report, supra* note 1, § 6.4, at 654; *TriBar 2006 LLC Report, supra* note 1, § 5.0, at 690–92 (discussing opinion’s coverage of compliance with fiduciary duties of those who approve agreement on behalf of a corporation or an LLC).

51. An agreement executed by a limited partnership will usually indicate on the signature block the name of the general partner that signed it and, if the general partner is an entity, the name and capacity of the person acting on its behalf. Under the Delaware LP Act, unless the partnership agreement otherwise provides, a general partner may delegate its powers, including its power to sign agreements on behalf of the limited partnership, to one or more other persons, including third parties. *See infra* note 57.

52. *See TriBar 2006 LLC Report, supra* note 1, § 4.0, at 689, for a discussion of action opinions for LLCs.

53. *See, e.g., Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 170 (Del. 2002).

agreement (i) the approvals needed for the limited partnership to take particular actions, including quorum requirements for meetings and voting rights of classes or groups of partners, and (ii) procedures for exercising voting rights, including the calling and holding of meetings of partners, acting by written consent without a meeting, and fixing record dates.⁵⁴

Management by the general partners is the default rule under the Delaware LP Act and other limited partnership statutes based on the Revised Uniform Limited Partnership Act.⁵⁵ This rule, however, can be changed by a partnership agreement. Thus, in preparing an action opinion, the opinion preparers should determine what approvals (if any) the partnership agreement requires for the limited partnership to enter into the agreement covered by the opinion⁵⁶ and confirm that those approvals (for example, approval by someone who is not a partner) do not violate the applicable limited partnership statute.⁵⁷ They then should confirm that the required approvals were given in accordance with the applicable limited partnership statute and the partnership agreement. For example, the opinion preparers need to determine whether approval by the limited partners, or a class or group of limited partners, is required by the applicable limited partnership statute or the partnership agreement and, if so, whether the required ap-

54. See, e.g., Delaware LP Act §§ 17-302, 17-405.

55. Section 17-403(a) of the Delaware LP Act provides that, unless otherwise provided in a partnership agreement, a general partner of a Delaware limited partnership “has the rights and powers and is subject to the restrictions of a partner in a partnership that is governed by the Delaware Uniform Partnership Law.” 6 Del. C. §§ 1501–1553 (1914) (“DUPA”). Under section 1518 of DUPA, unless an agreement among the partners provides otherwise, all general partners have equal rights in the management and conduct of partnership business and a majority of the partners can decide any differences arising as to ordinary matters connected with the partnership business. Thus, under the default rules of the Delaware LP Act, action by a majority of the general partners is all that is needed to decide ordinary matters. If the opinion preparers are uncertain whether a proposed transaction constitutes an ordinary matter, they might require that the partnership agreement be amended to clarify the approval required. Alternatively, they might include in the opinion letter an express assumption that the transaction is an ordinary matter. See *infra* note 56.

DUPA has been superseded by the Delaware Revised Uniform Partnership Act, DEL. CODE ANN. tit. 6, §§ 101–1210 (West, Westlaw through 81 Laws 2018, chs. 200–243) (“DRUPA”), but remains applicable to Delaware limited partnerships to the extent that provisions of the Delaware LP Act (such as section 17-403(a)) refer to “the Delaware Uniform Partnership Law in effect on July 11, 1999,” the day before DUPA was superseded by DRUPA.

56. Sometimes the partnership agreement will itself expressly authorize the limited partnership to enter into a specified agreement.

57. Some limited partnership statutes do not permit a partnership agreement to delegate approval of partnership actions to a person who is neither a general partner nor a limited partner. In contrast, section 17-403(c) of the Delaware LP Act gives a general partner broad latitude (unless the partnership agreement provides otherwise) to delegate its rights, powers, and duties to manage and control the business and affairs of the limited partnership to one or more other persons, including not only to agents, officers, and employees of a general or limited partner but also to third parties. Moreover, under section 17-403(c), unless the partnership agreement otherwise provides, the delegation is irrevocable if it states that it is irrevocable.

If the requirements in the partnership agreement for approving an agreement covered by the opinion are unclear, before giving an opinion, opinion preparers might require that the partnership agreement be amended to add a provision specifically approving that agreement and expressly authorizing its execution and delivery.

proval was properly given.⁵⁸ Opinion preparers can confirm that required approvals were given by obtaining a certificate or representation from an appropriate person⁵⁹ detailing the action taken or, if the action requires a meeting or written consent, by examining a copy of the minutes of the relevant meeting or written consent or a copy of the authorizing resolution. Often the procedures a partnership agreement requires a limited partnership to follow to approve a matter are less formal than those required of a corporation.⁶⁰ For example, a partnership agreement may expressly authorize a general partner to enter into an agreement on behalf of a limited partnership without any further act, vote, or approval, and when it does, the opinion preparers may be able to conclude that the only action required for the limited partnership to enter into the agreement is the execution of the agreement by the general partner.⁶¹

The opinion preparers also must confirm that the persons who executed the agreement on behalf of the limited partnership were authorized to do so. Sometimes, the partnership agreement authorizes a particular person (such as a managing general partner) to execute agreements on behalf of the limited partnership. The due execution and delivery part of an action opinion on a limited partnership generally has the same meaning and requires the same work as its counterpart in an action opinion on a corporation or an LLC.⁶²

