

**LEGAL OPINIONS COMMITTEE
BUSINESS LAW SECTION
STATE BAR OF TEXAS**

**REPORT ON CERTAIN
THIRD-PARTY LEGAL OPINIONS CONCERNING
FOR-PROFIT CORPORATIONS**

December 31, 2025

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FORWARD

We are pleased to present this *Report on Certain Third-Party Legal Opinions Concerning For-Profit Corporations*. This *Report* has been approved for publication by the Council of the Business Law Section of the State Bar of Texas and the Section's Legal Opinions Committee. The *Report* provides a comprehensive guide for practitioners regarding third-party legal opinions given under the Texas Business Organizations Code (the TBOC) on Texas for-profit corporations.

The *Report* is the culmination of years of work by the Reporters and other members of the Drafting Subcommittee updating the Legal Opinions Committee's prior opinion report to take account of the TBOC's extensive rearrangement of the Texas corporate statute as well as developments in customary opinion practice since the issuance of the prior report in 1992. The *Report* updates and supersedes those sections of the prior opinion report relating to opinions on corporate status and corporate power, the due authorization, execution and delivery opinions (the "corporate action" opinions), opinions often given on corporate shares, and opinions on the authorization to transact business and good standing in Texas of corporations formed in other jurisdictions.

Chapters II through IV of the *Report* provide an analysis of the meaning of each of these opinions and the work required to give them. These Chapters also include a detailed summary of related provisions of the TBOC with extensive explanatory footnotes. The information on the TBOC is intended to assist those practitioners who regularly give opinions on Texas corporations (or review them for their clients), as well as those who regularly advise their clients on matters covered by these opinions. The *Report* also addresses evolving business practices relating to the use of electronic signatures and the electronic delivery of transaction documents. And in Chapter I the reader will find a discussion of principles of customary practice applicable to the opinions covered by the *Report* and to third-party opinions more generally.

In closing, we want to thank everyone involved in this effort, most especially those whose names are listed on the title page. We believe, due to their efforts, the *Report* will serve as a valuable resource not only to opinion givers and recipients, but also to all business lawyers seeking guidance on these issues.

December 31, 2025

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**REPORT ON CERTAIN
THIRD-PARTY LEGAL OPINIONS CONCERNING
FOR-PROFIT CORPORATIONS**

December 31, 2025

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GLOSSARY OF TERMS

As used in this report, the following terms have the meanings set out below:

“**BCA**” means the Texas Business Corporation Act, as cited in the Table of Authorities.

“**Board of Directors**” or “**Board**” means, as to a Corporation, (a) the board of directors of the Corporation, (b) if applicable and authorized by the Corporation’s certificate of formation or bylaws, any duly appointed board committee (consisting of one or more directors) having the authority established by the board of directors in the resolution designating the committee or by the Corporation’s certificate of formation or bylaws but subject to the limitations set forth in Section 21.416(c) of the TBOC, or (c) in the case of a Corporation operating pursuant to a Section 21.101 Shareholders’ Agreement, the person or persons authorized to perform the functions of the board of directors under that Section 21.101 Shareholders’ Agreement. The terms “**Directors**” and “**members of the Board**” are used interchangeably in this report.

“**Certified Certificate of Formation**” means, as to a Corporation, the Corporation’s certificate of formation (including all amendments), certified by the Secretary of State on a date, to the extent practicable, on or shortly before the date of the opinion letter. When it is impractical to obtain such a certified copy of the Corporation’s certificate of formation from the Secretary of State, opinion givers often rely on a copy of the Corporation’s certificate of formation certified by an officer’s certificate dated on or as of the date of the opinion letter, certifying that an attached copy of the Corporation’s certificate of formation is a true and complete copy, as amended to the date of the officer’s certificate, which is in full force and effect on such date. If a certificate from the Secretary of State is obtained that is dated before the date of the opinion letter, some opinion givers, depending on the circumstances, obtain such an officer’s certificate, dated on or as of the opinion date, to “bring down” the Secretary of State’s certification to the date of the opinion letter.

“**closing**” means the consummation of a transaction, which includes delivering executed Transaction Documents to the respective parties to the transaction and taking such other actions as may be necessary to consummate the transaction in connection with which an opinion letter is being delivered.

“**Committee**” has the meaning assigned in the first paragraph of Chapter I of this report.

“**Company**” refers, in each illustrative opinion form in this report, to the Corporation that is the subject of the opinion.

“**Comptroller**” has the meaning assigned in Section 2.2(a) of this report.

“**Corporation**” has the meaning assigned in the first paragraph of Chapter I of this report.

“**E-SIGN**” has the meaning assigned in Section 1.5 of this report.

“**know**” and the correlative term “**knowledge**” when used in this report do not refer to what should have been known or reasonably should have been known.

“**officer’s certificate**” means a written certification by the secretary or another appropriate officer of a Corporation as to the authenticity of documents or certain other factual matters for reliance by an opinion giver. Typically an officer’s certificate is dated on or as of the date of the opinion letter, because an opinion is understood to speak as of that date.¹

“**opinion**” means the expression of a professional judgment of the opinion giver regarding specific legal matters addressed in its opinion letter.

“**opinion giver**” means the lawyer or legal organization giving an opinion in an opinion letter.

“**opinion letter**” means a third-party opinion letter signed and delivered by an opinion giver addressed to a party or parties not the opinion giver’s client that expresses one or more opinions.

¹ See *infra* note 27 and accompanying text. An illustrative officer’s certificate is set out in Annex A.

“**opinion preparers**” means the lawyers preparing an opinion letter on behalf of an opinion giver (or, if the opinion giver is an individual, then that lawyer).

“**Pre-Code Entity**” has the meaning assigned in note 10 of Chapter I.

“**Secretary of State**” means the Secretary of State of the State of Texas.

“**Section 21.101 Shareholders’ Agreement**” means an agreement among the shareholders of a Corporation pursuant to Section 21.101 of the TBOC that alters by agreement the way the Corporation would otherwise be governed under applicable provisions of the TBOC, including restricting the powers of the Board or entirely eliminating the Board.²

“**Statement of Franchise Tax Account Status**” has the meaning assigned in Section 2.2(a) of this report.

“**TBOC**” means the Texas Business Organizations Code as cited in the Table of Authorities.

“**Texas 1992 Report**” means the *Texas 1992 Report*, as cited in the Table of Authorities.

“**Texas Supplement No. 5**” means *Texas Supplement No. 5*, as cited in the Table of Authorities.

“**transaction**” means the transaction (*e.g.*, loan, sale of securities, merger or acquisition) by a Corporation and other parties in connection with which an opinion is being given.

² Section 21.101 of the TBOC sets forth a list of various provisions relating to the authority and composition of the board of directors and other corporate governance matters that may be included in this type of shareholders’ agreement regarding governance of the Corporation. For further information on Section 21.101 Shareholders’ Agreements see *infra* note 179. Because Section 21.101 Shareholders’ Agreements are rare, this report does not address all of the work required to give the opinions covered by this report as to a Corporation subject to such an agreement.

“**Transaction Document**” means a contract or other document relating to the transaction that contains or relates to obligations of a Corporation and that is explicitly addressed by one or more opinions in an opinion letter.³

“**TUETA**” has the meaning assigned in Section 1.5 of this report.

“**UETA**” has the meaning assigned in Section 1.5 of this report.

³ Typically a Transaction Document is dated on or before the date of the opinion letter. *See infra* note 13.

