

Third-Party Closing Opinions: Limited Liability Companies

(Revised 2021)

By the TriBar Opinion Committee*

This report provides guidance on the wording and meaning of opinions on limited liability companies (“LLCs”) and the work required to support them. It replaces the Committee’s 2006 and 2011 reports on those opinions.¹

Like corporations² and limited partnerships, LLCs are formed under an authorizing statute and are legal entities separate from their owners (members in the case of LLCs). Today every state has an LLC statute, and every state grants those forming an LLC under its statute broad discretion to determine how the LLC’s business and affairs are to be conducted and managed. Because of the widespread practice of forming LLCs in Delaware, this report uses Delaware LLC law as a paradigm for its analysis and provides extensive citations to the Delaware Limited Liability Company Act (hereinafter “Delaware LLC Act”).³

* The TriBar Opinion Committee was formed over forty-five years ago by three New York bar associations. Over the years its membership has expanded to include lawyers from across the United States in leadership positions in city, state and national bar groups focusing on third-party legal opinion practice. A list of the Committee members is attached as Appendix I. The views expressed in this report reflect a consensus of Committee members but not necessarily the views of particular members or the law firms, bar associations or other organizations with which they are associated.

1. TriBar Op. Comm., *Third-Party Closing Opinions: Limited Liability Companies*, 61 BUS. LAW. 679 (2006) [hereinafter *TriBar 2006 LLC Opinion Report*]; TriBar Op. Comm., *Supplemental TriBar LLC Opinion Report: Opinions on LLC Membership Interests*, 66 BUS. LAW. 1065 (2011) [hereinafter *TriBar 2011 Supplemental LLC Opinion Report*].

Since publication of the Committee’s two earlier reports on LLC opinions, opinion practice for non-corporate entities has continued to develop, and various aspects have been clarified. In 2018 the Committee published a report on opinions on limited partnerships. TriBar Op. Comm., *Third-Party Closing Opinions: Limited Partnerships*, 73 BUS. LAW. 1107 (2018) [hereinafter *TriBar LP Opinion Report*]. The discussion of opinions on LLCs in this report has been aligned where appropriate with the discussion of opinions on limited partnerships in the *TriBar LP Opinion Report*. An Addendum to the third paragraph of note 2 of that report accompanies this report.

2. In 1998 the Committee published a comprehensive report on opinions to third parties in business transactions. TriBar Op. Comm., *Third-Party “Closing” Opinions: A Report of the TriBar Opinion Committee*, 53 BUS. LAW. 591 (1998) [hereinafter *TriBar 1998 Report*]. Although addressing opinions on corporations, that report suggested that much of its discussion and analysis could be applied by analogy to opinions on non-corporate entities.

3. DEL. CODE ANN. tit. 6, §§ 18-101–18-1208 (West, Westlaw through 2021). The Delaware LLC Act permits an LLC in its operating agreement to vary all but a few of the provisions in the Act that would otherwise apply (see *infra* note 8 and accompanying text). See, e.g., *Elf Atochem, N. Am., Inc. v. Jaffari*, 727 A.2d 286 (Del. 1999) (subject to a few non-waivable provisions, Delaware

The formation of an LLC requires the filing of a document—in Delaware, a certificate of formation—with the appropriate governmental office in the state⁴ where the LLC is being formed.⁵ In addition, Delaware, like many other states, requires that an LLC have at least one member⁶ and an agreement of its members (or member if it has only one).⁷ That agreement is referred to in this report as an operating agreement.⁸ In Delaware an operating agreement may be oral or implied.⁹ To eliminate uncertainty, however, over what the operating agreement provides, opinion preparers ordinarily will not give an opinion on an LLC unless the operating agreement is in writing and they receive a copy from an appropriate source.¹⁰

The opinions typically given with respect to an LLC cover its (i) formation and existence, (ii) power to enter into and perform its obligations under the transaction

furnishes statutory answers only on matters not covered by an operating agreement). *See also* *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 170 (Del. 2002) (discussing broad discretion granted to drafters of Delaware limited partnership agreements). Section 18-1101(b) of the Delaware LLC Act states that the policy of that statute is “to give the maximum effect to the principle of freedom of contract and to the enforceability of [operating] agreements.” DEL. CODE ANN. tit. 6, §18-1101(b).

Some state LLC statutes impose different requirements than the Delaware LLC Act for the formation of an LLC, ranging, for example, from not requiring that an LLC have an operating agreement to requiring that an LLC have a written operating agreement within a short period after the filing of its certificate of formation. In addition, some state LLC statutes impose more limitations than the Delaware LLC Act on the extent to which an operating agreement can modify statutory requirements. *See* Revised Uniform Limited Liability Company Act (2013) § 110. Reports of bar associations of particular states can provide guidance on how those limitations and other state-specific statutory provisions affect opinions on LLCs formed in those states.

4. 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 other United States jurisdictions where an LLC may be formed such as the District of Columbia and Puerto Rico.

5. *See, e.g.*, DEL. CODE ANN. tit. 6, § 18-201(b). In Delaware a certificate of formation is a bare bones document that needs to disclose only the LLC’s name, its registered office and the name and address of its registered agent.

6. *Id.* § 18-101(8). At one time many states required that an LLC have at least two members. That is no longer the case.

7. *Id.* §§ 18-101(9), 18-201(d).

8. The Delaware LLC Act refers to an operating agreement as a “limited liability company agreement.” *Id.* § 18-101(9) (defining the term “limited liability company agreement” to mean “any agreement . . . of the member or members as to the affairs of a limited liability company and the conduct of its business”). An operating agreement may consist of a single document or multiple documents. Like other LLC statutes, the Delaware LLC Act does not require the public filing of an LLC’s operating agreement, whether in connection with its formation or later.

Topics often addressed in an operating agreement include: admission of members; purposes, powers and management structure; contributions by members; allocation of profits and losses; distributions to members; access to books and records; reporting of information to members; fiduciary duties of members and managers; related party transactions; exculpation and indemnification of members and managers; assignment of LLC interests; resignation and removal of members and managers; admission of members; dissolution, winding up and termination of the LLC; amendment of the operating agreement; governing law; and dispute resolution.

9. *Id.* § 18-101(9).

10. Opinion preparers ordinarily obtain a copy of the operating agreement from a representative of the LLC, such as a managing member, manager, secretary or other recording officer or, if the opinion preparers are acting as local counsel, the LLC’s principal counsel. When the copy of the operating agreement they receive is furnished to them by an appropriate source, as a matter of customary practice the opinion preparers may assume without so stating that the copy is the current version of the operating agreement and is complete.

documents and (iii) authorization, execution and delivery of the transaction documents (referred to in this report collectively as the “status, power and action” opinions). In addition, when an LLC is issuing limited liability company interests (“LLC Interests”), purchasers of those LLC Interests sometimes request opinions covering (i) the issuance of the LLC Interests they are purchasing, (ii) their admission as members of the LLC, (iii) their obligation to make payments in connection with their purchase and ownership of LLC Interests and, on occasion, (iv) their liability as members for obligations of the LLC and (v) the enforceability of the operating agreement. This report addresses all but the last of those opinions.¹¹

1.0 OPINIONS BY NON-DELAWARE LAWYERS ON LLCs FORMED IN DELAWARE

Like corporations, LLCs often are formed in Delaware rather than the state where their sponsors or principal counsel are located. Non-Delaware lawyers routinely give opinions on Delaware LLCs (as they do on Delaware corporations) when they regard themselves as competent to deal with the issues raised by those opinions.¹²

When giving opinions on Delaware LLCs, non-Delaware lawyers typically include in their opinion letters a statement limiting the coverage of their opinions on Delaware law to the Delaware LLC Act (the “Delaware LLC Act coverage limitation”). Like the reference to the Delaware General Corporation Law in the coverage limitation typically included by non-Delaware lawyers in opinion letters on Delaware corporations,¹³ the reference to the Delaware LLC Act in the Delaware LLC Act coverage limitation is understood to cover not only that statute but also reported Delaware judicial decisions interpreting that statute.¹⁴

11. The opinions discussed in this report are the opinions most often requested by opinion recipients (and also most often given by non-Delaware lawyers on Delaware LLCs). As indicated, this report does not discuss the opinion on the enforceability of the operating agreement, which is an opinion discussed in Section 6.0 of the Committee’s 2006 LLC Opinion Report. Giving an opinion on the enforceability of the operating agreement often is more challenging than giving the opinions discussed in this report because giving that opinion typically requires a deeper knowledge of the law, particularly the contract law, of the jurisdictions the opinion preparers are proposing to cover (whether the law of the jurisdiction where the LLC was formed, the law (if different) chosen in the operating agreement as its governing law, or both). The Committee has completed its consideration of the opinions discussed in this report but not the opinion on the enforceability of the operating agreement. Rather than delay publication to complete its consideration of the additional issues raised by the opinion on the enforceability of the operating agreement, the Committee has decided to publish this report without a section addressing that opinion.

12. See *TriBar 1998 Report*, *supra* note 2, § 4.1, at 631 n.85 (observing that many non-Delaware lawyers regard themselves as competent to give opinions on various matters covered by the Delaware General Corporation Law, such as corporate status).

13. A typical coverage limitation in an opinion letter by a New York opinion giver giving opinions on a Delaware corporation states: “The opinions expressed herein are limited to the federal law of the United States, the law of the State of New York and the Delaware General Corporation Law.” *TriBar 1998 Report*, *supra* note 2, at 668.

14. See *TriBar Op. Comm., Special Report of the TriBar Opinion Committee: The Remedies Opinion—Deciding When to Include Exceptions and Assumptions*, 59 *BUS. LAW.* 1483, 1487 n.25 (2004) [hereinafter *TriBar 2004 Remedies Opinion Report*]. The Delaware LLC Act was based on the Delaware Revised

As noted above, one of the conditions for an LLC to exist under the Delaware LLC Act is that it have an operating agreement governing its affairs and the conduct of its business.¹⁵ Ordinarily, opinion preparers will be able to rely on the plain meaning of an operating agreement when giving the opinions discussed in this report.¹⁶ That, however, will not always be the case. Sometimes the meaning of a provision in the operating agreement will not be plain, and how it is interpreted will determine whether the opinion preparers can give one or more of those opinions.¹⁷ When that is the case and the opinion letter contains a Delaware LLC Act coverage limitation, the question arises whether the opinion preparers need to consider how the Delaware courts are likely to interpret the provision as a matter of Delaware contract law.¹⁸

Uniform Limited Partnership Act, and therefore reported Delaware judicial decisions interpreting the Delaware Revised Uniform Limited Partnership Act also can be relevant to interpreting the Delaware LLC Act.

If acceptable to the recipient, an opinion giver wishing to exclude coverage of Delaware judicial decisions interpreting the Delaware LLC Act should so state expressly in the opinion letter. The Division of Corporation Finance of the Securities and Exchange Commission has taken the position that an opinion letter regarding a registrant included as an exhibit to a registration statement filed with the Commission under the Securities Act of 1933 may not exclude reported judicial decisions interpreting the statute under which the registrant was formed. SEC STAFF LEGAL BULLETIN No. 19 (2011).

15. See *supra* note 8.

16. See, e.g., *Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482 (Del. 2019) (holding that plain meaning of operating agreement foreclosed attempt by minority members of LLC to force its sale); *Star Cellular Tel. Co. v. Baton Rouge CGSA, Inc.*, C.A. No. 12507, 1993 WL 29487, at *4 (Del. Ch. Aug. 2, 1993) (stating that if a term “has a plain or generally prevailing meaning . . . then no other evidence need be considered”), *aff’d*, 647 A.2d 382 (Del. 1994). See also DEL. CODE ANN. tit. 6, § 18-1101(a) (“The rule that statutes in derogation of the common law are to be strictly construed shall have no application to [the Delaware LLC Act].”).