When the general partner is an entity, the question arises whether the opinion also confirms that the general partner has the power under the entity statute under which it was formed and its organizational documents to approve the actions covered by the opinion and has obtained whatever internal authorizations it needs to give that approval. As a matter of customary practice, lawyers who give the action opinion, rather than considering those matters, may assume, without so stating, that, when a general partner that is an entity is acting on behalf of a limited partnership, it (i) is the type of entity it purports to be, (ii) has the entity power and took any internal steps it was required to take to approve the actions covered by the opinion, and (iii) authorized

58. In Delaware, limited partners or classes or groups of limited partners have no voting rights other than those granted to them by the Delaware LP Act or the partnership agreement. Under specified circumstances, a general partner in its discretion may grant voting rights on a particular matter to a limited partner or a class or group of limited partners. See Delaware LP Act § 17-302(f).

59. If the partnership agreement provides for a secretary or similar recording officer, he or she normally will be an appropriate person. The partnership agreement may make clear who is an appropriate person by assigning a particular partner or other person, entity, or designated official responsibility for the matter covered by the certificate or representation. In other cases, the opinion preparers will need to decide who is an appropriate person (for example, a managing general partner). See *TriBar 1998 Report*, *supra* note 1, § 2.2.1, at 611–13.

60. See Delaware LP Act §§ 17-302, 17-405. The partnership agreement, for example, may permit a transaction to be approved by a majority of the general partners without a meeting or by a sole general partner without any formal action.

61. See *TriBar 1998 Report*, *supra* note 1, § 2.4, at 616 (discussing presumption of regularity). The presumption of regularity applies to opinions on limited partnerships and other non-corporate entities, as it does to opinions on corporations.

62. See *TriBar 1998 Report*, *supra* note 1, § 6.4, at 653–54; see also *TriBar 2006 LLC Report*, *supra* note 1, § 4.0, at 690.

those acting for it to take those actions on its behalf.⁶³ If an opinion recipient is concerned about these matters, it should request a separate opinion covering them.

4.0 VALID ISSUANCE OF LP INTERESTS

Like opinions on corporate stock and limited liability company interests, opinions on LP Interests typically state that the LP Interests have been “validly issued.”⁶⁴ A validly issued opinion on LP Interests means that the creation and issuance of the LP Interests satisfied the requirements,⁶⁵ including those relating to the consideration required for those interests,⁶⁶ of the applicable limited partnership statute and the partnership agreement.⁶⁷ If the limited partnership statute or partnership agreement requires that a resolution be adopted or that other action be taken to approve the issuance, the opinion also means that the resolution or other action was duly adopted or taken⁶⁸ and that the issuance complied with any conditions on issuance in that resolution or other action. To identify the requirements for creating and issuing LP Interests,⁶⁹ opinion pre-

63. See *supra* note 21.

Implicit in this assumption are the further assumptions, which also need not be stated, that each entity further up the chain had the entity power and took the internal steps required for it to approve the action taken by the entity below it and to authorize those acting for it to take that action on its behalf. Although an express assumption is not necessary, some opinion preparers expressly assume in their opinion letters that all necessary approvals by entities up the chain have been provided. See *TriBar 1998 Report*, *supra* note 1, § 2.3(c), at 616 (describing limitations on reliance on unstated and stated assumptions).

64. See *TriBar 2011 Supplemental LLC Report*, *supra* note 1, § 1.0, at 1066; see also TriBar Opinion Comm., *Special Report of the TriBar Opinion Committee: Duly Authorized Opinions on Preferred Stock*, 63 Bus. Law. 921 (2008) (discussing opinions on preferred stock of a corporation) [hereinafter *TriBar Preferred Stock Opinion Report*]. Ordinarily, opinions on stock of a corporation also state that the stock has been “duly authorized” and is “fully paid and non-assessable.” The last paragraph of this Section 4.0 addresses opinions on due authorization of LP Interests; Section 6.0 addresses full payment and non-assessability.

65. When sales of LP Interests are registered under the Securities Act of 1933, an opinion confirming the valid issuance of those LP Interests is required to be filed as an exhibit to the registration statement. See *infra* notes 96 & 101.

66. See *TriBar 1998 Report*, *supra* note 1, § 6.2.2, at 649–51 (discussing opinion that stock of a corporation has been “validly issued”); see also *TriBar 2011 Supplemental LLC Report*, *supra* note 1, at 1067. Opinion preparers usually address receipt of required consideration by relying on a certificate or representation of a general partner or other appropriate person or an express assumption. Alternatively, the opinion may state that the LP Interests will be validly issued when the required consideration is received.

67. Unlike corporation statutes (which specify the steps required to create authorized stock), limited partnership statutes grant limited partnerships flexibility to determine in their partnership agreements how LP Interests are to be created. Not all partnership agreements, however, specifically address the creation of LP Interests, leaving the issue to be addressed by the applicable limited partnership statute or more general provisions of the partnership agreement.