TABLE OF AUTHORITIES

This Table of Authorities lists many of the authorities cited in this report, along with a shortened form of citation for each of these authorities used in the footnotes. **Many of these authorities are posted on the Legal Opinions Resource Center of the Business Law Section of the American Bar Association**, which is available (currently to both members and non-members of the ABA's Business Law Section) at https://www.americanbar.org/groups/business_law/resources/legal-opinions-resource-center/.

Shortened Form of Citation	Authority
ABA MODEL M&A (STOCK PURCHASE) OPINIONS	M&A COMM., BUS. LAW SECTION, ABA, MODEL STOCK PURCHASE AGREEMENT WITH COMMENTARY, EXHIBITS 8.6(a) and 9.5(a), LEGAL OPINIONS (Volume II) (2 nd Ed. 2010)
<i>Accord Report</i>	Comm. on Legal Ops., ABA Bus. Law Section, <i>Third-Party Legal Opinion Report, Including the Legal Opinion Accord</i> , 47 BUS. LAW. 167 (1991)
BCA	Texas Business Corporation Act, 1955 Tex Gen. Laws, ch. 64 (expired Jan 1, 2010), repealed and replaced by the TBOC
<i>Boston Streamlined Opinion</i>	Donald W. Glazer & Stanley Keller, <i>A Streamlined Form of Closing Opinion (2019 Update)</i> , 74 BUS. LAW. 1065 (2019)
CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT	CORP. COMM., BUS. LAW SECTION, STATE BAR OF CAL., REPORT ON LEGAL OPINIONS IN BUSINESS TRANSACTIONS (EXCLUDING THE REMEDIES OPINION) (2005 & 2007 Update)
CALIFORNIA 2009 VC LEGAL OPINION ISSUES REPORT	OPS. COMM., BUS. LAW SECTION, STATE BAR OF CAL., <i>Report on Selected Legal Opinion Issues in Venture Capital Financing Transactions</i> , 65 BUS LAW. 161 (2009)

Shortened Form of Citation	Authority
CALIFORNIA 2014 SAMPLE OPINION REPORT	OPS. COMM., BUS. LAW SECTION, STATE BAR OF CAL., SAMPLE CALIFORNIA THIRD-PARTY LEGAL OPINION FOR BUSINESS TRANSACTIONS (Revised 2014)
<i>Customary Practice Statement</i>	<i>Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions.</i> 63 BUS. LAW. 1277 (2008)
FIELD & SMITH	ARTHUR NORMAN FIELD & JEFFREY M. SMITH, LEGAL OPINIONS IN BUSINESS TRANSACTIONS (4th ed. 2019)
FLORIDA REPORT	LEGAL OP. STDS. COMM., BUS. LAW SECTION, FLA. BAR & LEGAL OPS. COMM., REAL PROP., PROBATE & TR. LAW SECTION, FLA. BAR, REPORT ON THIRD-PARTY LEGAL OPINION CUSTOMARY PRACTICE IN FLORIDA (2011)
FLORIDA 2021 SUPPLEMENT	LEGAL OP. STDS. COMM., BUS. LAW SECTION, FLA. BAR & LEGAL OPS. SUBCOMM., REAL PROP. FIN. & LENDING COMM., REAL PROP., PROBATE. & TR. LAW SECTION, FLA. BAR, FIRST SUPPLEMENT TO THE REPORT ON THIRD-PARTY LEGAL OPINION CUSTOMARY PRACTICE IN FLORIDA (2021)
GLAZER	DONALD W. GLAZER, ET AL., GLAZER AND FITZGIBBON ON LEGAL OPINIONS: DRAFTING, INTERPRETING AND SUPPORTING CLOSING OPINIONS IN BUSINESS TRANSACTIONS (3d ed. 2008 & Supp. 2024)
<i>Guidelines</i>	ABA Bus. Law Section Comm. on Legal Ops., <i>Guidelines for the Preparation of Closing Opinions</i> , 57 BUS. LAW. 875 (2002) ⁴

⁴ As noted in note 4 to the *Statement of Opinion Practices*, the *Statement* updates selected provisions of the *Guidelines*, but the remaining provisions of the

Shortened Form of Citation	Authority
MARYLAND REPORT	SPECIAL JOINT COMM., SECTION OF BUS. LAW & SECTION OF REAL PROP., PLANNING & ZONING, MD. STATE BAR ASS'N, 2007 REPORT ON LAWYERS' OPINIONS IN BUSINESS TRANSACTIONS (rev. ed. Oct. 6, 2009)
MICHIGAN REPORT	BUS. LAW SECTION, STATE BAR OF MICH., REPORT OF THE MICHIGAN AD HOC COMMITTEE ON LEGAL OPINIONS IN BUSINESS TRANSACTIONS (2010)
NORTH CAROLINA 2004 REPORT	LEGAL OP. COMM., BUS. LAW SECTION, N.C. BAR ASS'N, THIRD-PARTY LEGAL OPINIONS IN BUSINESS TRANSACTIONS (2d ed. 2004)
NVCA Form Opinion	NATIONAL VENTURE CAPITAL ASSOCIATION, FORM OF LEGAL OPINION (Last Updated June 2013), https://nvca.org/document/model-legal-opinion/
PENNSYLVANIA REPORT	LEGAL OPS. COMM., BUS. LAW SECTION, PENN. BAR ASS'N, PENNSYLVANIA THIRD-PARTY LEGAL OPINION REPORT (2007)
<i>Statement of Opinion Practices</i>	<i>Statement of Opinion Practices</i> , 74 BUS. LAW. 807 (2019). A copy of the <i>Statement of Opinion Practices</i> is attached as Annex B hereto
TBOC	TEX. BUS. ORGS. CODE ANN. §§ 1.001–402.015. All citations to the TBOC in this report refer to the version of the TBOC as published in the LEXIS electronic service, and all citations are current through the end of the 2025 Regular Session of the 89 th Texas Legislature

Guidelines are unaffected. For a listing of matters in the *Guidelines* not addressed by the *Statement of Opinion Practices*, see *Explanatory Note to Statement of Opinion Practices*, 74 BUS. LAW. 803, 805–06 (2019).

Shortened Form of Citation	Authority
TENNESSEE REPORT	JOINT OP. COMM., SECTIONS OF REAL ESTATE LAW & BUS. LAW, TENN. BAR ASS'N, REPORT ON THIRD-PARTY CLOSING OPINIONS (2011)
<i>Texas 1992 Report</i>	<i>Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions</i> , BULL. BUS. LAW SEC. STATE BAR TEX. (Tex. State Bar Bus. Law Section Legal Ops. Comm., Austin, Tex.) (Special Issue) 1 (June-Sept. 1992)
<i>Texas Supplement No. 1</i>	<i>Supplement No. 1 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions</i> , BULL. BUS. LAW SEC. STATE BAR TEX. (Tex. State Bar Bus. Law Section Legal Ops. Comm., Austin, Tex.) (Dec. 1994) at 1
<i>Texas Supplement No. 2</i>	<i>Supplement No. 2 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions</i> , BULL. BUS. LAW SEC. STATE BAR TEX. (Tex. State Bar Bus. Law Section Legal Ops. Comm., Austin, Tex.) (Spring 2001) at 1
<i>Texas Supplement No. 3</i>	Legal Ops. Comm., Bus. Law Section, State Bar of Tex., <i>Supplement No. 3 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions: Statement on Legal Opinions Regarding Indemnification and Exculpation Provisions under Texas Law</i> , 41 TEX. J. BUS. LAW 271 (2006)
<i>Texas Supplement No. 4</i>	Legal Ops. Comm., Bus. Law Section, State Bar of Tex., <i>Supplement No. 4 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions: Statement on ABA Principles and Guidelines</i> , 43 TEX. J. BUS. LAW 1 (2009)