17. For example, a provision in an operating agreement may be ambiguous, vague, inconsistent with another provision in the agreement, or otherwise unclear.

18. *Godden v. Franco*, C.A. No. 2018-0504-VCL, 2018 WL 3998431, at *8 (Del. Ch. Aug. 21, 2018) (stating that same principles are used to interpret operating agreements as are used to interpret other contracts; setting forth those principles and applying them); *Williams Field Serv. Grp., LLC v. Caiman Energy II, LLC*, C.A. No. 2019-0350-JTL, 2019 WL 4668350, at *16 (Del. Ch. Sept. 25, 2019) (setting forth principles for interpreting operating agreements).

A general discussion of principles of Delaware contract law is beyond the scope of this report. The Committee notes, however, that the Delaware courts have taken various approaches to interpreting provisions in operating agreements. One approach, for example, is to apply canons of construction they have adopted in previous decisions. See, e.g., *Sunline Com. Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 847 (Del. 2019) (setting forth canons of interpretation used by Delaware courts in construing contracts generally). Another is to interpret a provision the way they interpreted a similar provision in another agreement or in a Delaware statute governing a different type of Delaware entity. See, e.g., *Freeman Fam. LLC v. Park Ave. Landing LLC*, C.A. No. 2018-0683-TMR, 2019 WL 1966808, at *5–7 (Del. Ch. Apr. 30, 2019) (holding that Delaware “corporate case law” applies to interpretation of indemnification provision in operating agreement of Delaware LLC because that provision mirrored Section 145 of the Delaware General Corporation Law); *In re Nantucket Island Assoc. Ltd. P’ship Unitholders Litig.*, 810 A.2d 351 (Del. Ch. Oct. 8, 2002) (looking to cases construing Section 271 of the Delaware General Corporation Law (relating to the sale of all or substantially all a corporation’s assets) for guidance in construing similar wording in partnership agreement of Delaware limited partnership). See generally *Obeid v. Hogan*, C.A. No. 11900-VLC, 2016 WL 3356851, at *6 (Del. Ch. June 10, 2016) (stating that when an operating agreement establishes a governance structure for an LLC that is similar to that of a corporation, courts will draw on analogies to corporate law in interpreting the terms of the operating agreement).

Although since the Committee wrote its original report on LLC opinions in 2006 a consensus has not developed on whether a Delaware LLC Act coverage limitation excludes Delaware contract law from the coverage of opinions on Delaware LLCs, the Committee continues to believe that a Delaware LLC Act coverage limitation without further elaboration should not be read to exclude Delaware contract law from the coverage of those opinions.¹⁹ The Committee recognizes, however, that in the absence of a consensus and to avoid any misunderstanding, some non-Delaware opinion givers who do not wish to be responsible for Delaware contract law when giving opinions on Delaware LLCs have adopted the practice of supplementing the Delaware LLC Act coverage limitation with an express disclaimer intended to make clear to the opinion recipient that those opinions do not cover Delaware contract law.²⁰

2.0 THE STATUS OPINION: FORMATION, EXISTENCE AND GOOD STANDING

A closing opinion for a transaction involving an LLC often contains an opinion that the LLC has been “duly formed” and is “validly existing.”²¹ If the Secretary of

19. In its 2006 report the Committee stated its belief that:

a statement limiting coverage [of an opinion letter] to the Delaware LLC Act should not be read to exclude from the coverage of the status, power and action opinions those Delaware contract law issues that are applicable to the matters covered by those opinions.

TriBar 2006 LLC Opinion Report, *supra* note 1, at 682. The Committee’s statement in its 2006 report addressed the status, power and action opinions because that report focused principally on those opinions. The Committee’s belief, as stated above in the text, also applies to the other opinions on Delaware LLCs discussed in this report.

20. Many forms of disclaimer (including many in current use) are sufficient to communicate to the opinion recipient the opinions’ limited basis. An example of such a disclaimer is:

We have given the opinions in numbered paragraphs x, y and z above solely in reliance on the Delaware LLC Act (including judicial decisions interpreting that Act) and disclaim coverage of all other Delaware law.

As in the above example, disclaimers often cover all other Delaware law, not just Delaware contract law.

21. 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. As discussed in the subsection titled Existence in this Section 2.0, an LLC cannot validly exist without its also having been duly formed. Consequently, the work needed to support an opinion that an LLC “validly exists” is sufficient to support an opinion that it has been “duly formed.”

Section 18-201(b) of the Delaware LLC Act provides that “[an] LLC formed under [the Delaware LLC Act] shall be a separate legal entity, the existence of which as a separate legal entity shall continue until cancellation of the LLC’s certificate of formation.” DEL. CODE ANN. tit. 6, § 18-201(b). A Delaware LLC can voluntarily terminate its existence by filing a certificate of cancellation with the Delaware Secretary of State. A Delaware LLC also can cease to exist by converting to another form of entity or by participating in a merger or division in which it is not the surviving entity.

Termination of an LLC’s existence can also be involuntary. The Delaware Secretary of State can cancel an LLC’s certificate of formation (and thereby terminate its existence) for various reasons including: (i) its failure to pay annual taxes (and penalties and interest); (ii) the resignation of its registered agent for non-payment of annual registered agent fees; and (iii) its failure to provide the registered agent with a current communications contact as required by Section 18-104(g) of the Delaware LLC Act. *See id.* §§ 18-1107, 18-1108. In addition, Section 18-112 of the Delaware LLC Act authorizes the Delaware Attorney General to seek a court order requiring the Delaware Secretary of

State of the state in which the LLC was formed issues “good standing” certificates for LLCs, an opinion that the LLC is in “good standing” in that state often is added after “validly existing.”²²

FORMATION

An opinion that an LLC has been “duly formed” means that the requirements for forming the LLC under the applicable LLC statute were met at some time on or before the date of the opinion letter.²³ Delaware has two such requirements: the filing of a certificate of formation with the Delaware Secretary of State and entry into an operating agreement²⁴ by at least one member who qualifies as a “person” as defined in the Delaware LLC Act and meets the requirements for

State to terminate the existence of an LLC that abuses its “powers, privileges or existence” under Delaware law. An LLC whose certificate of formation has been cancelled for failure to pay annual fees (§ 18-1108) or to maintain a registered office and agent for service of process (§ 18-104) may be revived in accordance with Section 18-1109 of the Delaware LLC Act.

22. What “good standing” means varies from state to state, often depending on the certificates available from government officials and the matters those certificates address. As discussed at length in the *TriBar 1998 Report*, *supra* note 2, at 645–46, good standing opinions “usually add little of value analytically” to the certificate or certificates on which they are based. Therefore, as that report observes, when a good standing opinion provides only a marginal benefit, the opinion process could be streamlined if the recipient refrained from requesting the opinion and relied instead simply on the certificates.

23. The opinion ordinarily does not indicate the date when the LLC was duly formed. Nor does it indicate what the requirements for due formation were on that date.

Section 18-201 of the Delaware LLC Act sets out the requirements for forming a Delaware LLC. Subsection (b) provides that an LLC is formed if there has been substantial compliance with the requirements of Section 18-201, thus permitting an LLC to be duly formed notwithstanding insubstantial failures to comply with those requirements. Providing an example of an insubstantial failure, Subsection (e) of Section 18-201 states that a certificate of formation substantially complies with Section 18-201 if it contains the name of the LLC’s registered agent and the address of that agent’s registered office even if the certificate does not expressly designate the named person as the registered agent or the address it contains as the agent’s registered office. DEL. CODE ANN. tit. 6, § 18-201.

Some defects in the certificate of formation of a Delaware LLC may be corrected by filing a certificate of correction with the Delaware Secretary of State. *See id.* § 18-211. 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. (Depending on the circumstances, when a defect has been corrected by a certificate of correction, opinion preparers sometimes address the “substantially and adversely” exception in Section 18-211, for example by expressly assuming in the opinion letter that the exception does not apply.) Alternatively, defects in the certificate of formation may be corrected and an LLC may become duly formed as of a date subsequent to the filing of the original certificate of formation by amending, or amending and restating, the certificate pursuant to Section 18-202 or Section 18-208 of the Delaware LLC Act.

An opinion that a Delaware LLC has been duly formed requires the opinion preparers to confirm that the LLC has an operating agreement. It does not require the opinion preparers to confirm that each and every provision of the operating agreement is enforceable. Like any other contract, an operating agreement can be entered into, and therefore the requirement that a Delaware LLC have an operating agreement can be satisfied, even though some of the terms of the operating agreement are not enforceable.

A duly formed opinion is not an opinion on the personal liability of members for the LLC’s obligations (*see* discussion at *infra* Section 7.2). Nor is it an opinion on the enforceability of the operating agreement (*see supra* note 11).

24. Ordinarily, the prerequisites under Delaware law for entering into an operating agreement will be easy to satisfy. In the case of a single member LLC, for example, the operating agreement may be entered into by that single member. Nevertheless, the initial operating agreement may impose con-

being a member in the operating agreement.²⁵ In Delaware as in some other states, the requirement that an LLC have an operating agreement need not be satisfied when the certificate of formation is filed,²⁶ and as a result an LLC may be formed long after the filing of the certificate.²⁷

To give a duly formed opinion on a Delaware LLC, the opinion preparers ordinarily obtain from the Delaware Secretary of State (i) a copy of the certificate of formation, as amended to date, on file with and certified by the Secretary of State²⁸ and (ii) a “good standing” certificate.²⁹ They then confirm that the certificate of formation meets the requirements of the Delaware LLC Act³⁰ and, if the certificate specifies a delayed effective date, that the delayed effective date has occurred.³¹ In addition, the opinion preparers ordinarily obtain a copy of the current operating agreement from an appropriate source³² and review it to confirm that (i) the name of the LLC in the operating agreement is consistent with the name of the

tractual conditions on its becoming effective, for example, conditioning effectiveness on the contribution to the LLC of a specified dollar amount or a particular piece of property.

25. In Delaware, the term “member” means a “person” (*see infra* note 93) that has been admitted to an LLC as a member as provided in Section 18-301 of the Delaware LLC Act. *See id.* § 18-101(13).

26. *See id.* § 18-201(d).

If an opinion recipient is concerned about the status of an LLC or legal consequences of actions taken by the LLC before the date of the opinion letter, the recipient should request a separate opinion specifically addressing that concern. *See infra* text at notes 46 & 47.

27. A Delaware LLC is formed (i) on the date when both the certificate of formation has been filed and the operating agreement has been entered into and become effective or (ii) if those requirements have been met and the operating agreement provides for its retroactive effectiveness, on the date specified in the operating agreement (which may be the date the certificate of formation was filed or some other date after filing). *See id.* § 18-201(d).

28. *See supra* note 23. The certified copy of the certificate of formation will include any amendments.

29. A “good standing” certificate from the Delaware Secretary of State states, among other things, that the LLC “is duly formed under the laws of the State of Delaware . . . so far as the records of this office show.” Because the statement that the LLC “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 LLC that do not require a filing with the Delaware Secretary of State. *See infra* note 37. A Delaware LLC can be duly formed even though it subsequently ceases to be in good standing. Although not ordinarily requested by opinion givers, a certificate relating only to a Delaware LLC’s formation (and existence) and not its good standing also is available from the Delaware Secretary of State.