68. If the issuance of LP Interests requires action by more than one general partner, the opinion preparers may need to consider the issues discussed in *supra* note 55.

69. Instead of creating a specific number of “authorized” LP Interests for later issuance, some partnership agreements establish a procedure for the creation of LP Interests as an incident to their issuance without limiting the number of LP Interests that may be created or requiring specified types or amounts of consideration.

parers ordinarily review the applicable limited partnership statute,⁷⁰ the partnership agreement, the resolution or other action, if any, approving the issuance, and, in some states, the certificate of limited partnership. They then obtain a certificate or otherwise confirm that the requirements they have identified have been met.⁷¹

As in the corporate and LLC contexts, the validly issued opinion requires a limited partnership to have the power under the applicable limited partnership statute, its certificate of limited partnership, if applicable, and its partnership agreement to create and issue the LP Interests covered by the opinion. Because LP Interests may not grant limited partners rights that are not permitted or deny them rights that are mandated by the applicable limited partnership statute, the partnership agreement or, in some states, the limited partnership's certificate of limited partnership, the validly issued opinion, unless expressly limited, confirms that the LP Interests do not grant or deny them such rights.⁷² To illustrate, opinion givers could not give an opinion that LP Interests have been validly issued if the LP Interests purport to grant holders two votes for each LP Interest they hold when the partnership agreement specifies that each LP Interest shall entitle holders to no more than one vote.

An opinion that LP Interests have been validly issued does not address the enforceability of the terms of the LP Interests.⁷³ Nor does the opinion address the issuance's compliance with other applicable laws⁷⁴ or the status of the LP Interests as general intangibles or securities (certificated or uncertificated) under the

70. In Delaware, the opinion preparers must, among other things, confirm, if applicable, compliance with (i) Section 17-302 of the Delaware LP Act (which addresses the creation of classes or groups of limited partners and the rights, powers, and duties of those limited partners) and (ii) if the opinion covers a series of LP Interests, section 17-218 of the Delaware LP Act (which addresses the creation of series of LP Interests and sets forth the requirements for limiting the liability of a series). A Delaware limited partnership has the power to create classes or series of LP Interests, and to create additional classes or series in the future, only if its partnership agreement so provides. In so providing, the partnership agreement may establish special requirements for creating new classes or series of LP Interests and approving the issuance of those LP Interests.

71. Unlike corporation statutes, which ordinarily specify the approvals required for stock issuances, limited partnership statutes typically grant limited partnerships discretion to provide in their partnership agreements what approvals are required for the issuance of LP Interests. Opinion preparers sometimes arrange for the amendment of the partnership agreement to expressly authorize the issuance of LP Interests on which they are giving an opinion when those LP Interests are being issued under a partnership agreement that does not clearly provide for their issuance or specify how their issuance is to be approved.

72. The rights in question are those granted to the holders of the LP Interests under the partnership agreement (or, in some states, the certificate of limited partnership) and not rights under some other agreement, such as a subscription agreement or side letter, that is not part of the partnership agreement. See *TriBar Preferred Stock Opinion Report*, *supra* note 64, at 923-24; see also *TriBar 2011 Supplemental LLC Report*, *supra* note 1, at 1067.

Limited partnerships formed in states other than Delaware may not have the broad discretion Delaware limited partnerships have to determine the rights of holders of their LP Interests. In those states, state bar association reports may provide guidance on which of those rights are covered by a validly issued opinion.

73. In this regard, opinions on the valid issuance of LP Interests are analogous to opinions on the valid issuance of LLC interests. See *TriBar 2011 Supplemental LLC Report*, *supra* note 1, § 1.0, at 1068.

74. See *TriBar 1998 Report*, *supra* note 1, § 6.2.2, at 649-50.

Uniform Commercial Code.⁷⁵ These matters, if addressed at all, would be covered in separate opinions.

Some opinion preparers state not only that LP Interests have been validly issued but also, using the language of the analogous opinion on corporate stock, that the LP Interests have been “duly authorized.” Unlike corporation statutes, limited partnership statutes do not require creation of a pool of authorized capital or specify procedures for creating such a pool should one be desired. Consequently, an opinion stating that LP Interests have been duly authorized, unlike the analogous opinion for corporate stock, does not cover matters beyond those covered by the validly issued opinion and should not be understood as having a meaning that is different from the validly issued opinion.

5.0 ADMISSION OF PURCHASERS OF LP INTERESTS AS LIMITED PARTNERS

An opinion that the purchasers of LP Interests have been duly admitted as limited partners of a limited partnership means that the purchasers have been admitted as limited partners of the limited partnership in compliance with the requirements, if any, of the limited partnership statute under which the limited partnership was formed⁷⁶ and its partnership agreement (and, depending on the state, its certificate of limited partnership).⁷⁷

Under many state limited partnership statutes, including the Delaware LP Act,⁷⁸ purchasing or otherwise acquiring an LP Interest does not by itself make a person

75. See U.C.C. §§ 8-102(a)(15), 8-103 (2011). The validly issued opinion, by itself, does not address the status of the LP Interests under the Uniform Commercial Code even if the partnership agreement states that the LP Interests are securities under Article 8 of the Uniform Commercial Code.