Shortened Form of Citation	Authority
<i>Texas Supplement No. 5</i>	Legal Ops. Comm., Bus. Law Section, State Bar of Tex., <i>Supplement No. 5 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions: Statement on Entity, Status, Power and Authority Opinions Regarding Pre-Code Texas Entities and Pre-Code Registered Foreign Entities under the Texas Business Organizations Code</i> , 45 TEX. J. BUS. LAW 1 (2012)
<i>Texas Supplement No. 6</i>	Legal Ops. Comm., Bus. Law Section., State Bar of Tex., <i>Supplement No. 6 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions: Statement on Changes to the Procedure for Good Standing Certificates Issued by the Texas Comptroller of Public Accounts</i> , 45 TEX. J. BUS. LAW 201 (2013)
<i>TriBar 1998 Report</i>	TriBar Op. Comm., <i>Third Party “Closing” Opinions: A Report of the TriBar Opinion Committee</i> , 53 BUS. LAW. 591 (1998)
<i>TriBar 2004 Remedies Report</i>	TriBar Op. Comm., <i>Special Report of the TriBar Opinion Committee: The Remedies Opinion—Deciding When to Include Exceptions and Assumptions</i> , 59 BUS. LAW. 1483 (2004)
<i>TriBar Comment on Electronic Signatures</i>	TriBar Op. Comm., <i>Comment Concerning Use of Electronic Signatures and Third-Party Opinion Letters</i> , 75 BUS. LAW. 2253 (2020)
VIRGINIA REPORT	LEGAL OPS. COMM., BUS. LAW SECTION, VA. BAR ASS’N, VIRGINIA REPORT ON THIRD-PARTY LEGAL OPINIONS IN BUSINESS TRANSACTIONS (2018)

Shortened Form of Citation	Authority
WASHINGTON REPORT	LEGAL OPS. COMM., BUS. LAW SECTION, WASH. STATE BAR ASS'N, AMENDED AND RESTATED REPORT ON THIRD-PARTY LEGAL OPINION PRACTICE IN THE STATE OF WASHINGTON (2018)

CHAPTER I

INTRODUCTION

This report⁵ by the Legal Opinions Committee of the Business Law Section of the State Bar of Texas (the “**Committee**”)⁶ provides guidance on customary practice⁷ and other practices generally followed by Texas lawyers in giving and reviewing for their clients third-party legal opinions on for-profit corporations that are formed under and governed by the TBOC,⁸ or that are formed under the BCA or under earlier prior

⁵ Certain terms used in this report are defined in the Glossary of Terms above. In addition, the Table of Authorities above lists many of the authorities that are cited in this report and indicates the shortened form of citation for these authorities used in the footnotes (for example, the *Texas 1992 Report*).

⁶ This report has been prepared by a Subcommittee of the Legal Opinions Committee of the Business Law Section of the State Bar of Texas consisting of the members listed on the title page. This report was approved by the Subcommittee on September 29, 2025 and by the Legal Opinions Committee on February 13, 2026 and the Council of the Business Law Section of the State Bar of Texas on January 15, 2026.

⁷ For a discussion of customary practice, see *infra* Section 1.1 (*Application of Customary Practice and Rules of Professional Conduct*).

⁸ Section 1.002(25) of the TBOC defines a “for-profit corporation” as a corporation governed as a for-profit corporation under Chapter 21 of the TBOC. In giving opinions on Texas for-profit corporations, opinion givers should review (i) Title 1 (*General Provisions*) of the TBOC, which applies generally to each type of organization formed under or the affairs of which are governed by the TBOC, (ii) Chapter 20 (*General Provisions*) of the TBOC, which applies generally to corporations, and (iii) Chapter 21 (*For-Profit Corporations*) of the TBOC, which applies to for-profit corporations.

This report does not address (i) non-profit corporations (governed by Chapter 22 of the TBOC), (ii) special purpose corporations (governed by Chapter 23 of the TBOC) or (iii) professional corporations (governed as professional entities under Title 7 of the TBOC). This report also does not address (i) close corporations (which, under the provisions of Section 1.002 of the TBOC, are defined to be for-profit corporations that elect to be governed in accordance with Subchapter O, Chapter 21 of the TBOC) or (ii) public benefit corporations (which, under the provisions of Section 21.952 of the TBOC, are defined to be domestic for-profit corporations that elect under the provisions of Section 3.007(e) of the TBOC to be a public benefit corporation governed by Subchapter S, Chapter 21 of the TBOC).

legislation⁹ and continuing to exist under (and now governed by) the TBOC.¹⁰ In this report we refer to any such corporation (other than a close

⁹ Prior to the effectiveness of the TBOC on January 1, 2006, Texas for-profit corporations were governed by the BCA, enacted September 6, 1955. The BCA had a five-year transition period and became effective for all Texas corporations on September 6, 1960, subject to a few exceptions detailed in Article 9.14 of the BCA. The BCA was preceded by a statute enacted in 1874, Act of April 23, 1874, 8 H. GAMMEL, LAWS OF TEXAS 122 (1898). The 1874 act was amended from time to time and the statute, as amended, was compiled in Title 32 of the Texas Revised Civil Statutes, TEX. REV. CIV. STAT. art. 1302–1538m (Vernon 1925). Prior to the 1874 act, each Texas corporation was created by specific legislation of the Texas legislature. For a detailed description of the history of Texas corporation statutes, see Alan R. Bromberg, *Texas Business Organization and Commercial Law—Two Centuries of Development*, 55 SMU L. REV. 83 (2002).

¹⁰ The TBOC combined and codified a host of predecessor statutes into a single, comprehensive statute. Under the provisions of Section 402.001 of the TBOC, the TBOC immediately applied to corporations, as well as certain other types of entities formed on or after January 1, 2006, the effective date of the TBOC. As to a corporation or other relevant entity formed prior to January 1, 2006 (a “**Pre-Code Entity**”), under the transition rules, the TBOC became applicable to a Pre-Code Entity on the earlier of (a) the date on which the Pre-Code Entity voluntarily elected to adopt and become subject to the TBOC, or (b) January 1, 2010. On January 1, 2010 the TBOC became mandatorily applicable to all Pre-Code Entities and the predecessor statutes expired and/or were repealed. TBOC §§ 402.003—.005; H.B. 1156, 78th Texas Legislature (Regular Session), §§ 2–12, 16 (amending predecessor statutes to set expiration dates and repealing miscellaneous statutes).

The Committee has previously concluded that the application of the TBOC, by itself, would not affect the giving of customary legal opinions addressing a Pre-Code Entity’s existence, good standing, and corporate power to execute, deliver and perform its obligations under a contract. *Texas Supplement No. 5* at 8.