30. Section 18-201(a) of the Delaware LLC Act requires that the certificate of formation be executed by one or more authorized persons and that it state the name of the LLC, the address of its registered office, and the name and address of its registered agent for service of process. DEL. CODE ANN. tit. 6, § 18-201(a). If the certificate of formation contains provisions beyond those required by the Delaware LLC Act and if the matters addressed by those provisions bear on the opinions being given, the opinion preparers also will need to consider whether and, if so, how any ambiguities, inconsistencies or other issues raised by those provisions should be addressed. *See infra* note 51.

31. A Delaware LLC’s certificate of formation can specify that it will become effective on a date that is later than the date on which the certificate is filed even if all other statutory requirements for due formation have been satisfied when the certificate of formation was filed. *See* DEL. CODE ANN. tit. 6, § 18-201(b).

32. *See supra* note 10. Even though an earlier version of the LLC’s operating agreement may be sufficient to support a duly formed opinion, the current version is needed to support other opinions typically given on an LLC, including the validly existing opinion (which almost always follows the duly formed opinion), and, therefore, to support the due formation opinion, opinion preparers often use the current version of the operating agreement instead of an earlier version.

LLC in the certificate of formation, (ii) any requirements in the Delaware LLC Act and any conditions in the LLC's operating agreement for the LLC to be duly formed have been met³³ and (iii) the LLC had or has at least one member.^{34,35}

EXISTENCE

An opinion that an LLC is “validly existing” means that on the date of the opinion letter the entity on which the opinion is given exists as an LLC under the statute under which it was formed.³⁶

The work required to give a validly existing opinion on a Delaware LLC is essentially the same as the work required to give a due formation opinion except that the validly existing opinion must be based on the facts existing on the date of the opinion letter. To give a validly existing opinion, the opinion preparers obtain and rely on (i) a “good standing” certificate from the Delaware Secretary

33. Once a Delaware LLC has been duly formed, a subsequent change in statutory requirements for forming an LLC will not change its duly formed status.

In Delaware an LLC 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 will prevent an LLC from being duly formed (and also from being validly existing) are: (1) no certificate of formation was filed; (2) no operating agreement (whether written, oral or implied) exists; (3) the name of the LLC in the certificate of formation is different from the name of the LLC in the operating agreement; (4) the certificate of formation was not executed by an authorized person; and (5) the LLC did not have at least one natural person or entity purporting to be a member that fits within the category of persons permitted to be members under the Delaware LLC Act and the operating agreement.

34. See DEL. CODE ANN. tit. 6, § 101(8) (LLC must have one or more members); *id.* § 18-101(9) (member need not execute operating agreement to be bound by it). In addition, if the Delaware LLC Act or operating agreement imposes any conditions on the admission of a person as a member, the opinion preparers must address those conditions, for example, by obtaining a certificate from an appropriate person confirming that at least one member has satisfied the relevant conditions or by expressly assuming satisfaction of those conditions. Unless otherwise provided in a Delaware LLC's operating agreement, a person may be admitted as a member (including as the sole member) without making or incurring an obligation to make a contribution to the LLC and without acquiring an interest in the LLC. See *id.* § 18-301(d).

35. As a matter of customary practice, the opinion preparers may rely on unstated assumptions that the persons shown as having signed the certificate of formation and the operating agreement: (i) are, in fact, the persons or entities they purport to be; (ii) if natural persons, had legal capacity to sign those documents; and (iii) if entities, are the types of entities they purport to be and had the entity power and took the internal steps required to authorize their approval of the certificate of formation and operating agreement and the signing of those documents by the persons who signed them on their behalf. 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. Although not necessary, some opinion preparers include in their opinion letters express assumptions regarding some or all of these matters.

36. The validly existing opinion can be given on an LLC whose existence terminated prior to the date of the opinion letter if the LLC has been revived and all the other requirements for an LLC to validly exist are satisfied on the date of the opinion letter. Delaware permits an LLC whose existence has terminated to be revived in various ways, for example, (i) by filing a certificate of correction of a certificate of cancellation (*id.* § 18-203(b)); (ii) by petitioning the Court of Chancery (*id.* § 18-805); and (iii) if an LLC's certificate of formation was cancelled as a result of a failure to pay annual taxes or to maintain a registered office and agent, by filing a certificate of revival and paying the required fee and unpaid taxes (including penalties and interest) (*id.* § 18-1109).

of State;³⁷ (ii) a copy of the certificate of formation, as amended to date, on file with and certified by the Secretary of State; and (iii) a copy of the current operating agreement³⁸ furnished to them by an appropriate source.³⁹ As with the duly formed opinion, the opinion preparers then confirm that (i) the certificate of formation meets the requirements of the Delaware LLC Act,⁴⁰ (ii) the name of

37. A “good standing” certificate from the Delaware Secretary of State states that the LLC has a legal existence “so far as the records of [the Secretary of State] show.” This statement means that the LLC’s certificate of formation was filed with the Secretary of State, a certificate of cancellation has not been filed (or, if filed, has been subsequently revoked) and, according to the records of the Secretary of State, the LLC’s existence has not been terminated for some other reason. In addition, a good standing certificate lists the documents the LLC has filed with the Secretary of State and states that the LLC is current in its payment of annual taxes (thus confirming that its certificate of formation is not subject to cancellation for that reason). See *id.* § 18-201(b) (stating that LLC’s certificate of formation will be cancelled if LLC fails to pay annual tax for three years). In some states, including Delaware, the Secretary of State will issue a more limited certificate that addresses the existence of an LLC without also addressing its good standing. In those states customary practice varies on whether opinion preparers need a certificate confirming an LLC’s good standing to give an opinion that the LLC validly exists. See *TriBar 1998 Report, supra* note 2, § 6.1.4, at 645.

Because the statement in the Secretary of State’s certificate regarding an LLC’s legal existence is limited by the words “so far as the records of this office show,” that certificate, although confirming that the LLC’s certificate of formation has not been cancelled, provides no assurance that the LLC has an operating agreement (which, as noted above, is not required to be filed with the Delaware Secretary of State but is required for an LLC to be duly formed and validly exist). (This is in contrast to the corporate context in which the Secretary of State’s certificate for a Delaware corporation serves as prima facie evidence of a corporation’s existence (see DEL. CODE ANN. tit. 8, § 105 (West, Westlaw through 2021)).

A Delaware LLC ceases to exist as an LLC when its certificate of formation is cancelled by the Delaware Secretary of State. Because the Delaware Secretary of State will not issue a “good standing” certificate for an LLC if a certificate of cancellation has been filed and has not been revoked, the issuance of a “good standing” certificate by the Delaware Secretary of State confirms that no certificate of cancellation currently is in effect with regard to the LLC. See DEL. CODE ANN. tit. 6, § 18-203. Besides the filing of a certificate of cancellation, other events also can cause a Delaware LLC’s certificate of formation to be cancelled and hence cause the LLC to cease to exist. See *supra* note 21 (third paragraph); see also *TriBar 1998 Report, supra* note 2, § 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).

38. For a Delaware LLC to validly exist, it must have an operating agreement meeting the requirements of the Delaware LLC Act. To give a validly existing opinion, the opinion preparers need to obtain a copy of the current operating agreement so that they can confirm that it meets statutory requirements applicable to the operating agreement on the date of the opinion letter. (They also need the current operating agreement to give the other opinions discussed in this report (except for the due formation opinion).) Although not required to do so, some opinion preparers assume expressly that the current operating agreement has been duly adopted (or its equivalent, duly authorized, executed and delivered by the parties).

If the operating agreement provides for the manner in which it may be amended, it may be amended only in that manner or as otherwise permitted by law. See DEL. CODE ANN. tit. 6, § 18-302(e). If the operating agreement for an LLC formed on or after January 1, 2012 does not provide for the manner in which it may be amended, its amendment requires the approval of all of its members unless otherwise permitted by law. *Id.* § 18-302(f).

A validly existing opinion is not an opinion on the liability of members for an LLC’s obligations. Nor is it an opinion on the enforceability of the operating agreement (see *supra* note 11).

39. See *supra* note 10. To give a validly existing opinion, the opinion preparers need only confirm that the operating agreement satisfies Delaware’s requirements for a contract to be entered into (which requirements, except for a single-member LLC, are consistent with common law requirements for formation of a contract).

40. If the certificate of formation complied with the statutory requirements in effect when it was filed (thus permitting the giving of a duly formed opinion) but no longer complies with statutory requirements, the opinion preparers will need to consider whether they can still give an opinion that

the LLC in the operating agreement is consistent with the name of the LLC in the certificate of formation and good standing certificate and (iii) the LLC has at least one member.⁴¹ The opinion preparers also confirm that any conditions in the operating agreement on its becoming effective have been met (which they also will do if they are giving a due formation opinion).⁴²

In Delaware (as well as many other states) dissolution of an LLC does not alone terminate the LLC's existence. Rather, for the LLC's existence to terminate, its certificate of formation must be cancelled.⁴³ Therefore, in Delaware so long as an LLC's certificate of formation has not been cancelled, the fact an LLC has dissolved will not in and of itself prevent the giving of an opinion that the LLC validly exists. Nevertheless, the opinion preparers will need to address the possibility the LLC has dissolved when, as is often the case, they are giving not only a status opinion but also the power and action opinions discussed in Sections 3.0 and 4.0 of this report.⁴⁴

An opinion that a Delaware LLC 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 an LLC based solely on a Delaware Secretary of State's "good standing" certificate adds nothing analytically to the limited information provided by that certificate.⁴⁵

PERIOD BEFORE DELIVERY OF OPINION LETTER

An opinion that an LLC has been duly formed means that the LLC was duly formed at some time on or before the date on which the opinion is given;⁴⁶ an

the LLC is validly existing. Often, rather than spend time puzzling over that question, the opinion preparers will arrange to have the certificate amended or corrected to meet current statutory requirements.

41. See *supra* note 34.

42. When giving a validly existing opinion, the opinion preparers may rely on the same unstated assumptions they may rely on when giving a due formation opinion. See *supra* note 35.

43. See, e.g., DEL. CODE ANN. tit. 6, §§ 18-201(b), 18-203.

44. When a status opinion is being given on a dissolved LLC, the implications of the LLC's dissolution for the transaction and the status and other opinions in the opinion letter may, depending on the circumstances, merit consideration by the opinion preparers if they know the LLC has dissolved. See *infra* Section 3.0, third paragraph from the end (discussing power opinion when opinion preparers know LLC has dissolved).

45. By describing in the opinion letter what they have (or have not) done, opinion preparers can vary the scope and nature of the work they otherwise would be required to perform as a matter of customary practice to give an opinion. As pointed out in note 37 above, a Delaware Secretary of State's "good standing" certificate confirms an LLC's legal existence only so far as the records of the Secretary of State's office show and, therefore, does not address compliance with Delaware's requirements for a Delaware LLC to exist that do not require a filing with the Delaware Secretary of State, including in particular compliance with the requirement that the LLC have an operating agreement. See *TriBar LP Opinion Report*, *supra* note 1, at 1113–14.

46. Unlike a corporation, which is formed (assuming satisfaction of statutory requirements) on the date its certificate of incorporation is accepted for filing by the Delaware Secretary of State (or on a later date specified in the certificate of incorporation), the date on which a Delaware LLC is formed will not always be obvious. For example, before or after filing a certificate of formation but long before entering into a written operating agreement, those forming a Delaware LLC may have entered into an oral agreement satisfying statutory requirements. See DEL. CODE ANN. tit. 6, § 18-101(9) (authorizing oral operating agreements). Moreover, even if the initial operating agreement was in writing,

opinion that an LLC is validly existing means that the LLC exists on the date the opinion is given. Those opinions do not address the date when the LLC was duly formed or whether it existed as an LLC on any particular date before the date of the opinion letter. If an opinion recipient is concerned about the status of the LLC before the date of the opinion letter or the legal consequences of a specific action taken by the LLC before that date, the recipient is always free to request an opinion specifically addressing that concern.⁴⁷

3.0 POWER OF LLC TO ENTER INTO AND PERFORM ITS OBLIGATIONS UNDER AGREEMENTS BEING ENTERED INTO BY LLC

The opinion that an LLC has the power to execute, deliver and perform its obligations under specified agreements being entered into by the LLC (the “LLC power opinion”) requires that the LLC exist,⁴⁸ and it means that the LLC has the requisite power, whether by virtue of the LLC statute under which it was formed or, to the extent permitted by that statute, its operating agreement (and in some states its certificate of formation).⁴⁹ By analogy to the corporate power opinion, the LLC power opinion often refers to “limited liability company” or “LLC” power but is understood to have the same meaning whether or not it contains that qualifier.