76. One requirement for admission as a limited partner is that the limited partner be a “person” who is permitted to be a limited partner under the applicable limited partnership statute. See, e.g., Delaware LP Act § 17-101(8) (defining “limited partner” as a “person” admitted as a limited partner as provided in section 17-301 of the Delaware LP Act).

Section 17-101(14) of the Delaware LP Act broadly defines “person” to include

a natural person, partnership (whether general or limited), limited liability company, trust (including a common law trust, business trust, statutory trust, voting trust or any other form of trust), estate, association (including any group, organization, co-tenancy, plan, board, council or committee), corporation, government (including a country, state, county or any other governmental subdivision, agency or instrumentality), custodian, nominee or any individual or entity (or series thereof) in its own or any representative capacity, in each case, whether domestic or foreign.

The limited partnership statutes of other states may define “person” differently or not at all.

77. Opinions are rarely given on the admission of general partners. Admission of a general partner of a Delaware limited partnership requires not only that the general partner be admitted in accordance with the partnership agreement but also that the general partner be named in and execute the certificate of limited partnership (or an amendment to the certificate). See *supra* notes 12 & 18.

78. The principal provisions of the Delaware LP Act governing the admission of limited partners are sections 17-101(8), 17-301, 17-702, and 17-704. In Delaware, a person can be admitted as a limited partner and be bound by a partnership agreement without executing the partnership agreement if that person satisfies the requirements for admission as a limited partner in the Delaware LP Act and the partnership agreement. See Delaware LP Act § 17-101(12). Different rules for admission of limited partners may apply in the case of a merger, conversion, or domestication. See Delaware LP Act §§ 17-301(b)(3), 17-301(c).

a limited partner.⁷⁹ Instead, limited partnership statutes typically require that specified conditions be satisfied for a person to become a limited partner unless the partnership agreement otherwise provides.⁸⁰ Partnership agreements often specify conditions for admitting limited partners, and those conditions sometimes differ depending on when limited partners are admitted (e.g., at the time the limited partnership was formed or later).⁸¹ To support an opinion that purchasers of LP Interests have been duly admitted as limited partners, opinion preparers should confirm that all requirements for admission of the applicable limited partnership statute and the partnership agreement have been satisfied or waived (other than requirements they expressly assume to have been met or expressly exclude from the opinion's coverage).

Subscription agreements for LP Interests⁸² sometimes impose conditions on the admission of purchasers as limited partners. An opinion that purchasers have been admitted as limited partners covers compliance with those conditions when they are incorporated in or otherwise made part of the partnership agreement.⁸³ The Delaware LP Act does not expressly require that conditions on admission that are not part of the partnership agreement be satisfied for a purchaser to become a limited partner.⁸⁴ Nevertheless, some opinion givers, to avoid any misunderstanding, either expressly assume in their opinion letters that conditions on admission of limited partners have been satisfied or state that they have relied on a certificate confirming compliance with those conditions.

An opinion that a person has been admitted as a limited partner of a limited partnership is not an opinion that (i) the person can enforce the obligations that the general partner, the other limited partners, or the limited partnership have to

79. In Delaware, the assignee of an LP Interest has no right to become (or to exercise any rights or powers of) a partner except as provided in the partnership agreement or, if not otherwise provided in the partnership agreement, upon the affirmative vote or written consent of all partners of the limited partnership. See Delaware LP Act §§ 17-301(b), 17-702, 17-704.

80. See, e.g., Delaware LP Act §§ 17-301(a), 17-301(b).

81. For example, a partnership agreement could require, as a condition to being admitted as a limited partner after the limited partnership is formed, that a person (i) execute the partnership agreement and (ii) be listed as a limited partner on a schedule to the partnership agreement. In such a case, the opinion preparers would be required to confirm that those conditions have been satisfied or include an express assumption to that effect. Limited partnership statutes also may contain different provisions for admission of a person as a limited partner depending on whether that person acquires an LP Interest from the limited partnership or from a limited partner. See Delaware LP Act §§ 17-301(b)(1), 17-301(b)(2).

82. Sales of LP Interests are not always made pursuant to subscription agreements. The use of subscription agreements largely depends on the type of transaction. Investment funds often use subscription agreements when issuing LP Interests.

83. If covered, absent an express assumption, opinion preparers will need to address satisfaction of those conditions, for example, by obtaining a certificate on factual matters from an appropriate source. If a limited partner has made representations in the partnership agreement or its subscription agreement for LP Interests regarding its compliance with admission requirements, the opinion could be based on those representations.

Even though the applicable limited partnership statute may not make compliance with a condition for admission contained solely in a subscription agreement a requirement for a purchaser to be admitted as a limited partner, if the opinion preparers are aware that a condition in a subscription agreement has not been satisfied or waived, they will need to consider whether to disclose the issue in their opinion letter or, indeed, whether to give an opinion at all.

84. See, e.g., Delaware LP Act § 17-301.

limited partners under the partnership agreement; (ii) the limited partnership or its other partners can enforce the obligations of the person under the partnership agreement; or (iii) if the person is an entity rather than a natural person, that it has the power to be a limited partner under the law under which it was formed.