The TBOC is organized by titles and chapters under what is commonly referred to as a “hub and spoke” approach. Title 1 (consisting of Chapters 1 through 12) of the TBOC is the “hub” portion of the TBOC containing general provisions applicable, in many cases, to all Texas entities. Title 1 covers definitions (Chapter 1), purpose and power (Chapter 2), formation and governance (Chapter 3), filings (Chapter 4), names and registered agents and offices (Chapter 5), meetings and voting (Chapter 6), liability and indemnification (Chapters 7 and 8), foreign entities (Chapter 9), mergers, conversions and sales of assets (Chapter 10), winding up and termination (Chapter 11) and state administrative powers (Chapter 12). Titles 2 through 7 of the TBOC are the “spokes” of the TBOC with each containing provisions for a different category of Texas entity.

corporation or a public benefit corporation, neither of which is covered by this report) as a “**Corporation.**”¹¹

Third-party opinions are opinions given at the request of the opinion giver’s client in an opinion letter addressed to one or more third parties to the transaction (that is, to one or more parties other than the opinion giver’s own client). This report covers the third-party opinions often requested in business transactions that address a Corporation’s corporate status, corporate power, corporate action, issuance of shares, and capitalization, in each case under Texas law.¹² These opinions relate to the transaction and the Transaction Documents.¹³ This report examines the

Title 2 is the “spoke” of the TBOC that contains provisions related to various kinds of Texas corporations. Title 2, Chapter 20, contains general provisions for all types of Texas corporations and Title 2, Chapter 21, contains provisions regarding Texas for-profit corporations. Title 1, § 1.106(c) of the TBOC states that to the extent a provision of Title 1 (the “hub”) conflicts with a provision of one of the spokes, the provision in the “spoke” supersedes the conflicting provision in the “hub”.

This report discusses TBOC provisions applicable to Corporations in both the “hub” and the corporations “spoke” (Title 2, Chapters 20 and 21) that relate to the opinions covered by this report.

¹¹ This report uses the term “Corporation” to refer to the subject of an opinion, which may include a Corporation that is not a client of the opinion giver, such as a subsidiary or other affiliate of the client.

Many of the provisions of Title 1 of the TBOC applicable to a Corporation are stated to apply to all “domestic entities” (a term that the TBOC defines to include for-profit corporations and other organizations that are formed under, or the internal affairs of which are governed by, the TBOC). TBOC § 1.002(18). For example, the provisions of the TBOC that address a Corporation’s powers and purposes are stated in relation to a “domestic entity.” *Id.* ch. 2.

This report does not address close corporations or public benefit corporations among certain other types of entities. *See supra* note 8.

¹² Texas lawyers are sometimes asked to give opinions on corporations formed under Delaware law. Some Texas lawyers and law firms have adopted internal policies related to those opinions. However, opinions as to Delaware corporations are beyond the scope of this report.

¹³ Typically a Transaction Document is dated on or before the opinion letter. Although it is unusual to do so, an opinion giver might choose, under special circumstances and in lieu of delivering a separate opinion letter at a later date, to deliver a requested corporate opinion at closing as to a Transaction Document that, though in substantially final form, is expected to be executed and delivered

wording and meaning of those opinions and the work needed to support them. This report does not address opinions or advice lawyers provide to their own clients.

In 1992, the Committee published a report and a statement regarding these opinions as well as other third-party legal opinions given under Texas law.¹⁴ This report supersedes and replaces Subparts B, C, D and E of Part VIII of the Committee's *Texas 1992 Report*.¹⁵

post-closing. Because it is not typical to deliver such an opinion letter on future agreements, this report does not address the additional assumptions and qualifications such an opinion letter would require.

¹⁴ *Texas 1992 Report*. The *Texas 1992 Report* has been supplemented six times. *Texas Supplement No. 1* (addressing certain Texas usury law issues); *Texas Supplement No. 2* (addressing Texas opinions regarding security interests in investment property collateral under a former version of the Texas UCC); *Texas Supplement No. 3* (addressing Texas opinions regarding indemnification and exculpation provisions); *Texas Supplement No. 4* (addressing the *Legal Opinion Principles and the Guidelines for the Preparation of Closing Opinions* published by the Committee on Legal Opinions of the Business Law Section of the American Bar Association); *Texas Supplement No. 5* (addressing whether enactment of the TBOC has affected certain opinions commonly given in commercial transactions as such opinions relate to Pre-Code Entities); and *Texas Supplement No. 6* (addressing procedures for good standing certificates from the Texas Comptroller of Public Accounts). The *Texas 1992 Report* and all of the *Supplements* thereto are available electronically at the website of the Business Law Section of the State Bar of Texas at <https://www.texasbusinesslaw.org/texas-legal-opinions-reports>. They are also available at the Legal Opinion Resource Center of the Business Law Section of the American Bar Association at https://www.americanbar.org/groups/business_law/resources/legal-opinions-resource-center/.

¹⁵ The *Accord Report* of the ABA Business Law Section was adopted by the Committee as part of the *Texas 1992 Report*. Intended as a first step toward establishing a national consensus on third-party legal opinions, the *Accord Report* set out 22 statements (including assumptions, qualifications, and definitions) referred to as the "Accord", which were to govern those opinion letters that expressly adopted the Accord. However, the practice of adopting the Accord in legal opinions has not been widely accepted. Although many principles reflected in the *Accord Report* remain relevant to legal opinion practice, the *Accord Report* is no longer adopted by the Committee and is not adopted by this report.

Section 1.1 Application of Customary Practice and Rules of Professional Conduct.

Opinion letters, including opinion letters containing the opinions covered by this report, are prepared and understood in accordance with the customary practice of lawyers who regularly give opinions and lawyers who regularly review opinions for their clients.¹⁶ Many basic principles of preparing and understanding third-party legal opinions are set out in two nationally recognized statements of opinion practice: the *Customary Practice Statement* and the *Statement of Opinion Practices*.¹⁷ For example the *Statement of Opinion Practices* provides that “[t]he phrase ‘customary practice’ refers principally to the work lawyers are expected to perform to give opinions (‘customary diligence’) and the way certain words and phrases commonly used in closing opinions are understood (‘customary usage’).”¹⁸ An opinion giver is entitled to presume that the opinion recipient and its counsel are familiar with customary practice,¹⁹ and customary practice applies to the opinions given whether or not the opinion letter expressly refers to it.²⁰ When giving opinions, including the opinions covered by this report, opinion givers also are subject to the rules governing the professional conduct of lawyers.²¹

Both the *Customary Practice Statement* and the *Statement of Opinion Practices* have been approved by this Committee and by The Business Law Section of the State Bar of Texas, as well as by more than thirty bar associations and other opinion groups around the country. The *Customary Practice Statement* recognizes the role of customary practice in third-party opinion practice while the *Statement of Opinion Practices* identifies more particularly “key aspects of customary practice and other practices applicable to third-party legal opinions that are commonly

¹⁶ *Customary Practice Statement* at 1277 (noting that the role of customary practice in third-party legal opinion practice is well established and referring to various provisions of the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (AM. L. INST. 2000) relating to customary practice); *see also Statement of Opinion Practices* § 2.

¹⁷ *See infra* Annex B.

¹⁸ *Statement of Opinion Practices* § 2.

¹⁹ *Id.* § 8.1.

²⁰ *Id.* § 2; *Customary Practice Statement* at 1278.

²¹ *Statement of Opinion Practices* § 3.

understood and accepted throughout the United States.”²² Because this report is meant to be read with the *Statement of Opinion Practices*, a copy is included as Annex B. Due to widespread acceptance of the *Statement of Opinion Practices* and to avoid redundancy, where the *Statement of Opinion Practices* is cited in support of a statement made in the text, this report generally omits additional citations to other opinion reports of the same groups that approved the *Statement of Opinion Practices*.