Subject to only limited exceptions, most state LLC statutes grant LLCs the power to carry on any lawful business or purpose except as otherwise provided in their operating agreements (or in some states their certificates of formation).⁵⁰ Taking full advantage of this broad statutory grant, many LLCs have included in their operating agreements no limits on the activities in which they are permitted

it may have been lost or otherwise be unavailable, thus making the precise date of formation difficult, if not impossible, to determine.

47. Sometimes a gap will exist between the filing of a certificate of formation with the Secretary of State and the satisfaction of all of the other requirements for formation of an LLC, including the requirement that it have an oral, implied or written operating agreement. If the opinion preparers know of a gap and also know that during the gap—i.e. before the LLC’s due formation—the LLC’s predecessor engaged in substantial activities, for example, borrowing funds or issuing what purported to be LLC Interests, the implications of those activities for the transaction and the status and other opinions in the opinion letter may, depending on the circumstances, merit the opinion preparers’ consideration. See, e.g., DEL. CODE ANN. tit. 6, § 18-201. See generally *TriBar 1998 Report*, *supra* note 2, § 1.4(d).

48. Consequently, if the opinion preparers are not giving a validly existing opinion (see *supra* Section 2.0), for them to give a power opinion, they either have to confirm the LLC’s existence or expressly assume in the opinion letter that the LLC exists.

In Delaware if a gap exists because an operating agreement was not entered into on or before the filing of a certificate of formation, the gap can be eliminated and thus concerns raised by its existence can be put to rest by providing in the operating agreement, as permitted by Section 18-201(d) of the Delaware LLC Act, that it shall be effective retroactively to the date the certificate was filed.

49. See, e.g., DEL. CODE ANN. tit. 6, § 18-106(b) (permitting Delaware LLC to have the powers granted not only by the Delaware LLC Act but also by its operating agreement). Because the legal effect of provisions in a certificate of formation varies from state to state, opinion preparers will need to consider the extent to which they can or are required to take provisions in a certificate of formation into account when giving a power opinion. See *infra* note 51.

50. See, e.g., DEL. CODE ANN. tit. 6, § 18-106(a) (“A limited liability company 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.”).

to engage apart from those imposed by statute.⁵¹ Other LLCs, however, are formed for a particular purpose, and have included in their operating agreements provisions limiting their powers to those necessary to pursue that purpose.⁵² In either case, to give an LLC power opinion, the opinion preparers must confirm that under the applicable LLC statute and the LLC's operating agreement (and in some states its certificate of formation) the LLC has the power to take the actions covered by the opinion.⁵³ When the opinion preparers cannot do so with the requisite confidence, they often arrange for the operating agreement (and, if necessary, the certificate of formation) to be amended in a manner that allows them to give the opinion.

The possibility that an LLC has dissolved presents an additional issue for the giving of an LLC power opinion. Although in Delaware a dissolved LLC continues to exist until its certificate of formation is cancelled,⁵⁴ the Delaware LLC Act, like many other LLC statutes, requires that, once an LLC has dissolved, "its affairs shall be wound up."⁵⁵ Because a dissolved LLC's entering into an agreement that is inconsistent with its winding up would violate this statutory requirement, when giving an opinion that an LLC has the power to enter into an agreement, opinion preparers need to address (as discussed below) the possible dissolution of the LLC.

Some operating agreements provide for an LLC to dissolve on a specified date or on the occurrence of a specified event, such as the sale by the LLC of particular assets or substantially all its assets.⁵⁶ LLC statutes also may specify events of

51. Section 18-207 of the Delaware LLC Act provides that the filing of a certificate of formation with the Delaware Secretary of State provides notice that the LLC is a limited liability company and of all other facts required by the Delaware LLC Act to be set forth in the certificate. The facts the statute requires be set forth do not include a description of the LLC's powers or any limitations on those powers. If a certificate of formation, nevertheless, contains a provision describing or limiting the LLC's power to engage in specified activities and that provision is inconsistent with a provision in the operating agreement applicable to the actions covered by the opinion, opinion preparers often put to rest any question raised by the inconsistency by arranging for the provision in the certificate of formation to be deleted or amended to conform with the operating agreement or for other action to be taken to resolve the inconsistency. DEL. CODE ANN. tit. 6, § 18-207.

52. See *TriBar 1998 Report*, *supra* note 2, § 6.3, at 653; *TriBar LP Opinion Report*, *supra* note 1, § 2.0, at 1115–16. A limitation may be general, for example, limiting the LLC's powers to those required to further its stated purpose. Alternatively, a limitation may be specific, for example, prohibiting the LLC from investing in anything other than government securities.

53. In some transactions, preparation of a power opinion can require extensive analysis. For example, the operating agreements of many investment LLCs specify that their purpose is to invest in particular businesses and then enumerate limitations on their powers. Those limitations in turn may be waivable in specified ways, for example, by action of an advisory committee of non-managing members. In addition, the operating agreement may grant the LLC other powers—e.g., the power to make or withhold distributions, the power to merge or divide, the power to sell assets to affiliates, the power to contract for services from affiliates—and subject them to various requirements that similarly are waivable in specified ways.

54. See *supra* note 21.

55. DEL. CODE ANN. tit. 6, § 18-801. Section 18-803(b) of the Delaware LLC Act expressly permits the persons winding up an LLC's affairs to "gradually settle and close" the LLC's business. *Id.* § 18-803(b).

56. See *id.* § 18-801(a)(2).

dissolution. For example, the Delaware LLC Act provides that an LLC will dissolve when it has no members.⁵⁷

LLC statutes ordinarily do not require public notice that an LLC has dissolved or a filing with a Secretary of State or other governmental office. Therefore, when giving an LLC power opinion, the opinion preparers cannot rely simply on a certificate of the Secretary of State or other government official⁵⁸ but also must address in some other way the possibility that the LLC has dissolved.⁵⁹ Sometimes, the opinion preparers will have personal knowledge that no event of dissolution has occurred (as they might, for example, when the LLC is formed just before the closing of the transaction covered by the LLC power opinion). In other circumstances, the opinion preparers may be able to rely on a combination of personal knowledge, a manager's, member's or officer's certificate and factual representations in the operating agreement or the transaction documents. In still other circumstances, they may choose to address the issue by, for example (i) including in the opinion letter an express assumption that no event of dissolution has occurred or (ii) stating in the opinion letter that they have not conducted a factual investigation into the possibility that the LLC has dissolved.

A Delaware LLC that has dissolved may revoke its dissolution and thereby cure problems that may have arisen as a result of its engaging in activities that were beyond its powers as a dissolved LLC.⁶⁰ Therefore, if the opinion preparers are aware that a Delaware LLC has dissolved and the transaction in question is inconsistent with the winding up of its affairs, they still may be able to give an LLC power opinion if they are able to arrange for the dissolution to be revoked on or before the date of the opinion letter. To assure that an LLC, especially one formed long before the date of the opinion letter, has not dissolved, some opinion preparers out of an abundance of caution request that the operating agreement be amended or other steps be taken to revoke any dissolution that may have occurred.

If an LLC has dissolved and its dissolution has not been revoked, opinion preparers could still give a power opinion if the transaction is consistent with the winding up of the dissolved LLC's affairs. Nevertheless, when giving a power

57. Under Section 18-801(a)(4) of the Delaware LLC Act, an LLC is dissolved and its affairs are required to be wound up when it has no members unless a person is admitted as a member effective as of the date of the event that caused the last remaining member to cease to be a member. *Id.* § 18-801(a)(4).

58. Because a filing with the Delaware Secretary of State is not required when a Delaware LLC dissolves, the Delaware Secretary of State may issue a good standing certificate for a Delaware LLC even if it has dissolved.

59. This is in contrast to the dissolution of a Delaware corporation. Dissolution of a Delaware corporation requires a filing with the Delaware Secretary of State, and because the Delaware Secretary of State will not issue a certificate that a dissolved corporation is in good standing, the opinion preparers can confirm that a Delaware corporation has not dissolved simply by obtaining a good standing certificate.

60. In Delaware, an LLC's dissolution ordinarily can be revoked without a public filing. *See id.* § 18-806. Revocation would not be required if the activities in question were consistent with the LLC's winding up.

opinion on a dissolved LLC, although not required to do so, opinion preparers may point out the LLC's dissolved status in the opinion letter.

Like an opinion on the power of a corporation or limited partnership, an LLC power opinion is understood as a matter of customary practice to address only the limitations on an LLC's power that are imposed by the LLC statute under which the LLC was formed and its operating agreement (and in some states its certificate of formation). Thus, the opinion does not address limitations imposed by other statutes, for example, statutes requiring licenses or permits to engage in specified activities. An LLC's compliance with limitations imposed by other statutes, even statutes covered by the opinion letter, is addressed, if at all, by another opinion.⁶¹

An LLC power opinion is not an opinion that the LLC has obtained the approvals required by the applicable LLC statute and its operating agreement (and in some states its certificate of formation) for it to enter into the agreement or agreements addressed by the opinion.⁶² The opinion that the LLC has obtained those approvals is discussed in the following section.

4.0 DUE AUTHORIZATION, EXECUTION AND DELIVERY OF AGREEMENTS BEING ENTERED INTO BY LLC (THE "ACTION" OPINION)

The opinion that an LLC has duly authorized, executed and delivered an agreement requires that the LLC exist⁶³ and have the LLC power to enter into the agreement.⁶⁴ Assuming those requirements are satisfied, the opinion means that: (i) the steps required by the applicable LLC statute and the LLC's operating agreement (and in some states its certificate of formation) to approve the agreement have been taken;⁶⁵ (ii) the agreement has been executed by a person (often but not necessarily a member, manager or officer) having authority to act on the LLC's behalf;⁶⁶ (iii) the agreement has been executed and delivered by

61. See *TriBar 1998 Report*, *supra* note 2, § 6.6, at 661 (discussing opinion on compliance with statutes, rules and regulations).

62. It also is not an opinion that, in entering into the agreement or performing its obligations under the agreement, the LLC has obtained the approvals required under any other statute.

63. When a validly existing opinion is not being given, the same considerations apply to an action opinion as apply to a power opinion (as discussed in note 48).

64. See *supra* Section 3.0. As discussed in Section 3.0, in Delaware and many other states, once an LLC has dissolved, it is required to wind up its affairs.

65. When giving an action opinion on an LLC, the opinion preparers ordinarily will be able to 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 limited partnership. See *TriBar 1998 Report*, *supra* note 2, § 6.4, at 654; *TriBar LP Opinion Report*, *supra* note 1, at 1118 n.50. Unlike the *TriBar 2006 LLC Opinion Report*, which at 690 contains a section on fiduciary duties, this report does not contain a section on fiduciary duties because compliance with fiduciary duties ordinarily is covered by an unstated assumption.