6.0 PAYMENTS AND CONTRIBUTIONS

Opinions regarding the obligations of purchasers to make payments and contributions to a limited partnership in connection with their purchase or ownership of LP Interests currently take a variety of forms.⁸⁵ For the reasons discussed below, the Committee suggests that opinion givers consider adopting the following form of opinion on purchasers' obligations to make payments and contributions to the limited partnership:⁸⁶

Under [name of statute under which limited partnership was formed],⁸⁷ Purchasers⁸⁸ have no obligation solely by reason of their ownership⁸⁹ of LP Interests [or their status

85. For example, some opinion preparers, using the language normally used in opinions on corporate stock, state that the LP Interests are "fully paid and nonassessable." This opinion is discussed in the last paragraph of this Section 6.0.

86. The suggested form of opinion and discussion of it in this Section 6.0 follow closely the form of opinion and discussion in Section 3.1 of the *TriBar 2011 Supplemental LLC Report*, *supra* note 1, at 1071–74. The form suggested here assumes that the terms "Limited Partnership," "Purchasers," "Holders" (if applicable), "LP Interests," "Subscription Agreements," and "Partnership Agreement" are defined in the opinion letter. If the partnership agreement uses different terms, those terms should be substituted for the terms used in the suggested form of opinion.

87. When non-Delaware lawyers give opinions on Delaware limited partnerships, they normally limit their coverage of Delaware law to the Delaware LP Act (just as they limit their coverage of Delaware law to the Delaware General Corporation Law when giving opinions on Delaware corporations). *See supra* note 2; *TriBar LLC Opinion Report*, *supra* note 1, at 682 (discussing meaning of statement in opinion letter limiting coverage of Delaware law to Delaware LLC Act). When an opinion letter limits its coverage of Delaware law to the Delaware LP Act, that limitation applies to all the opinions in the opinion letter, and, therefore, the language at the beginning of the suggested form of opinion (i.e. the introductory clause that begins with the word "Under") is not needed to exclude from the opinion's coverage obligations that arise under Delaware law apart from the Delaware LP Act. However, that language would be needed to exclude from the opinion obligations that may arise under federal law, the law of another state (i.e. a state other than Delaware), or both, if they also are otherwise covered by the opinion letter and are not excluded for some other reason. *See Tri-Bar 1998 Report*, *supra* note 1, at 631–36.

When giving opinions on Delaware limited partnerships, Delaware lawyers typically cover Delaware law generally and do not, as is done by the bracketed language, limit the opinion's coverage to the Delaware LP Act. Lawyers in states other than Delaware giving the suggested form of opinion on a limited partnership formed in their state will need to decide whether to limit the coverage of the opinion to their state's limited partnership statute or to cover obligations arising under their state's law generally.

88. In appropriate situations, "Holders" may be substituted for "Purchasers."

89. As discussed in Section 5.0 above, under the Delaware LP Act, Purchasers can acquire LP Interests without becoming limited partners of the limited partnership. The word "ownership" in the suggested form of opinion covers obligations of holders of LP Interests who are not limited partners as well as those who are limited partners. Under section 17-702(c) of the Delaware LP Act, holders of LP Interests who are not limited partners may still have obligations to make contributions to the limited partnership if they agree to make them (for example, in their subscription agreements) or are required to make them by the partnership agreement.

as limited partners of [name of limited partnership]]⁹⁰ to make payments beyond those they have previously made⁹¹ for their purchase of LP Interests or contributions to [name of limited partnership] [except as provided in their Subscription Agreements or the Partnership Agreement⁹²]⁹³ [and] [except for their obligation to repay any funds wrongfully distributed to them]⁹⁴ [and except as they otherwise may have agreed⁹⁵].⁹⁶

90. When all Purchasers are becoming limited partners, opinion givers may choose to include these words (i.e., “or their status as limited partners of [name of limited partnership]”) in the opinion. If some but not all Purchasers are becoming limited partners, the phrase “if applicable, their status as limited partners of [name of limited partnership]” could be added.

91. The phrase “beyond those they have previously made” should be deleted if the opinion is being given before Purchasers have made any payments or contributions.

92. See Delaware LP Act § 17-502 (discussing liability for contributions). Some opinion givers also include an exception for particular obligations of limited partners under the partnership agreement such as the obligation to pay for copies of books and records of the limited partnership if the limited partner makes a demand for them and to pay for costs the limited partnership incurs to transfer LP Interests to an assignee. Because these obligations are not obligations to make payments for their purchase of LP Interests or contributions solely by reason of their ownership of LP Interests (or, if covered in the opinion, status as limited partners), an exception for these obligations is not necessary.

93. For the reasons discussed in the text, when this bracketed exception is included, the suggested form of opinion does not require the opinion preparers to identify particular obligations to make payments and contributions under the Purchasers’ Subscription Agreements and the Partnership Agreement. Opinions covering those obligations are discussed in the second to last paragraph of this Section 6.0. If the Subscription Agreements and the Partnership Agreement do not impose any obligations to make further payments or contributions, the bracketed exception may be deleted (as is done, for example, in the form of opinion suggested in *infra* note 96).