Section 1.2 Factual Matters; Reliance on Certificates, Representations, and Assumptions; Opinions Speak as of the Opinion Letter Date Unless Otherwise Indicated.

Opinion preparers may not have personal knowledge of all the facts needed to support many of the opinions discussed in this report. Opinion givers, therefore, ordinarily are entitled to base those opinions on factual information provided by others, including their client, and on factual assumptions.²³ For factual information opinion givers are “entitled to rely on ... an appropriate source unless the opinion preparers know that the information being relied on is incorrect or know of facts they recognize make reliance under the circumstances otherwise unwarranted.”²⁴ Since an opinion is understood to speak as of the date of the opinion letter, work to support an opinion is undertaken up to the date of the opinion letter unless otherwise indicated.²⁵

Many of the opinions covered by this report are typically given in reliance on factual information obtained by an opinion giver in a certificate

²² Stanley Keller & Steven O. Weise, *Obtaining National Consensus on Key Opinion Practices: An Introduction to the Statement of Opinion Practices*, 74 *Bus. Law* 801 (2019).

²³ *Statement of Opinion Practices* § 5.1. Notwithstanding an opinion giver’s right to base its opinions on factual information provided by others, “[a]n opinion giver should not base an opinion on a representation that is tantamount to the legal conclusion the opinion expresses. An opinion giver may, however, rely on a legal conclusion in a certificate of an appropriate government official.” *Id.* § 5.4.

²⁴ *Id.* § 5.2. In confirming factual information needed to support an opinion, “[o]pinion preparers are not expected to conduct an inquiry of other lawyers in their law firm or a review of the firm’s records ..., except to the extent they recognize that a particular lawyer is reasonably likely to have or a particular record is reasonably likely to contain information not otherwise known to them that they need to render an opinion.” *Id.* § 5.3.

²⁵ FIELD & SMITH Vol. 1, § 1:1.3[O], at 31; GLAZER § 2.2.1, at 58–60.

(or, in some instances, on the website) of a government official, who under customary practice is considered to be an appropriate source; an opinion giver also is entitled to rely on a legal conclusion in a certificate of an appropriate government official.²⁶

Often an opinion giver will rely on factual matters certified by an officer's certificate because that permits the opinion giver (i) to satisfy the factual diligence required for an opinion and (ii) to discuss relevant factual matters with the signer of the certificate. An opinion giver is entitled to rely on an officer's certificate as to factual matters relating to the matters addressed in an opinion letter, regardless of whether the certificate expressly authorizes the opinion giver to so rely. Typically an officer's certificate is dated on or as of the date of the opinion letter.²⁷

Some opinions require an opinion giver to rely on factual matters contained in a Corporation's books and records, and in some situations an opinion giver may choose to review these books and records to find the needed information. However, in most circumstances, instead of reviewing physical records, an opinion giver will obtain an officer's certificate confirming the relevant factual matters, such as a certificate certifying that particular resolutions or other corporate records are accurate and complete and remain in full force and effect on or as of the date of the certificate.²⁸ Absent unwarranted reliance, an officer's certificate confirming adoption of corporate resolutions entitles the opinion giver to rely without so stating on implicit assumptions as to the status of those acting as shareholders or Directors approving the resolutions and the satisfaction of procedural requirements such as notice, the presence of a quorum, adoption by requisite vote, receipt by shareholders of adequate information to make an informed decision, and the legal authority of proxy

²⁶ *Statement of Opinion Practices* § 5.4.

²⁷ An illustrative officer's certificate is included in Annex A. For a general discussion of reliance on factual information provided by company officers, see GLAZER § 4.2.3, at 142–61 (Supp. 2024).

²⁸ In its review of a Corporation's corporate records, an opinion giver is entitled to rely, without so stating in its opinion letter, on the presumption of regularity and continuity regarding gaps in corporate records that are not inconsistent with subsequent records of the Corporation and that otherwise are unlikely to be significant. *TriBar 1998 Report* § 2.4, at 616; *accord Guidelines* § 3.3. For a general discussion of the presumption of regularity, see GLAZER § 4.3.5, at 169-72 (Supp. 2024).

holders to vote their proxies. Opinion givers also may rely on recitals in a Corporation's minutes of meetings as to such procedural matters.²⁹

In some instances, factual matters relevant to an opinion are contained in representations in the Transaction Documents. When they are, the opinion giver is generally entitled to rely on the factual information in those representations in giving the opinion.³⁰ When relying on the representations in Transaction Documents, opinion givers often disclose that reliance in their opinion letters³¹ although they are not required to do so. However, Transaction Documents are often prepared by counsel to the opinion recipient, and the representations may not include all of the factual elements necessary to support the opinion or may not be stated solely as a factual representation. Further, when the opinion preparers conclude that relevant factual matters have been stated broadly for risk allocation purposes (for example under circumstances in which the Corporation is willing to risk the consequences of its representations being wrong) or when representations are conclusions of law or tantamount to legal conclusions, the opinion giver should not base a legal opinion on them.³²

²⁹ See, e.g., GLAZER § 9.3.3.4, at 284–86 (Supp. 2024); CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 45–46; PENNSYLVANIA REPORT at 26. For further discussion of these matters, see *infra* note 180 and accompanying text.

³⁰ Opinion preparers will want to consider reviewing the factual matters they are relying on in representations set out in Transaction Documents with appropriate officers of the Corporation in the same manner they would review representations provided in an officer's certificate. See Glazer § 4.2.1, at 136 (Supp. 2024).

³¹ See, e.g., GLAZER § 4.2.1, at 137 (Supp. 2024) (stating that when relying on representations many lawyers disclose that reliance).

³² See, e.g., *Statement of Opinion Practices* § 5.4 (“An opinion giver should not base an opinion on a representation that is tantamount to the legal conclusion the opinion expresses.”); GLAZER § 4.2.1, at 135–37 (Supp. 2024) (opinion givers may not rely on representations framed as conclusions of law or based merely on allocation of risk); § 4.2.3.10, at 159–61 (Supp. 2024) (reliance not permitted on a statement of information tantamount to expression of a legal conclusion unless in a statement from a government official, or unless the statement is in a representation regarding a legal conclusion and is only a subordinate element on which the representation depends and not tantamount to the legal conclusion expressed by the opinion itself, such as a representation of duly elected officers in an incumbency certificate) (the subordinate element) to support a due execution opinion (the legal conclusion)); see also *TriBar 1998 Report* § 2.2.1(d)(ii), at 613 (explaining that because an opinion giver has access to its client, an opinion should not be based on client representations in an agreement that reflect the

In giving opinions based on factual assumptions, some assumptions need to be stated, and others do not. The *Statement of Opinion Practices* states that those “[f]actual assumptions that ordinarily do not need to be stated include assumptions of general application that apply regardless of the type of transaction or the nature of the parties.”³³ Nevertheless, opinion givers should bear the following in mind when considering whether to rely on an unstated assumption rather than stating it expressly in the opinion letter:

An opinion should not be based on an unstated assumption if the opinion preparers know that the assumption is incorrect or know of facts that they recognize make their reliance under the circumstances otherwise unwarranted. A stated assumption is not subject to this limitation because stating the assumption puts the opinion recipient on notice of the particular matters being assumed. Stating expressly a particular assumption that could have been unstated does not imply the absence of other unstated assumptions.³⁴

Note, however, that basing an opinion on a stated assumption is subject to the generally applicable limitation regarding misleading opinions discussed in the following section.³⁵

client’s mere surmise or its risk allocation, unless such matters are disclosed in the opinion letter or otherwise known to the opinion recipient).