66. An agreement executed by an LLC usually will indicate on the signature page the name of the person who signed it and, if that person is an entity, the name and capacity of the person signing on that entity's behalf. Under the Delaware LLC Act, unless the operating agreement otherwise provides, a member or manager (if designated) has the authority to bind the LLC and may delegate its powers, including its power to sign agreements on behalf of the LLC, to one or more other persons. See *infra*

the LLC in accordance with the requirements of the applicable LLC statute and the LLC's operating agreement (and in some states its certificate of formation); and (iv) the execution and delivery of the agreement complied with the law of the state or states, if any, whose law relating to the execution and delivery of an agreement also is covered by the opinion.⁶⁷

Subject to limited exceptions, state LLC statutes allow LLCs broad discretion to specify in their operating agreements (i) the approvals they need for particular actions, quorum requirements for meetings and voting rights of classes or groups of members or managers and (ii) the procedures for exercising voting rights, including the calling and holding of meetings of members or managers, actions by written consent without a meeting and the fixing of record dates.⁶⁸ Often, operating agreements impose fewer formal requirements for approval of matters than do corporation statutes and corporate bylaws.

Operating agreements take many different approaches to decision-making.⁶⁹ Some, for example, grant the managers exclusive power over all matters.⁷⁰ Others grant them broad powers but require them to obtain member approval of major transactions, for example a sale of all or substantially all their assets. Still others require them to obtain member approval of a broader range of matters, such as agreements for more than a specified dollar amount.

In preparing an action opinion, the opinion preparers also: (i) determine what approvals, if any, the applicable LLC statute and the operating agreement (and in some states the certificate of formation) require for the LLC to enter into the agreement on which the opinion is being given;⁷¹ (ii) confirm that those approvals do

note 72. Sometimes, the person signing on behalf of an LLC will have been granted specific authority to sign by the operating agreement or a resolution. See text at *infra* note 78.

67. For example, if the opinion letter covers not only the Delaware LLC Act but New York law generally, the action opinion would address not only whether the execution and delivery of the agreement satisfied the requirements of the Delaware LLC Act but also whether they satisfied the requirements of New York law with regard to execution and delivery. Business agreements typically choose the law of a particular state as their governing law. As a general rule, the law a contract chooses as its governing law determines the "formalities required to make a valid contract." See RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 199 (1971). Some states, however, have supplemented that rule with additional requirements for contracts entered into within their borders even though the contracts are governed generally by the law of another state. See, e.g., *Hunt v. Rhodes*, 369 F.2d 623, 626 (1st Cir. 1966) ("agreement made in Massachusetts on Sunday is illegal").

68. See, e.g., DEL. CODE ANN. tit. 6, §§ 18-302, 18-404.

69. In Delaware, unless an operating agreement otherwise provides, the decision of LLC members owning more than a 50 percent interest in the profits of the LLC is controlling. See *id.* § 18-402. As permitted by Section 18-402, however, the operating agreements of Delaware LLCs on which opinions are given ordinarily do provide for a different decision-making structure.

70. Delaware LLCs are not required to have managers. Instead, under Section 18-402 of the Delaware LLC Act, unless the operating agreement otherwise provides, the management of an LLC is vested in the members owning more than a 50 percent interest in the LLC's profits. If an LLC is to have a manager or managers, Section 18-101(12) of the Delaware LLC Act requires that the manager or managers be named as such in the LLC's operating agreement or be designated pursuant to the operating agreement or similar instrument under which the LLC was formed. *Id.* § 18-101(12).

71. Sometimes the operating agreement itself will expressly authorize the LLC to enter into a specified agreement.

Unlike the LLC statutes of some states, the Delaware LLC Act permits an LLC in its operating agreement to require the approval of specified matters by persons who are not members or managers, including persons who are not parties to the operating agreement. See *id.* § 18-101(9). Delaware also

not violate the applicable LLC statute;⁷² and (iii) confirm that those approvals were given in accordance with the applicable LLC statute and the operating agreement (and in some states the certificate of formation).⁷³ Opinion preparers can confirm that required approvals were given by obtaining a certificate or representation from an appropriate person⁷⁴ detailing the action taken or, if the action requires a meeting or written consent, by examining a copy of the minutes of the meeting or written consent or a copy of the authorizing resolution.⁷⁵ However, obtaining a certificate, a representation or a copy of the LLC's minutes will not be necessary if an operating agreement expressly authorizes a member, managing member, manager, officer or some other person to enter into an agreement on behalf of the LLC without the approval of anyone else.⁷⁶ Under those circumstances, the opinion preparers need do no more than confirm that the agreement has been executed on behalf of the LLC by an authorized person.⁷⁷

The opinion preparers also confirm that the persons who executed and delivered the agreement on behalf of the LLC were authorized to do so. Sometimes, the operating agreement authorizes a particular person (such as a member, managing member, manager, officer or some other specified person) to execute and deliver agreements on behalf of the LLC. The due execution and delivery part of an action opinion on an LLC generally has the same meaning and requires the same work as its counterpart in an action opinion on a corporation or a limited partnership.⁷⁸

permits an LLC in its operating agreement to grant other rights to persons who are not parties to the operating agreement.

72. Section 18-407 of the Delaware LLC Act gives a member or manager broad latitude (unless the operating agreement provides otherwise) to delegate its rights, powers, and duties to manage and control the business and affairs of the LLC to one or more other persons, including not only agents, officers, and employees of a member or manager but also others. *Id.* § 18-407. Moreover, under Section 18-407, unless the operating agreement otherwise provides, the delegation is irrevocable if it states that it is irrevocable. *Id.*

If the requirements in the operating agreement for approving an agreement covered by the opinion are unclear, before giving an opinion, opinion preparers sometimes require (i) that the operating agreement be amended to clarify what approvals are needed and then confirm that those approvals were obtained or (ii) that a provision be added to the operating agreement specifically approving the agreement and expressly authorizing its execution and delivery.

73. See *supra* note 51 (discussing limitations in certificate of formation on Delaware LLC's powers).

74. If the operating agreement provides for a secretary or similar recording officer, that officer normally will be an appropriate person. The operating agreement may make clear who is an appropriate person by assigning a particular member, manager, officer or other person 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 member, manager, or officer). See *TriBar 1998 Report*, *supra* note 2, § 2.2.1, at 611–13.

75. The presumption of regularity applies to LLC action opinions, just as it does to opinions on actions taken by corporations and limited partnerships. See *TriBar LP Opinion Report*, *supra* note 1, at 1120 n.61.

76. See DEL. CODE ANN. tit. 6, §§ 18-302, 18-402, 18-404.

77. Opinion preparers may rely on assumptions regarding such matters as the genuineness of signatures that as a matter of customary practice are understood to apply even when not stated.

78. See *TriBar 1998 Report*, *supra* note 2, § 6.4, at 653–54; *TriBar LP Opinion Report*, *supra* note 1, § 3.0, at 1118–21.

When the managing member or manager is an entity, the question arises whether the opinion also confirms that the managing member or manager has the power under the entity statute under which it was formed and its organizational documents to take the actions covered by the opinion and has obtained whatever internal authorizations it needs to take those actions. As a matter of customary practice, lawyers giving an action opinion do not have to address those matters but are permitted to assume, without so stating, that, when a managing member or manager is an entity and is acting on behalf of an LLC, 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 authorize it to take the actions covered by the opinion; and (iii) authorized the individuals acting on its behalf to take those actions, including signing the agreement in its name and delivering the agreement. These same unstated assumptions apply to each entity further up the chain.⁷⁹ If an opinion recipient is concerned about these matters, it should request a separate opinion covering them.

5.0 VALID ISSUANCE OF LLC INTERESTS

Like opinions on corporate stock and limited partnership interests, opinions on LLC Interests typically state that the LLC Interests have been “validly issued.”⁸⁰ A validly issued opinion on LLC Interests means that the creation and issuance of the LLC Interests satisfied the requirements, including requirements relating to payment for those interests,⁸¹ of the applicable LLC statute and the operating agreement.⁸² If the LLC statute or operating 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 taken⁸³ and that the issuance complied with any conditions on issuance in that resolution or other action.⁸⁴ To determine the requirements for

79. See *TriBar 1998 Report*, *supra* note 2, § 2.3(c), at 616 (describing limitations on reliance on unstated and stated assumptions).

80. See *TriBar 1998 Report*, *supra* note 2, § 6.2.2, at 649–51 (discussing the opinion that stock of a corporation has been “validly issued”); see also *TriBar LP Opinion Report*, *supra* note 1, at 1121. 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 5.0 addresses opinions on due authorization of LLC Interests. Section 7.0 addresses opinions on purchasers’ payment for LLC Interests and obligation to make contributions to the LLC. The last paragraph of Section 7.1 explains why non-assessable opinions are not ordinarily given on LLC Interests.

81. Opinion preparers usually address receipt of required consideration by relying on copies of cross-receipts, a certificate or representation of a member, manager, or other appropriate source or an express assumption. Alternatively, the opinion may state that the LLC Interests will be validly issued upon receipt of the required consideration.

82. Unlike corporation statutes, which set forth the specific steps required for a corporation to create authorized stock, LLC statutes do not specify how LLC Interests are to be created. Instead, LLC statutes permit LLCs to specify in their operating agreements the requirements for creating LLC Interests or, alternatively, to leave creation of LLC Interests to more general provisions in the operating agreement or the applicable LLC statute.

83. If the issuance of LLC Interests requires action by members, the opinion preparers will need to consider the issues discussed in the text at *supra* note 68.

84. When sales of LLC Interests are registered under the Securities Act of 1933, an opinion confirming the valid issuance of those LLC Interests is required to be filed as an exhibit to the registration

creating and issuing LLC Interests,⁸⁵ opinion preparers ordinarily review the applicable LLC statute,⁸⁶ the operating agreement, the resolution or other action, if any, approving the issuance and, in some states, the certificate of formation. They then confirm that the requirements they have determined are applicable have been met.⁸⁷

A validly issued opinion on LLC Interests requires an LLC to have the power under the applicable LLC statute, its certificate of formation and its operating agreement to create and issue the LLC Interests covered by the opinion.⁸⁸ Because LLC Interests may not grant members rights that are not permitted by, or deny them rights that are mandated by, the applicable LLC statute, the operating agreement or, in some states, the LLC's certificate of formation, opinion preparers giving a validly issued opinion must confirm that the LLC Interests do not grant or deny the members such rights.⁸⁹ To illustrate, opinion preparers could not give an opinion that LLC Interests have been validly issued if the LLC Interests purport to grant holders two votes for each LLC Interest they hold

statement. See *infra* note 111. Compliance with the Securities Act of 1933 is not addressed by the validly issued opinion. See *infra* note 91 & accompanying text.

85. Instead of creating a specific number of “authorized” LLC Interests for later issuance, the operating agreement may establish a procedure for the creation of LLC Interests as an incident to their issuance, without limiting the number of LLC Interests that may be created or requiring any particular type or amount of consideration.

86. When giving an opinion on a Delaware LLC, the opinion preparers must, among other things, confirm compliance with (if applicable) (i) Section 18-302 of the Delaware LLC Act (which addresses the creation of classes or groups of members and the rights, powers and duties of those members) and (ii) if the opinion covers a series of LLC Interests, Section 18-215(b) of the Delaware LLC Act (for statutory series of LLC Interests) or Section 18-218 of the Delaware LLC Act (for registered series of LLC Interests). A Delaware LLC has the power to create classes or series of LLC Interests and to create additional classes or series in the future only if its operating agreement so provides.

87. Unlike corporation statutes, which ordinarily specify the approvals required for stock issuances, LLC statutes typically grant LLCs discretion to provide in their operating agreements the approvals required for the issuance of LLC Interests. In giving a validly issued opinion on a class or series of LLC Interests, the opinion preparers must confirm not only that the operating agreement provides for the creation of the class or series but also that the requirements in the operating agreement for creating the class or series have been satisfied.