94. The bracketed exception for the obligation of limited partners to repay wrongful distributions, while included by some opinion givers, is not necessary for an opinion in the form suggested by the Committee: that obligation does not arise solely by reason of ownership of LP Interests (or, if covered in the opinion, status as a limited partner) and can depend on a recipient’s knowledge that the distribution violated the applicable limited partnership statute.

95. Because Purchasers may agree to make payments or contributions apart from their Subscription Agreement and the Partnership Agreement, opinion preparers sometimes make clear in their opinion letters that they are not addressing the possibility that Purchasers have made such agreements. The suggested form of opinion in the text does this by adding at its end the phrase “except as they otherwise may have agreed.” That exception, however, is not necessary because the suggested form of opinion in the text covers only obligations to make payments that are attributable solely to ownership of LP Interests (or, if covered by the opinion, status as limited partners).

96. If included in an opinion letter filed as an exhibit to a registration statement under the Securities Act of 1933, this form of opinion could be modified to read as follows:

Under [name of statute under which the limited partnership was formed], upon issuance by [name of limited partnership] against payment as contemplated by the Registration Statement and Prospectus, the LP Interests will be validly issued, and holders of LP Interests will have no obligation solely by reason of their ownership of LP Interests to make any further payments for the purchase of the LP Interests or contributions to [name of limited partnership].

See SEC Staff Legal Bulletin No. 19, § II.B.1.b (Oct. 14, 2011), 2011 WL 4957889, <http://www.sec.gov/interp/legal/cfslb19.htm>. The reference to the limited partnership statute at the beginning of this modified form of opinion need not be included if the coverage of the opinion already is limited to that statute (as it ordinarily will be, for example, when non-Delaware counsel is giving an opinion on a Delaware limited partnership). The reference also should be omitted when the opinion preparers do not limit the coverage of the opinion to a state’s limited partnership statute (as may be the case when the opinion is given by counsel in the state where the limited partnership was formed). See *supra* note 87.

The modified form of opinion in this note does not include the bracketed exception for obligations arising under subscription agreements and the partnership agreement (which appears near the end of the suggested form of opinion in the text) because after the closing of a public offering holders of LP Interests normally will have no obligation to make payments or contributions. It also does not include

The bracketed exception to this opinion for obligations arising under subscription agreements and the partnership agreement excludes from the opinion's coverage purchasers' obligations to make future payments or contributions to the limited partnership under those agreements.⁹⁷ When the opinion is given without the bracketed exception, it means that a purchaser of LP Interests has no further obligation to make payments or contributions to a limited partnership under the purchaser's subscription agreement, the partnership agreement, or the applicable limited partnership statute. Purchasers of LP Interests in privately held limited partnerships frequently agree in their subscription agreements or are obligated under the partnership agreement to make contributions to the limited partnership after the closing, for example, to satisfy capital calls or to provide funding for a specified event such as the acquisition by the limited partnership of a particular business or property. Opinion preparers often include the bracketed exception on the basis that purchasers should not need a third-party opinion on matters that they (or their counsel) can readily determine for themselves by reading their subscription agreements, any other agreements they may have entered into, and the partnership agreement. An opinion that includes the bracketed exception (i) requires the opinion preparers to consider whether the statute under which the limited partnership was formed imposes on purchasers any requirements to make payments for the purchase of their LP Interests or contributions solely by reason of their ownership of LP Interests⁹⁸ (or, if expressly covered in the opinion, status as limited partners) and (ii) leaves to opinion recipients (i.e. the purchasers of LP Interests or new limited partners) the responsibility for determining what their contractual obligations (including those under the partnership agreement) are to make payments and contributions. Including the bracketed exception eliminates the need for what, in many circumstances, could be numerous exceptions to the opinion.

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

the bracketed exception for wrongful distributions at the end of the suggested form of opinion in the text. See *supra* note 94.

97. The exception may be deleted when purchasers are paying the full purchase price at the closing and are not subject to any such obligations. See *supra* note 93.

98. See *infra* note 108 regarding statutory provisions apart from the applicable limited partnership statute (and therefore outside the coverage of the suggested form of opinion in the text) that impose obligations on purchasers of limited partnership interests or limited partners; cf. *TriBar 1998 Report*, *supra* note 1, at 651 (pointing out that although section 630 of the New York Business Corporation Law "is not strictly an assessment statute . . . many lawyers make express reference to it in opinions on the non-assessability of stock of privately-held New York corporations").

The Committee suggests that opinion givers use the form of opinion appearing in the first paragraph of this Section 6.0 and that they not give an opinion that LP Interests are “fully paid and nonassessable” (which is a phrase typically used in opinions on corporate stock). Limited partnership statutes ordinarily do not define the phrase “fully paid and nonassessable,”⁹⁹ and the phrase does not have a generally understood meaning with respect to LP Interests.¹⁰⁰