³³ *Statement of Opinion Practices* § 5.5 (providing the following examples of unstated assumptions:

... assumptions that (i) the documents reviewed are accurate, complete, and authentic, (ii) copies are identical to the originals, (iii) signatures are genuine, (iv) the parties to the transaction other than the opinion giver’s client (or a non-client whose obligations are covered by the opinion) have the power and have taken the necessary action to enter into the transaction, and (v) the agreements those parties have entered into with the opinion giver’s client (or the non-client) are enforceable against them.)

³⁴ *Id.* (citation omitted).

³⁵ *Id.* n.10, § 12. See *infra* Section 1.3 (*Misleading Opinions*).

Section 1.3 Misleading Opinions.

The following principle set out in Section 12 of the *Statement of Opinion Practices* generally applies to all of the opinions covered in this report, and opinion preparers should be aware of this overriding principle when giving these opinions:

An opinion giver should not give an opinion that the opinion preparers recognize will mislead the opinion recipient with regard to a matter the opinion addresses.³⁶

The *Statement of Opinion Practices* also notes that, even if it is technically correct, an opinion “can mislead if it will cause the opinion recipient, under the circumstances, to miscalculate the opinion.”³⁷ An opinion giver can avoid the risk of misleading an opinion recipient with an appropriate disclosure. An opinion giver may also limit the matters addressed by an opinion with specific language (including a specific assumption, exception or qualification) “so long as the opinion preparers do not recognize that the limitation itself will mislead the recipient.”³⁸ Notwithstanding the foregoing, any omissions from an opinion letter “of information unrelated to the opinions given do not mislead.”³⁹

Section 1.4 Laws and Legal Opinions Beyond the Scope of this Report.

As discussed throughout this report, generally the law covered by the specific opinions addressed in this report is limited as a matter of customary practice to the TBOC, which governs the powers, rights, and other internal affairs of a Corporation, so that these opinions generally do not cover other laws that may apply to the Corporation’s business, such as

³⁶ *Statement of Opinion Practices* § 12.

³⁷ *Id.* § 12, n.15.

³⁸ *Id.* As to the use of such specific language, the *Statement of Opinion Practices* provides that “[t]he application of customary practice, including those aspects of customary practice described in this *Statement*, to a closing opinion or any particular opinion may be varied by a statement in the closing opinion or by an understanding with the opinion recipient or its counsel.” *Id.* § 10.

³⁹ *Id.* § 12, n.15.

laws requiring licenses or permits to engage in particular activities.⁴⁰ This limitation, however, is subject to exceptions for (a) Texas contract law (when applicable) and agency law relating to the due execution and delivery of Transaction Documents⁴¹ and (b) those laws that are applicable to Corporations in regulated industries and require regulatory approval for the issuance of stock.⁴²

Often opinions discussed in this report are given with other opinions covering other laws, such as security interests under the Uniform Commercial Code, or other matters, such as the enforceability of Transaction Documents and the execution, delivery, and performance of Transaction Documents not violating a statute, rule, or regulation, not requiring governmental consents or filings, and not resulting in a breach of or default under other agreements to which the Corporation is a party.⁴³ These other opinions relating to the Corporation and the Transaction Documents are beyond the scope of this report.

Section 1.5 Electronic Signatures and the Opinions Addressed in this Report.

Lawyers rarely give opinions any longer based on witnessing in-person delivery of original copies of tangible paper documents that have been manually signed.⁴⁴ Even before the COVID-19 pandemic, formal closings at which all of the parties to a transaction met in person to sign,

⁴⁰ See, e.g., *infra* Section 2.7 (*What Corporate Status Opinions Do Not Cover*); Section 3.1(b) (*What a Corporate Power Opinion Does Not Cover*); Section 3.2(b) (*What a Duly Authorized Opinion Does Not Cover*).

⁴¹ See *infra* Section 3.3(a) (*Meaning of a Duly Executed and Duly Delivered Opinion*), notes 199, 205–207 and accompanying text.

⁴² See *infra* Section 4.2(a)(4) (*Regulated Industry Approvals*), at note 300.

⁴³ See, e.g., *infra* Section 3.1(b) (*What a Corporate Power Opinion Does Not Cover*); notes 249, 291 and accompanying text; see also *infra* Section 4.1(b) (*What the Duly Authorized Shares Opinion Does Not Cover*).

In the limited circumstance where a Section 21.101 Shareholders' Agreement exists, the duly authorized opinion covering actions of the Corporation *does* address compliance with the Section 21.101 Shareholders' Agreement. However, those shareholders' agreements are rarely used by shareholders of Texas Corporations. For additional information on Section 21.101 Shareholders' Agreements, see *infra* note 179 and accompanying text.

⁴⁴ *TriBar Comment on Electronic Signatures* at 2253.

exchange, and deliver Transaction Documents were uncommon. Closings frequently were accomplished by the parties manually signing documents or signature pages remotely and delivering physical copies to a transaction participant (often counsel to an opinion recipient) acting as closing agent, as well as to the opinion giver. Over time delivery of physical copies was replaced by electronic transmission. The COVID-19 pandemic and its accompanying lockdown period when lawyers and clients had limited access to photocopy and scanning equipment accelerated the adoption of signatures by stylus onto an electronic device and signatures provided using processes offered by commercial providers such as Adobe Sign, DocuSign, PactSafe, and SignNow.

The TBOC has addressed the shift to electronic exchange of signatures with several provisions dealing with electronic records. TBOC Section 1.007 provides that “a writing has been signed by a person when the writing includes, bears, or incorporates the person’s signature [and a] ... transmission or reproduction of a writing signed by a person is considered signed by that person for purposes of [the TBOC].” The TBOC definition of writing includes “... words, letters, characters, numbers, symbols, figures, or other textual information that is ... stored in an electronic or other medium that is retrievable in a perceivable form.”⁴⁵ The term writing “includes stored or transmitted electronic data, electronic transmissions, and reproductions of writing; and ... does not include sound or video recordings of speech other than transcriptions that are otherwise writings.”⁴⁶ Signature is defined as “any symbol executed or adopted by a person with the present intention to authenticate a writing and [u]nless the context requires otherwise the term includes a digital signature, an electronic signature, and a facsimile of a signature.”⁴⁷ Electronic transmission is defined as “a form of communication that (A) does not directly involve the physical transmission of paper; (B) creates a record that may be retained, retrieved, and reviewed by the recipient; and (C) may be directly reproduced in paper form by the recipient through an automated process.”⁴⁸

The TBOC requires certain instruments to be signed, including certificates of formation and other documents filed with the Secretary of

⁴⁵ TBOC § 1.002(89).

⁴⁶ *Id.*

⁴⁷ *Id.* § 1.002(82).

⁴⁸ *Id.* § 1.002(20-b).