When an operating agreement does not clearly provide for the creation of or specify the approvals needed to create and issue the LLC Interests on which they are giving an opinion, opinion preparers sometimes arrange for the operating agreement to be amended to expressly authorize the creation and issuance of those LLC Interests. See, e.g., *DG BF, LLC v. Ray*, C.A. No. 2020-0459-MTZ, 2020 WL 3867123 (Del. Ch. July 9, 2020) (deciding what approvals operating agreement required to approve amendment creating new class of LLC Interests).

88. See *TriBar Op. Comm., Special Report of the TriBar Opinion Committee: Duly Authorized Opinions on Preferred Stock*, 63 *BUS. LAW.* 921, 921–23 (2008) (taking the same position on opinions on corporation's due authorization of preferred stock) [hereinafter *TriBar Preferred Stock Opinion Report*]. A validly issued opinion on LLC Interests also requires that the LLC be validly existing.

89. The rights in question are those granted to the holders of the LLC Interests under the operating agreement (or, in some states, the certificate of formation) and not rights under some other agreement, such as a subscription agreement or side letter, that is not part of the operating agreement. See *TriBar Preferred Stock Opinion Report*, *supra* note 88, at 923–24; see also *TriBar LP Opinion Report*, *supra* note 1, at 1121.

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

when the operating agreement specifies that each LLC Interest shall entitle holders to one vote.

An opinion that LLC Interests have been validly issued does not address the enforceability of the terms of the LLC Interests.⁹⁰ Nor does the opinion address the issuance's compliance with other applicable laws⁹¹ or the status of the LLC Interests as general intangibles or securities (certificated or uncertificated) under the Uniform Commercial Code.⁹² These matters, if addressed at all, would be covered in separate opinions.

Some opinion preparers state not only that LLC Interests have been validly issued but also, using the language of the analogous opinion commonly given on corporate stock, that the LLC Interests have been "duly authorized." Unlike corporation statutes, LLC statutes do not require or specify procedures for the creation of authorized capital, and although some operating agreements specify procedures, many do not. Consequently, unlike the analogous opinion for corporate stock, an opinion stating that LLC Interests have been duly authorized does not cover matters beyond those covered by the validly issued opinion and should not be understood to add anything to the validly issued opinion.

6.0 ADMISSION OF PURCHASERS OF LLC INTERESTS AS MEMBERS OF THE LLC

An opinion that the purchasers of LLC Interests have been duly admitted as members of an LLC means that the purchasers have satisfied the admission requirements, if any, of the LLC statute under which the LLC was formed⁹³ and its operating agreement (and, in some states, its certificate of formation).⁹⁴

90. In this regard, opinions on the valid issuance of LLC Interests are analogous to opinions on the valid issuance of LP Interests. See *TriBar LP Report*, *supra* note 1, § 4.0, at 1122.

91. See *TriBar 1998 Report*, *supra* note 2, § 6.2.2, at 649–50.

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

93. One requirement for admission as a member is that the member be a "person" who is permitted to be a member under the applicable LLC statute. See, e.g., DEL. CODE ANN. tit. 6, § 18-101(13) (defining "member" as a "person" admitted as a member as provided in Section 18-301 of the Delaware LLC Act). Section 18-101(14) of the Delaware LLC 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.

Id. § 18-101(14). The LLC statutes of other states may define "person" differently or not at all.

94. In addition to opinions on the admission of purchasers of LLC Interests, opinions also are sometimes given on the admission of holders of LLC Interests as members of the surviving LLC in a merger, conversion or division. Opinions are rarely given that those purporting to be managers of an LLC meet the requirements for being managers under the applicable LLC statute and the operating agreement. Under Section 18-101(12) a "manager" means a person who is named as a manager of an LLC in, or

Under many state LLC statutes, including the Delaware LLC Act,⁹⁵ purchasing or otherwise acquiring an LLC Interest does not by itself make the holder of that LLC Interest a member of the LLC.⁹⁶ Instead, LLC statutes typically require that specified conditions be satisfied for a person to become a member unless the operating agreement otherwise provides.⁹⁷ Operating agreements often specify conditions for admitting members, and those conditions sometimes differ depending on when members are admitted (e.g., when the LLC was formed or later).⁹⁸ To support an opinion that purchasers of LLC Interests have been duly admitted as members, opinion preparers confirm that all requirements for admission in the applicable LLC statute and the operating agreement (and in some states the certificate of formation) have been satisfied or waived, except any requirements they expressly assume to have been met or expressly exclude from the opinion's coverage.⁹⁹

Subscription agreements for LLC Interests¹⁰⁰ may also impose conditions on the admission of purchasers as members. An opinion that purchasers have been admitted as members covers compliance with those conditions when they are incorporated in or otherwise made part of the operating agreement.¹⁰¹ The

designated as a manager of an LLC pursuant to, an operating agreement or similar instrument under which the LLC is formed and includes a manager associated with a series of the LLC. The Delaware LLC Act does not require that a person becoming a manager of a Delaware LLC sign the LLC's operating agreement. *Id.* § 18-101(12)

95. The principal provisions of the Delaware LLC Act governing the admission of members are Sections 18-101(13), 18-301, 18-702 and 18-704. Under the Delaware LLC Act, a person satisfying the requirements for admission as an LLC member in the Act and the LLC's operating agreement can be admitted as a member and be bound by the operating agreement without executing the operating agreement. *See id.* § 18-101(9). Different rules for admission of members may apply in the case of a merger, conversion, domestication or division. *See id.* §§ 18-301(b)(3)(4), 18-301(c).

96. Under the Delaware LLC Act, an assignee of an LLC Interest has no right to become a member of an LLC or to exercise the rights or powers of a member unless the operating agreement otherwise provides or the LLC's members approve. *See id.* §§ 18-301(b), 18-702, 18-704. However, pursuant to Section 18-704(a)(3) of the Delaware LLC Act, upon the voluntary assignment by the sole member of an LLC of all the LLC Interests in the LLC, the assignee automatically becomes a member unless otherwise provided when the LLC Interest was assigned or otherwise provided in the operating agreement by a specific reference to Section 18-704(a)(3). An assignment is treated as voluntary for purposes of Section 18-704(a)(3) if the member consents to the assignment and the assignment is not effected by foreclosure or other similar process.

97. *See, e.g., id.* § 18-301(a), (b), (c). LLC statutes may specify conditions for admitting members that differ depending on whether the person to be admitted acquired an LLC Interest from the LLC or from a member. *See id.* § 18-301(b)(1), (b)(2).

98. For example, after the LLC is formed an operating agreement could condition a person's being admitted as a member on that person's executing a counterpart of, or agreeing to be bound by, the operating agreement and being listed as a member in a schedule to the operating agreement.

99. *See infra* note 101 if the opinion preparers are aware that a condition in a subscription agreement has not been met.

100. When issuing LLC Interests, LLCs operating as investment funds, as well as many other types of LLCs, often require purchasers to execute subscription agreements.

101. If conditions on admission are incorporated in or otherwise made part of the operating agreement, opinion preparers will need to address satisfaction of those conditions, for example, by including an express assumption in the opinion letter or obtaining a certificate on factual matters from an appropriate source. If a purchaser has made representations in the operating agreement or its subscription agreement regarding its compliance with the requirements for admission that have been made part of the operating agreement, the opinion could be based on those representations.

Delaware LLC Act does not expressly require that conditions on admission that are not part of the operating agreement be satisfied for a purchaser to become a member.¹⁰² Nevertheless, some opinion givers, to avoid any misunderstanding, either expressly assume in their opinion letters that any such conditions 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 member of an LLC is not an opinion that (i) the person can enforce the obligations the operating agreement imposes on the LLC, the manager or other members; (ii) the LLC, the manager or the other members can enforce against that person its obligations under the operating agreement; or (iii) if the person is an entity rather than a natural person, it has the power to be a member under the statute under which it was formed and its constituent documents.

7.0 OBLIGATIONS OF PURCHASERS

Purchasers of LLC Interests sometimes request an opinion on their obligation to make payments to the LLC after the closing for their LLC Interests and to make future contributions to the LLC by reason of their ownership of LLC Interests. A form of that opinion is suggested and discussed in Section 7.1 below. Purchasers also may request that the opinion in Section 7.1 be supplemented by an opinion regarding their liability to third parties for debts, obligations and liabilities of the LLC. A suggested form of that opinion is discussed in Section 7.2 below.

7.1 PAYMENTS AND CONTRIBUTIONS

Opinions regarding the obligation of purchasers to make payments and contributions to the LLC in connection with their purchase and ownership of LLC Interests can take different forms. Some, tracking the opinion normally given on corporate stock, may state that the LLC Interests are “fully paid and non-assessable.”¹⁰³ Others may take a similar approach to that historically taken in opinions on interests in limited partnerships. For the reasons discussed below, the Committee suggests that opinion givers adopt the following form of opinion on purchasers’ obligations to make payments and contributions to the LLC¹⁰⁴:

Even when the applicable LLC statute does not make compliance with a condition for admission contained solely in a subscription agreement a requirement for a purchaser to be admitted as a member, 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 give the opinion without disclosing in the opinion letter that the condition has not been satisfied or, indeed, whether to deliver an opinion letter at all.

102. See, e.g., DEL. CODE ANN. tit. 6, § 18-301.

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

104. The use in the suggested form of opinion of the terms “LLC,” “Purchasers,” “Holders” (if applicable), “LLC Interests,” “Subscription Agreements” and “Operating Agreement” is premised on

Under [name of LLC statute under which LLC was formed],¹⁰⁵ Purchasers¹⁰⁶ have no obligation to make further¹⁰⁷ payments for their purchase of LLC Interests or contributions to LLC solely by reason of their ownership¹⁰⁸ of LLC Interests [or their status as members of LLC]¹⁰⁹ [except as provided in their Subscription Agreements or the Operating Agreement¹¹⁰]^{111,112} [and except for their obligation to

those terms having been previously defined in the opinion letter. The terms actually used in the opinion should be the same as the terms used in the operating agreement or subscription agreement.

105. When, as discussed in Section 1.0, above, an opinion letter limits its coverage of Delaware law to the Delaware LLC Act, that limitation applies to all the opinions in the opinion letter and, therefore, the introductory clause beginning with the word “Under” in the suggested form of opinion is not needed to exclude from the opinion’s coverage obligations that arise under Delaware law apart from the Delaware LLC Act. However, that clause would be needed to exclude from the opinion obligations to make payments and contributions that may arise under federal law, the law of another state (i.e., a state other than Delaware), or both, if federal law or the law of another state is covered by the opinion letter and those obligations are not otherwise excluded (see *TriBar 1998 Report*, *supra* note 2, § 4.1, at 631–32).

When Delaware lawyers give the suggested form of opinion on a Delaware LLC, they typically cover Delaware law generally and thus omit the “Under” clause. When lawyers in other states give the suggested form of opinion on an LLC formed under their state’s LLC statute, they will need to decide whether to limit the coverage of the opinion to that statute or to cover all the obligations covered by the opinion arising under that state’s law.

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

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

108. As discussed in Section 6.0, in Delaware, a person can acquire an LLC Interest without becoming a member of the LLC. Under Section 18-702(d) of the Delaware LLC Act, holders of LLC Interests who are not members may still have obligations under some circumstances to make contributions to the LLC. By using the word “ownership,” the suggested form of opinion covers obligations of holders of LLC Interests whether or not they are members.

109. When all purchasers are becoming members, opinion preparers may choose to include these words (i.e. “or their status as members of LLC”) in the opinion. If some but not all purchasers are becoming members, the phrase “or, if applicable, their status as members of LLC” could be included instead.