7.0 PERSONAL LIABILITY OF LIMITED PARTNERS

As a supplement to the opinion discussed in Section 6.0, purchasers of LP Interests sometimes request an opinion that by reason of their ownership of LP Interests or in their capacity as limited partners they will have no personal liability to third parties for obligations of the limited partnership.¹⁰¹ Purchasers of LP Interests may request this opinion because many limited partnership statutes contemplate that a limited partner that participates in the control of the business of a limited partnership may be liable under certain circumstances for obligations of the limited partnership. To give an opinion that a limited partner will not be personally liable for obligations of a limited partnership, opinion preparers need to consider, therefore, whether the exercise by a limited partner of any of the rights and powers it has under the partnership agreement would cause the limited partner to participate in the “control” of the business of the limited partnership as that term is interpreted under the applicable limited partnership statute. Opinion preparers typically do so by confirming that each of those rights or powers fits within a safe harbor provided by that statute.¹⁰²

99. This is in contrast to the many corporation statutes that define the words “fully paid and nonassessable.” See, e.g., DEL. CODE ANN. tit. 8, § 152 (West 2015) (“The board of directors may authorize capital stock to be issued for consideration consisting of cash, any tangible or intangible property or any benefit to the corporation, or any combination thereof In the absence of actual fraud in the transaction, the judgment of the directors as to the value of such consideration shall be conclusive. The capital stock so issued shall be deemed to be fully paid and nonassessable stock upon receipt by the corporation of such consideration”).

100. As the Delaware Court of Chancery has pointed out, the underpinnings of Delaware law governing corporations and other entities are different. *CML V, LLC v. Bax*, 6 A.3d 238, 249–50 (Del. Ch. 2010) (explaining that “[b]ecause the conceptual underpinnings of the corporation law and [Delaware’s law on limited partnerships] are different, courts should be wary of uncritically importing requirements from the [Delaware General Corporation Law] into the [Delaware limited partnership] context”). Thus, lawyers who give “fully paid and nonassessable” opinions on LP Interests should not automatically assume that “fully paid and nonassessable” has the same meaning it has when used in an opinion on corporate stock. DEL. CODE ANN. tit. 8, § 152.

101. Purchasers of LLC interests also sometimes request a similar opinion regarding their personal liability as members of the LLC. See *TriBar 2011 Supplemental LLC Report*, *supra* note 1, at 1074–77. Purchasers of stock of a corporation, however, do not normally request a comparable opinion, presumably because they are comfortable with the protection provided them by the applicable corporation statute. See MODEL BUS. CORP. ACT ANN. § 2.02 cmt. 3.D (2016) (“The basic tenet of corporation law is that shareholders are not liable for the corporation’s liabilities by reason of their status as shareholders.”).

The staff of the Securities and Exchange Commission does not require an opinion on the personal liability of limited partners in an opinion letter on LP Interests filed as an exhibit to a registration statement under the Securities Act of 1933. See *supra* note 96.

102. Many states, including Delaware, currently have a limited partnership statute that is based on the 1985 version of the Revised Uniform Limited Partnership Act (“RULPA”). Under RULPA, limited

An opinion regarding the personal liability of limited partners sometimes is combined with the opinion discussed in Section 6.0. The Committee suggests the following form of combined opinion:

Under [name of statute under which limited partnership was formed] (the “Act”),¹⁰³ Purchasers¹⁰⁴ have no obligation solely by reason of their ownership¹⁰⁵ of LP Interests [or their status as limited partners of [name of limited partnership]]¹⁰⁶ to make payments beyond those they previously have made¹⁰⁷ for their purchase of LP Interests or contributions to [name of limited partnership] and, assuming the Purchasers, as limited partners of [name of limited partnership], do not participate in the control of the business of [name of limited partnership] within the meaning of the Act, the Purchasers will have no personal liability¹⁰⁸ for the obligations of [name of limited partnership] solely by reason of their ownership of LP Interests [or their being limited partners of [name of limited partnership]] [except in each case as provided in their Subscription Agreements or the Partnership Agreement¹⁰⁹]¹¹⁰ [and] [except for their obligation to

partners are not liable for the obligations of a limited partnership unless they also are general partners or participate in the control of the business of the limited partnership. RULPA provides “safe harbors” for activities it deems not to constitute participation in the control of the business of the limited partnership. Even among states with statutes based on RULPA, however, the scope of the safe harbors varies. Delaware has broad safe harbors. *Compare* Delaware LP Act § 17-303(b), with § 3423(b) of Vermont Limited Partnership Act, VT. STAT. ANN. tit. 11 (West, Westlaw through 2017–2018 session); and New Hampshire Limited Partnership Act, N.H. REV. STAT. ANN. § 304-B:19 II (1988).

In 2001 the National Conference of Commissioners on Uniform State Laws approved the Uniform Limited Partnership Act to replace RULPA. The Uniform Limited Partnership Act, which has been adopted in many states (but not Delaware), follows the corporate paradigm by eliminating the liability of a limited partner for the obligations of a limited partnership even if the limited partner participates in the control of the business of the limited partnership.

103. See *supra* note 87.

104. In appropriate circumstances, “Purchasers” may be changed to “Holders.”

105. See *supra* note 89.

106. See *supra* note 90.

107. The phrase “beyond those they have previously made” should be deleted if the opinion is being given before Purchasers have made any payments or contributions.