State and Director and shareholder written consents.⁴⁹ The provisions of the TBOC referred to above allow an opinion giver to establish that a document has been signed for purposes of the TBOC based on a physical paper document manually signed that has been faxed or converted to PDF or similar format and electronically transmitted by email or other transmission involving electronic devices, without a requirement that the recipient be in possession of or in the presence of the originally signed document. The opinion giver also can determine that a document that bears no manual signature and that may exist only in electronic or digital form nevertheless has been signed if the document bears a symbol adopted by the signing party with the intention of authenticating the document,⁵⁰ including a signature by stylus onto an electronic device, an image of the signing party's tangible signature reproduced on the document, and a signature provided using a commercial process (Adobe Sign, DocuSign, etc.) The Secretary of State does not require manually signed original copies for filing and will accept copies and electronically signed documents.⁵¹

Validity of and reliance on signatures in electronic form are based not only on the TBOC but also on a combination of federal law and other state law. With the passage of the Texas Uniform Electronic Transactions

⁴⁹ Section 3.004(b) of the TBOC requires the certificate of formation of a Corporation to be signed by each organizer of the Corporation. Sections 3.054, 3.060(b), and 20.001 of the TBOC contain additional provisions for the signature of filing instruments. Section 6.201(b) of the TBOC calls for the signing of written consents. As authorized under Section 6.205 of the TBOC, a Corporation may use electronic transmission of consents, including the shareholder and Director consents referred to in this report, unless these consents are not permitted by the Corporation's certificate of formation or bylaws (or a Section 21.101 Shareholders' Agreement). For further information on Section 21.101 Shareholders' Agreements, see *infra* note 179.

⁵⁰ TBOC § 1.002(82).

⁵¹ Texas Secretary of State, *Filing & Other General FAQs* <https://www.sos.state.tx.us/corp/filingandothergeneral FAQs.shtml#SD2>. Section 3.001(d) of the TBOC provides that filing of the original certificate of formation with the Secretary of State is conclusive evidence of the satisfaction of all conditions precedent to the Corporation's formation, which would include signing the certificate of formation.

Act (“**TUETA**”)⁵² in 2001, Texas adopted⁵³ the Uniform Electronic Transactions Act (“**UETA**”).⁵⁴ The relevant federal statute, the Electronic Signature in Global and National Commerce Act⁵⁵ (known as “**E-SIGN**”), provides essentially the same rules as UETA and preempts state laws that are not consistent with UETA.⁵⁶ The effect of these statutes is that every jurisdiction in the United States, including Texas, has substantially the same rules for signatures provided in electronic form.⁵⁷ These statutes provide that when parties agree to conduct a transaction by electronic means, the electronic signatures ordinarily will have legal effect.⁵⁸ The

⁵² TEX. BUS. & COMM. CODE §§ 322.001–.021 (LEXIS, 2025).

⁵³ Op. Tex. Att’y Gen. No. GA–0228 (2004) at 1.

⁵⁴ Forty-nine states, the District of Columbia, and the Virgin Islands have adopted UETA, with Washington state being the latest, effective July 28, 2019. New York has not adopted UETA (see <https://www.uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034>) but has enacted a separate statute. Although New York’s statute is somewhat different from UETA, New York law on electronic signatures is substantially the same as that of Texas (and every other U.S. jurisdiction) by virtue of the combination of state and federal law. *TriBar Comment on Electronic Signatures* at 2254.

⁵⁵ 15 U.S.C. §§ 7001–7006 (LEXIS, 2025).

⁵⁶ *Id.* § 7002(a).

⁵⁷ *TriBar Comment on Electronic Signatures* at 2254. See also, GLAZER § 9.4.2, at 299 & n.28 (Supp. 2024).

⁵⁸ TEX. BUS. & COMM. CODE § 322.007(a), (d) (LEXIS, 2025) (providing that a signature may not be denied legal effect or enforceability solely because it is in electronic form and that, if a law requires a signature, an electronic signature satisfies the law). TUETA and E-SIGN apply to transactions between consenting parties, where “transaction” means an action or set of actions between two or more persons relating to the conduct of business or commercial affairs. *Id.* § 322.002(15) (LEXIS, 2025); 15 U.S.C. § 7006(13) (LEXIS, 2025). E-SIGN further limits its coverage to transactions in or affecting interstate or foreign commerce. 15 U.S.C. § 7001(a) (LEXIS, 2025). TUETA also covers governmental transactions. TEX. BUS. COMM. CODE § 322.002(15), § 322.017 (LEXIS, 2025). E-SIGN also covers consumer transactions. 15 U.S.C. §§ 7001(c), 7006(13) (LEXIS, 2025). Neither TUETA nor E-SIGN contains choice of law provisions. TUETA provides that “[u]nless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is deemed to be sent from the sender’s place of business and to be received at the recipient’s place of business.” TEX. BUS. &

agreement of the parties to conduct a transaction by electronic means may be express or can be implied from all the circumstances broadly construed, including the conduct of the parties.⁵⁹ For example, the exchange of electronically signed documents is a sufficient indication of a party's intent⁶⁰ unless a document specifically requires a manual signature or unless the document is excluded from coverage of these statutes, such as a negotiable instrument governed by Article 3 of the UCC.⁶¹ Signatures in electronic form may be provided in emails, PDF's, and faxes or may be provided using a commercial process such as Adobe Sign or DocuSign so long as, in each case, the person providing or creating the signature does so with the intention of executing or authenticating the document.⁶² As with written signatures on paper, as a matter of customary practice an opinion giver may assume, without so stating, the genuineness of electronic signatures.⁶³

COMM. CODE § 322.015(d) (LEXIS, 2025). TUETA and UETA allow parties to vary the effect of the statute by agreement. *Id.* § 322.005(d).

⁵⁹ TEX. BUS. & COMM. CODE § 322.005(b) (LEXIS, 2025) (“This chapter [TUETA] applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties’ conduct.”).

⁶⁰ *TriBar Comment on Electronic Signatures* at 2254.

⁶¹ Note that TUETA and E-SIGN do not apply to agreements to the extent they are governed by the UCC, except for agreements governed by Articles 2 (sales of goods) and 2A (leases of goods) of the UCC. They also do not apply to other matters not relevant to this report, such as wills, codicils and testamentary trusts, and documents produced by court reporters or governed by Texas Supreme Court rules. TEX. BUS. & COMM. CODE §§ 322.003(b), (e) (LEXIS,2025); 15 U.S.C. § 7003(a). (LEXIS, 2025). A negotiable instrument requires a manual signature on a physical document to be negotiable, although an electronic signature on the instrument is sufficient to create an enforceable contract that is nonnegotiable. *TriBar Comment on Electronic Signatures* at 2254.

⁶² *TriBar Comment on Electronic Signatures* at 2254.

⁶³ *Id.* at 2254; GLAZER § 9.4.2, at 300 (Supp. 2024) (“UETA and E-SIGN do not validate forged signatures The authenticity of [an electronic] signature, however, is not an opinion problem because due execution opinions are based on a factual assumption, which may be unstated, that signatures are genuine.”).

For a discussion of opinions on due execution and delivery of Transaction Documents, including delivery by electronic means, see Section 3.3(a) (*Meaning of a Duly Executed and Delivered Opinion*) below.

Section 1.6 Opinions on Corporations Formed Prior to the TBOC.

In addition to this report, *Texas Supplement No. 5* provides guidance regarding corporate status, good standing, and corporate power opinions with respect to existing Corporations governed by the BCA before effectiveness of the TBOC.⁶⁴ In brief, the Committee concludes in *Texas Supplement No. 5* that opinions that could have been given under the BCA can continue to be given on a Pre-Code Entity even though the Corporation has not yet modified its formation documents to conform to the TBOC (such as by changing the name of its organizational filing from articles of incorporation to certificate of formation or otherwise adopting TBOC terminology). It should be noted that *Texas Supplement No. 5* does not address any other opinions that may relate to a Corporation, including those relating to a Corporation's issuance of its shares or its capitalization, as discussed in Chapter IV of this report.⁶⁵

An opinion giver should consult *Texas Supplement No. 5* for further guidance when giving an opinion on a Corporation formed prior to the effectiveness of the TBOC.