110. See DEL. CODE ANN, tit. 6, § 18-502 (liability for contributions).

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

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

The reference to the LLC statute in the introductory clause (beginning with the word “Under”) of the suggested form of opinion in the text has not been included in the foregoing opinion based either on the assumption that the opinion is being given by Delaware counsel and thus covers Delaware law generally (see *supra* note 105 (last paragraph)) or on the assumption that the opinion is being given by non-Delaware counsel and the opinion letter limits the opinion’s coverage to the Delaware LLC Act (see *supra* § 1.0 (second paragraph)). The bracketed exception following note 109 in the suggested form of opinion in the text has not been included because following a public offering holders of LLC Interests will rarely, if ever, have an obligation to make payments for LLC Interests or contributions to the LLC under subscription agreements or the operating agreement. For a discussion whether or not to include the bracketed exception for wrongful distributions included after notes 111 and 112 in the suggested form of opinion in the text, see *infra* note 113.

112. For the reasons discussed in the text, when this bracketed exception is included, the suggested form of opinion does not require the opinion preparers to identify particular obligations to make payments and contributions under purchasers’ subscription agreements and the operating agreement. If coverage of those obligations is desired, see the second to last paragraph of this Section 7.1. If the subscription agreements and the operating agreement do not impose any obligations to

repay any funds wrongfully distributed to them)¹¹³ [or as they otherwise may have agreed].¹¹⁴

The bracketed exception to this opinion for obligations of purchasers to the LLC provided in purchasers' subscription agreements and the operating agreement (i.e. the bracketed exception immediately following note 109) excludes from the opinion's coverage purchasers' obligations to make future payments or contributions to the LLC under those documents.¹¹⁵ Often, purchasers of LLC Interests in privately held LLCs agree in their subscription agreements or otherwise are obligated under the LLC's operating agreement to make contributions to the LLC after the closing, for example, to satisfy capital calls or to provide funding for a specified event such as the acquisition by the LLC of a particular business or property. Opinion preparers often include the bracketed exception based on the belief that purchasers should not need a third-party opinion on factual matters that they (or their counsel) can readily determine for themselves by reading the LLC's operating agreement and their subscription agreements.¹¹⁶ An opinion containing the bracketed exception thus requires the opinion preparers to consider, apart from the operating agreement and purchasers' subscription agreements, whether under the law covered by the opinion purchasers have any obligation following the closing to make payments for their

make further payments or contributions, the bracketed exception may be deleted (as is done, for example, in the form of Exhibit 5 opinion suggested in note 111).

113. When giving opinions on Delaware LLCs, some opinion givers, including many Delaware lawyers, include the bracketed exception for wrongful distributions out of concern that the provision of the Delaware LLC Act (Section 18-303(a)) exempting members from personal liability for liabilities of the LLC begins with the phrase "except as otherwise provided [in the Delaware LLC Act]" and thus might be read to exclude from the exemption provided by that provision the repayment obligations of members set forth in Section 18-607(b) and Section 18-804(c) of the Delaware LLC Act. Delaware lawyers also may include an exception for repayment obligations out of concern that their opinions typically are not limited to the Delaware LLC Act and, without that limitation, the suggested form of opinion could be read to cover obligations to repay funds to the LLC that arise under other Delaware statutes such as Delaware's fraudulent transfer statute. *See, e.g.*, Delaware Uniform Fraudulent Transfer Act, DEL. CODE ANN. tit. 6, § 1301 et seq. Other opinion givers do not include this exception because they do not regard the obligation under the Delaware LLC Act to repay wrongful distributions under Sections 18-607(b) and 18-804(c) as being covered by the opinion, viewing that obligation as not being solely attributable to ownership of LLC Interests (or status as a member) and observing that the obligation also does not satisfy the "solely" test because it depends on a recipient's knowledge that the distribution is unlawful. In the Committee's view, an express exception for the obligation of members to repay wrongful distributions is not necessary for the foregoing reasons.

114. As an alternative to this bracketed exception, opinion preparers sometimes expressly assume that, apart from purchasers' subscription agreements and the operating agreement, purchasers are not bound by any agreements requiring them to make payments or contributions to the LLC.

115. When purchasers are paying the full purchase price for their LLC Interests at the closing and are not subject to any such obligations, this exception is not needed. *See supra* note 111.

116. Because obligations of members under the operating agreement, such as the obligation to pay for copies of books and records of the LLC if the member makes a demand for them and to pay for costs the LLC incurs to transfer LLC Interests to an assignee, are not obligations to make payments for the purchase of LLC Interests or contributions solely by reason of ownership of LLC Interests, an exception for them has not been included in the suggested form of opinion and is not needed even if the bracketed exception is not included.

LLC Interests or contributions solely by reason of their ownership of LLC Interests.¹¹⁷ The effect of the bracketed exception, therefore, is to leave to purchasers the responsibility for knowing what their obligations are to make payments and contributions under the operating agreement and their subscription agreements.

Opinion recipients sometimes ask opinion preparers to cover the purchasers' obligations to the LLC under the purchasers' subscription agreements and the LLC's operating agreement. If the opinion preparers are willing to do so, they should omit from the opinion the bracketed exception immediately following note 109 in the above suggested form of opinion and instead refer in the opinion to the specific sections of the operating agreement and the subscription agreements that impose obligations on purchasers of LLC Interests to make further payments or contributions (e.g., "except as provided in Sections __, __ and __ of the Operating Agreement and Section __ of the Subscription Agreements").

The Committee recommends that opinion givers use the suggested form of opinion rather than an opinion, worded like the opinion ordinarily given on corporate stock, that LLC Interests are "fully paid and non-assessable." Standing alone, the words "fully paid" and "nonassessable" do not clearly convey what the opinion is intended to cover, typically are not defined in LLC statutes¹¹⁸ and do not have a generally understood meaning with respect to LLC Interests.¹¹⁹

7.2 LIABILITY TO THIRD PARTIES

As a supplement to the opinion discussed in Section 7.1, purchasers of LLC Interests may request an opinion, analogous to the opinion often requested by purchasers of limited partnership interests, that as members of the LLC they will have no personal liability to third parties for debts, obligations and liabilities of the LLC. Opinions on corporations do not address this issue, and the trend in recent years is for opinions not to be given on the personal liability of LLC

117. See *infra* note 126 (second paragraph) regarding statutory provisions outside the applicable LLC statute imposing obligations on holders of LLC Interests or LLC members that are not covered by the suggested form of opinion; cf. *TriBar 1998 Report*, *supra* note 2, 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").

118. This is in contrast to the many state corporation statutes that define the words "fully paid" and "non-assessable" as they apply to shares of corporate stock. For example, Section 152 of the Delaware General Corporation Law provides that:

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 non-assessable stock upon receipt by the corporation of such consideration

119. For example, unlike an opinion that corporate stock has been "fully paid" (see *TriBar 1998 Report*, *supra* note 2, at 650), no customary practice exists as to whether (or under what circumstances) an opinion that LLC interests are fully paid covers a purchaser's obligation to make payments required by a subscription or other similar agreement when not called for by the resolution approving the issuance of those interests.

members to third parties for liabilities of the LLC except in some private equity transactions and some transactions involving hedge funds or joint ventures.¹²⁰ When given, the opinion normally does not take the form of a stand-alone opinion but is combined with the opinion discussed in Section 7.1. The Committee suggests that a combined opinion be worded as follows:

Under [name of LLC statute under which LLC was formed] (the “Act”),¹²¹ Purchasers¹²² have no obligation to make further¹²³ payments for their purchase of LLC Interests or contributions to LLC solely by reason of their ownership¹²⁴ of LLC Interests [or their status as members of LLC]¹²⁵ and no personal liability¹²⁶ for the debts, obligations and liabilities of LLC, whether arising in contract, tort or otherwise, solely by reason of being members of LLC [except in each case as provided in their Subscription Agreements or the Operating Agreement]^{127,128} [and except

120. Section 18-303(a) of the Delaware LLC Act provides:

Except as otherwise provided by [the Delaware LLC Act], the debts, obligations and liabilities of an LLC, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the LLC, and no member or manager shall be obligated personally for any such debt, obligation or liability of the LLC solely by reason of being a member or acting as a manager of the LLC.

Because this opinion covers matters not addressed by a standard opinion on the stock of a corporation, it is not required to be included in the opinion on LLC Interests delivered as Exhibit 5 to a registration statement under the Securities Act of 1933. See *supra* note 111.

121. See the discussion regarding the need for this introductory clause in *supra* note 105.

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

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

124. See *supra* note 108.

125. See *supra* note 109.

126. By its terms, the suggested form of opinion does not address the personal liability of purchasers (or, if changed, holders) who are not members. If an assignee of an LLC Interest is not admitted as a member, under Section 18-702(d) of the Delaware LLC Act the assignee still may have personal liability as a member for the debts, obligations or liabilities of the LLC if the assignee so agrees, for example in an assumption agreement, or the operating agreement so provides. Nevertheless, opinions are rarely requested or given on the personal liability of holders of LLC Interests who are not members for the debts, obligations or liabilities of an LLC.

On occasion, a state may have a statutory provision, outside the LLC Act referred to in the opinion, that imposes personal liability on LLC members solely in that capacity for an obligation of the LLC. See, e.g., N.Y. TAX LAW § 1131(1) (2021) (imposing liability on LLC members for New York sales taxes not remitted by LLC to state tax authorities); N.Y. LLC LAW § 609(c) (2021) (holding ten largest members of foreign LLC liable for unpaid wages owed by LLC as a result of work performed in New York). Although not technically required to do so, some opinion preparers, if aware of such a provision, may choose, depending on the circumstances (for example when the opinion letter generally covers the law of the state with that provision), to refer to the provision in the opinion letter or otherwise to bring it to the attention of the recipient or its counsel.

127. The bracketed exception for liability of members under their subscription agreements and the operating agreement may be omitted (at least from opinions on Delaware LLCs) if the subscription agreements and operating agreement do not require the future payments or contributions to the LLC covered by the opinion and do not make members personally liable for the debts, obligations or liabilities of the LLC.

128. Although LLC statutes uniformly protect members from liability for the debts and other obligations of an LLC, some LLC statutes, including the Delaware LLC Act, expressly permit an LLC in its operating agreement and members in other agreements to override the statutory protection and thereby obligate members personally for any or all of the debts, obligations and liabilities of the LLC. See, e.g., DEL. CODE ANN. tit. 6, § 18-303(b).

for their obligation to repay any funds wrongfully distributed to them]¹²⁹ [or as they otherwise may have agreed].¹³⁰

Like the suggested form of opinion in Section 7.1, the exception in brackets immediately preceding notes 127 and 128 in the above suggested form of opinion has the practical effect, as discussed in Section 7.1, of leaving to each opinion recipient responsibility for knowing its obligations under its subscription agreement and the operating agreement.¹³¹ Again, as with the suggested form of opinion in Section 7.1, if the opinion recipients request that the opinion cover purchasers' personal liability (if any) under their subscription agreements and the LLC's operating agreement to third parties for the debts, obligations and liabilities of the LLC, the opinion preparers, if they agree, can do so by adding language along the lines discussed in the second to last paragraph of Section 7.1.

The phrase "solely by reason of being members" in the suggested form of opinion appears in Section 18-303(a) of the Delaware LLC Act, and its inclusion in the opinion together with the express reference to the Act in the introductory clause of the opinion¹³² is intended to limit the coverage of the opinion to the effect of the Act.¹³³ For LLC's formed under another state's LLC statute, the opinion should use the terminology used in the analogous provision in that statute.