108. By its terms, this form of opinion does not address the personal liability of Purchasers (or, if changed, Holders) who are not limited partners. See *supra* Section 5.0. If an assignee of an LP Interest is not admitted as a limited partner, under section 17-702(c) of the Delaware LP Act the assignee may still have liability as a limited partner if the assignee agrees, for example in an assumption agreement, or the partnership agreement so provides. Nevertheless, opinions are rarely requested or given on the personal liability of holders of LP Interests who are not limited partners.

Some states have statutory provisions apart from their limited partnership statutes that impose on a limited partnership’s limited partners personal liability for particular obligations of the limited partnership. See, e.g., N.Y. TAX LAW § 1131(1) (McKinney 2018) (imposing liability on limited partners of a limited partnership for New York sales taxes not remitted by the limited partnership to state tax authorities). Although not required to do so, some opinion preparers, if aware of such a provision, may choose, depending on the circumstances (for example, when the opinion letter covers the law generally of the state having that provision), to refer to the provision in the opinion letter or otherwise bring it to the attention of the recipient or its counsel.

109. See *supra* note 92. The bracketed exception for liability of limited partners under their subscription agreements and the partnership agreement may be omitted (at least from opinions on Delaware limited partnerships) if the subscription agreements and partnership agreement do not require Purchasers to make the future payments or contributions to the limited partnership that are covered by the opinion and do not make limited partners personally liable for the debts, obligations, or liabilities of the limited partnership.

110. See *supra* note 93.

repay any funds wrongfully distributed to them]¹¹¹ [and except as they otherwise may have agreed¹¹²]. The Limited Partners will not be deemed to be participating in the control of the business of [name of limited partnership] within the meaning of the Act if, as limited partners of [name of limited partnership], they take no actions other than those permitted by the Partnership Agreement.

By excluding from the opinion's coverage purchasers' personal liability to third parties under their subscription agreements, the partnership agreement and any other agreements they have entered into, the bracketed exceptions in the above opinion at notes 110 and 112 (like the analogous exceptions in the suggested form of opinion in the first paragraph of Section 6.0) shift from the opinion preparers to each purchaser the responsibility for determining its obligations under those agreements.¹¹³ As with the suggested form of opinion in the first paragraph of Section 6.0, if an opinion giver is willing to cover those obligations, the opinion preparers can include in the opinion letter language tailored for that purpose.¹¹⁴

The phrase "solely by reason of their ownership of LP Interests [or their being limited partners . . .]" in the suggested form of opinion, together with the express reference in the opinion to the Act,¹¹⁵ limits the coverage of the opinion to the protection from liability provided by the applicable limited partnership statute.¹¹⁶ For a limited partnership organized in a state other than Delaware, the opinion should be tailored to the language used in that state's limited partnership statute.

Some opinion givers historically have included more exceptions than are set forth in the suggested form of opinion. The Committee believes that many of these exceptions, such as the exception sometimes included for a limited partner's liability for its own conduct or acts, are unnecessary because they do not relate to liabilities attributable *solely* to a person's status as a limited partner.

By its terms the suggested form of opinion on Purchasers' personal liability covers only liabilities arising solely by reason of Purchasers' ownership of LP Interests (or, if covered, their being limited partners). It does not address, therefore, the personal liabilities of Purchasers that are not attributable solely to their owning LP Interests (or being limited partners). Nevertheless, although unnecessary, some opinion preparers choose to provide recipients examples of ways not covered by the opinion that a Purchaser may have personal liability. They may do so, for example, by including in the opinion letter a statement along the following lines:

111. See *supra* note 94.

112. See *supra* note 95.

113. See *supra* note 93.

114. See *supra* Section 6.0 (second to last paragraph).

115. See *supra* note 87.

116. Limited partnership statutes do not protect limited partners from personal liability for their own tortious or wrongful conduct. By covering only liability "solely by reason of their ownership of LP Interests [or their being limited partners . . .]" the suggested form of opinion similarly does not cover that liability. See generally Elizabeth S. Miller, *Are There Limits on Limited Liability? Owner Liability Protection and Piercing the Veil of Texas Business Entities*, 43 TEX. J. BUS. L. 405 (2009) (discussing various ways limited partners may be personally liable for obligations of a limited partnership).

The phrase “solely by reason of their ownership of LP Interests [or their being a limited partner]” has been included to make clear that the opinion is not intended to cover personal liability that a Purchaser may have that is not attributable solely to the Purchaser’s status as an owner of LP Interests or as a limited partner under the [name of statute under which limited partnership was formed], such as the personal liability a Purchaser may incur as a result of (i) the Purchaser’s status as a controlling person under securities laws, environmental laws, or other laws, (ii) the Purchaser’s service in another capacity, for example, as a general partner of a limited partnership or a director, officer, or manager of a general partner of a limited partnership, (iii) the Purchaser’s own tortious or wrongful conduct, or (iv) application of a piercing-the-veil or similar doctrine.

CONCLUSION

Opinions on limited partnerships are common, particularly in private equity, hedge fund, and financing transactions. By providing guidance to both opinion givers and counsel for opinion recipients on the wording and meaning of opinions on limited partnerships and the work needed to support them, this report is intended to facilitate the giving of those opinions and as a result to improve the opinion process.

APPENDIX A
MEMBERS OF THE TRIBAR OPINION COMMITTEE

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