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

An opinion on purchasers' personal liability for debts, obligations and liabilities of the LLC that, like the suggested form of opinion, covers liability solely by reason of purchasers' status as members does not address the liabilities that state

129. See *supra* note 113.

130. Opinion preparers can deal with the possibility that members have agreed to be personally liable for debts, obligations or liabilities of the LLC in various ways. For example, as in the suggested form of opinion, they can include the bracketed words "or as they otherwise may have agreed" at the end of the opinion. As another example, they can assume expressly that purchasers have not entered into any agreements (other than their subscription agreements) under which they have personally agreed to be liable for debts, obligations or liabilities of the LLC.

131. See *supra* note 112 and text at *supra* notes 115 and 116.

132. See *supra* note 105 regarding the need for the introductory clause.

133. Even though a purchaser can be liable under Delaware law for the purchaser's tortious or wrongful conduct, including conduct when acting as an LLC member, the suggested form of opinion does not cover that liability because it does not arise solely by reason of a person's status as a member. See *Pepsi-Cola Bottling Co. of Salisbury, Md. v. Handy*, C.A. No. 1973-VCP, 2000 WL 364199 (Del. Ch. Mar. 15, 2000) (stating that the phrase "solely by reason of being a member" implies that situations may arise in which members are not shielded from liability by Section 18-303 of the Delaware LLC Act). See generally Elizabeth S. Miller, *Are There Limits on Limited Liability? Owner Liability Protection and Piercing the Veil of Texas Business Entities*, 43 TEX. J. BUS. L. 406 (2009) (discussing various ways members may be personally liable for obligations of an LLC).

and federal laws, such as securities and environmental laws, impose on controlling persons of an entity because those liabilities do not derive *solely* from purchasers' status as members. In addition, the opinion does not address the liability of purchasers under a piercing-the-veil, alter ego or similar theory, the liability of purchasers for their tortious or wrongful conduct,¹³⁴ or their liability for actions they take in some other capacity, for example, as managers. Although the following paragraph is unnecessary, to avoid any misunderstanding when giving an opinion that addresses the personal liability of purchasers to third parties for obligations of the LLC, opinion givers may choose to include it (or a paragraph along the same lines) in their opinion letters:

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

CONCLUSION

In recent years LLCs have become increasingly common. By providing guidance to both opinion givers and counsel for opinion recipients on the wording and meaning of opinions on LLCs 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.

134. See *supra* note 133.

ADDENDUM

In a few instances this report includes a discussion of an issue not addressed in the *TriBar 2006 LLC Opinion Report* or the *TriBar 2011 Supplemental Opinion Report* or amplifies or differs from a position taken in one of those reports. Those are:

Section 1.0. Section 1.0 amplifies Section 1.0 of the *TriBar 2006 LLC Opinion Report* on opinions by non-Delaware lawyers on Delaware LLCs.

Note 10. Note 10 states that, when opinion preparers obtain a copy of an operating agreement from an appropriate source, they can assume without so stating that it is the current version and can rely on it in giving the opinions discussed in this report. Thus, they do not have to obtain the operating agreement in effect when the LLC was formed or amendments to that agreement up to the date of the opinion letter. *Compare TriBar 2006 LLC Opinion Report, supra* note 1, at 685–686.

Text at Note 11 and Note 11. This report does not include a section analogous to Section 6.0 of the *TriBar 2006 LLC Opinion Report* on the opinion on enforceability of an operating agreement. Note 11 explains why.

Text at Notes 43 and 44. Noting that for the existence of a Delaware LLC to terminate its certificate of formation must be cancelled, this report takes the position that the fact an LLC has dissolved will not in and of itself prevent giving an opinion that the LLC validly exists (but stating in note 44 that, if the opinion preparers are giving a status opinion on a dissolved LLC, the implications of the LLC's dissolution for the transaction and the status and other opinions in the opinion letter may, depending on the circumstances, merit the opinion preparers' consideration if they know the LLC has dissolved). *Compare TriBar 2006 LLC Opinion Report, supra* note 1, at 687 & n.41.

Section 2.0. Period Before Delivery of Opinion Letter. This subsection is new.

Third Through Seventh Paragraphs of Section 3.0. These paragraphs address an issue not covered by the comparable section on the power opinion (Section 3.0) in the *TriBar 2006 LLC Opinion Report*.

APPENDIX A

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An Addendum to Third-Party Closing Opinions: Limited Partnerships

By the TriBar Opinion Committee

The purpose of this addendum is to delete the third paragraph of note 2 of the TriBar Opinion Committee's 2018 Report, *Third-Party Closing Opinions: Limited Partnerships*, 73 Bus. Law. 1107 (2018), and to add the following new section to that report immediately before Section 1.0:

OPINIONS BY NON-DELAWARE LAWYERS ON LIMITED PARTNERSHIPS FORMED IN DELAWARE

Like corporations and limited liability companies (LLCs), limited partnerships often are formed in Delaware rather than the state where their sponsors or principal counsel are located. Non-Delaware lawyers routinely give opinions on Delaware limited partnerships (as they do on Delaware corporations and Delaware limited liability companies) when they regard themselves as competent to deal with the issues raised by those opinions.^{8a}

When giving opinions on Delaware limited partnerships, non-Delaware lawyers typically include in their opinion letters a statement limiting the coverage of their opinions on Delaware law to the Delaware LP Act (the "Delaware LP Act coverage limitation"). Like the reference to the Delaware General Corporation Law in the coverage limitation typically included by non-Delaware lawyers in opinion letters on Delaware corporations,^{8b} the reference to the Delaware Revised Uniform Limited Partnership Act (the "Delaware LP Act") in the Delaware LP Act coverage limitation is understood to cover not only that statute but also reported Delaware judicial decisions interpreting that statute.^{8c}

8a. See *TriBar 1998 Report*, *supra* note 1, § 4.1, at 631 n.85 (observing that many non-Delaware lawyers regard themselves as competent to give opinions on various matters covered by the Delaware General Corporation Law, such as corporate status).

8b. A typical coverage limitation in an opinion letter by a New York opinion giver giving opinions on a Delaware corporation states: "The opinions expressed herein are limited to the federal law of the United States, the law of the State of New York and the Delaware General Corporation Law." *TriBar 1998 Report*, *supra* note 1, at 668.

8c. See *TriBar Op. Comm.*, *Special Report of the TriBar Opinion Committee: The Remedies Opinion—Deciding When to Include Exceptions and Assumptions*, 59 BUS. LAW. 1483, 1487 n.25 (2004) [hereinafter *TriBar 2004 Remedies Opinion Report*]. The Delaware Limited Liability Company Act (the "Delaware LLC Act") was based on the Delaware LP Act, and therefore reported Delaware judicial decisions interpreting the Delaware LLC Act also can be relevant to interpreting the Delaware LP Act.

As noted above, one of the conditions for a limited partnership to exist under the Delaware LP Act is that it have a partnership agreement.^{8d} Ordinarily, opinion preparers will be able to rely on the plain meaning of partnership agreement when giving the opinions discussed in this report.^{8e} That, however, will not always be the case. Sometimes the meaning of a provision in the partnership agreement will not be plain, and how it is interpreted will determine whether the opinion preparers can give one of those opinions.^{8f} When that is the case and the opinion letter contains a Delaware LP Act coverage limitation, the question arises whether the opinion preparers need to consider how the Delaware courts are likely to interpret the provision as a matter of Delaware contract law.^{8g}

Although the Committee recognizes that a consensus may not exist on whether a Delaware LP Act coverage limitation excludes Delaware contract law from the coverage of opinions on Delaware limited partnerships, the Committee believes that a Delaware LP Act coverage limitation without further elaboration should not be read to exclude Delaware contract law from the coverage of

If acceptable to the recipient, an opinion giver wishing to exclude coverage of Delaware judicial decisions interpreting the Delaware LP Act should so state expressly in the opinion letter. The Division of Corporation Finance of the Securities and Exchange Commission has taken the position that an opinion letter regarding a registrant included as an exhibit to a registration statement filed with the Commission under the Securities Act of 1933 may not exclude reported judicial decisions interpreting the statute under which the registrant was formed. SEC STAFF LEGAL BULLETIN NO. 19 (2011).

8d. See *supra* note 5 & accompanying text.

8e. See, e.g., *Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482 (Del. 2019) (holding that plain meaning of operating agreement foreclosed attempt by LLC's minority members to force its sale); *Star Cellular Tel. Co. v. Baton Rouge CGSA, Inc., C.A. No. 12507, 1993 WL 29487*, at *4 (Del. Ch. Aug. 2, 1993) (stating that if a term "has a plain or generally prevailing meaning . . . then no other evidence need be considered"), *aff'd*, 647 A.2d 382 (Del. 1994). See also Delaware LP Act § 17-1101(b) ("The rule that statutes in derogation of the common law are to be strictly construed shall have no application to [the Delaware LP Act].").

8f. For example, a provision in an operating agreement may be ambiguous, vague, inconsistent with another provision in the agreement or otherwise unclear.

8g. *Godden v. Franco*, C.A. No. 2018-0504-VCL, 2018 WL 3998431, at *8 (Del. Ch. Aug. 21, 2018) (stating that same principles are used to interpret an LLC's operating agreement as are used to interpret other contracts; setting forth those principles and applying them); *Williams Field Serv. Grp., LLC v. Caiman Energy II, LLC*, C.A. No. 2019-0350-JTL, 2019 WL 4668350, at *16 (Del. Ch. Sept. 25, 2019) (setting forth principles for interpreting LLC operating agreements).

A general discussion of principles of Delaware contract law is beyond the scope of this report. The Committee notes, however, that the Delaware courts may take various approaches to interpreting provisions in partnership agreements. One approach, for example, is to apply canons of construction they have adopted in previous decisions. See, e.g., *Sunline Com. Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 847 (Del. 2019) (setting forth canons of interpretation used by Delaware courts in construing contracts generally). Another is to interpret a provision the way they interpreted a similar provision in another agreement or in a Delaware statute governing a different type of Delaware entity. See, e.g., *In re Nantucket Island Assoc. Ltd. P'ship Unitholders Litig.*, 810 A.2d 351 (Del. Ch., 2002) (looking to cases construing Section 271 of the Delaware General Corporation Law (relating to the sale of all or substantially all a corporation's assets) for guidance in construing similar wording in partnership agreement of Delaware limited partnership). See generally *Obeid v. Hogan*, C.A. No. 11900-VLC, 2016 WL 3356851, at *6 (Del. Ch. June 10, 2016) (stating that when an LLC's operating agreement establishes a governance structure for an LLC that is similar to that of a corporation, courts will draw on analogies to corporate law in interpreting the terms of the operating agreement).

those opinions.^{8h} The Committee recognizes, however, that in the absence of a consensus and to avoid any misunderstanding, some non-Delaware opinion givers who do not wish to be responsible for Delaware contract law when giving opinions on Delaware limited partnerships supplement the Delaware LP Act coverage limitation with an express disclaimer intended to make clear to the opinion recipient that those opinions do not cover Delaware contract law.⁸ⁱ

8h. This conclusion parallels the conclusion expressed in Section 1.0 of the TriBar Opinion Committee's report, *Third-Party Closing Opinion: Limited Liability Companies* (rev. 2021) published concurrently with this Addendum.

8i. Many forms of disclaimer (including many in current use) are sufficient to communicate to the opinion recipient the opinions' limited basis. An example of such a disclaimer is:

We have given the opinions in numbered paragraphs x, y and z above solely in reliance on the Delaware LP Act (including judicial decisions interpreting that Act) and disclaim coverage of all other Delaware law.

As in the above example, disclaimers often cover all other Delaware law, not just Delaware contract law.