For discussions on giving duly executed opinions when signatures are electronic, see generally *TriBar Comment on Electronic Signatures* and GLAZER § 9.4.2, at 299–301 (Supp. 2024).

⁶⁴ See *supra* note 9. Note that the “corporate power” opinion, as that term is used above and in this report, is referred to as the “corporate power and authority” opinion in *Texas Supplement No. 5* at 2 n.3.

⁶⁵ For a discussion of differences between the TBOC and the BCA relating to the issuance of a Corporation's shares, see *infra* notes 220 and 289.

CHAPTER II

CORPORATE STATUS OPINIONS

Opinions involving Corporations frequently address their formation, existence, and good standing. Illustrative language for each of these opinions, together with a discussion of their meaning and the work required to support them, are set forth below.

This Chapter II also addresses opinions often requested as to the authorization to transact business and the good standing in Texas of corporations formed outside of Texas.

Section 2.1 Opinions on Corporate Status: A Valid Existence Opinion.

Illustrative Opinion Form: The Company is a corporation validly existing under the laws of the State of Texas.

Opinion practice has developed so that opinion recipients regularly accept opinions as to a Corporation’s valid existence and good standing on the date the opinions are given, without receiving opinions expressly addressing the Corporation’s original formation (*i.e.*, that the Corporation has been duly incorporated or duly organized).⁶⁶ Although validly existing and good standing opinions are separate opinions with different meanings, they are often given together when addressed by the same opinion giver.⁶⁷ Because their meanings and the work required to

⁶⁶ See, e.g., GLAZER § 6.2.1, at 199–200 (Supp. 2024); *TriBar 1998 Report* § 6.1.3(b), at 644 (“In many transactions opinion recipients in recent years have been willing to accept (in lieu of an incorporation opinion) a stand-alone opinion that simply states that the Company is ‘validly existing as a corporation under the law of’ the jurisdiction in which it was incorporated, without also referring to ‘incorporation’ or ‘organization.’”); CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 41 (“[t]he Committee believes that opinion practice in California is evolving away from providing ‘duly incorporated’ opinions, particularly for older corporations, to providing a ‘validly existing’ opinion”). For a discussion of the “due incorporation” opinion, see *infra* Section 2.3 (*Due Incorporation Opinion*).

⁶⁷ The following is an illustrative form of opinion when valid existence and good standing opinion are given together:

The Company is a corporation validly existing and in good standing under the laws of the State of Texas.

give them differ, this Section 2.1 discusses a valid existence opinion, and Section 2.2 discusses a good standing opinion.

Subsection 2.1(a) Meaning of a Valid Existence Opinion. A valid existence opinion means that the Corporation exists as a *de jure* Corporation under the TBOC.⁶⁸ Section 3.001(d) of the TBOC addresses the formation and existence of a Corporation as follows:

Except in a proceeding by the state to terminate the existence of a filing entity [including a Corporation], an acknowledgment of the filing of the certificate of formation issued by the filing officer [*i.e.*, the Secretary of State] is *conclusive evidence* of:

- (1) the formation and existence of the filing entity;
- (2) the satisfaction of all conditions precedent to the formation of the filing entity; and

⁶⁸ See, e.g., GLAZER § 6.2.1, at 200–01 (Supp. 2024); *TriBar 1998 Report* § 6.1.3, at 643; CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 41. A *de jure* corporation is a corporation that has been formed in compliance with applicable law. In contrast, under Texas common law, a corporation may exist as a *de facto* corporation if a “colorable attempt” to form a corporation was made even though the attempt falls short of the formation of a *de jure* corporation. See, e.g., *Payne v. Backen*, 115 S.W.2d 903, 904 (Tex. 1938). As commonly understood in modern usage and as used in this report, a *de jure* Corporation is a Corporation that has been formed in compliance with applicable law in the sense that the statutorily mandated process for incorporation has been completed by the filing of the certificate of formation or similar instrument by the state official or agency authorized to do so, notwithstanding that there may be some defect with respect to the steps in the process or contents of the filing and that the defect may be grounds for the state to attack the corporate existence in a direct action. Thus, as used in this report, a *de jure* Corporation refers to a Corporation formed under the TBOC (or BCA) by acceptance of the corporation’s certificate of formation (or articles of incorporation, if formed under the BCA) in the Secretary of State’s filing system, and as to which the Secretary of State issued an acknowledgment of filing (or certificate of incorporation, if formed under the BCA).

- (3) the authority of the filing entity to transact business in this state.⁶⁹

Furthermore, Section 4.005(d) of the TBOC addresses the existence of a Corporation as follows:

Subject to any qualification stated in the certificate, a certificate issued by the secretary of state stating that a domestic filing entity is in existence may be relied on as conclusive evidence of the entity's existence.

Based on current opinion practice, a valid existence opinion is given only on a *de jure* corporation, and the opinion may be given as to a Corporation based solely on Section 3.001(d) and Section 4.005(d) of the TBOC and the work described in Subsection 2.1(b) (*Work Required to Support a Valid Existence Opinion*).⁷⁰ The Committee took the position in the *Texas 1992 Report*, based on then-prevailing practice, that an opinion could be given as to the “existence” of a *de facto* corporation by omitting the word “validly” from the opinion.⁷¹ However, based on current opinion practice, the Committee is no longer of the view that an existence opinion can be given as to what is merely a *de facto* Corporation. Under current practice, the validly existing opinion means the Corporation is a *de jure* Corporation whether or not the adverb “validly” or a variant of the word “valid” is

⁶⁹ TBOC § 3.001(d) (emphasis added). The term “filing entity” in the quoted language is defined in the TBOC to include a Corporation. *Id.* § 1.002(22).

For those who also give opinions on matters of Delaware corporate law, it is important to note the difference between the Texas rule under Section 3.001(d) of the TBOC and the rule in Delaware. Unlike the TBOC, Section 105 of the Delaware General Corporation Law provides that filing constitutes *prima facie*, but not *conclusive*, evidence of certain specified matters relating to a certificate of incorporation and other instruments that have been filed in the office of the Delaware Secretary of State. DEL. CODE ANN. tit. 8, § 105 (LEXIS, 2025).

⁷⁰ See *TriBar 1998 Report* 6.1, at 641 (“The corporate status opinion passes on the Company’s *de jure* status as a corporation. Thus it could not be rendered in standard form if the Company is only a *de facto* corporation or a corporation-by-estoppel.”). For the meaning of a *de facto* corporation, see *supra* note 68.

⁷¹ *Texas 1992 Report* at 83.

included or omitted. If the opinion giver wishes to limit the meaning of the opinion, it should do so by an express statement of the limitation.⁷²

Based on the “conclusive evidence” rule in Section 3.001(d) and Section 4.005(d) of the TBOC, for the purposes of giving an opinion on the valid existence (as well as the due incorporation⁷³) of a Corporation:

- (A) an acknowledgment of the filing of the Corporation’s certificate of formation and the Corporation’s existence issued by the Secretary of State is *conclusive evidence* of the matters referred to above in clauses (1) through (3) of Section 3.001(d) and Section 4.005(d) and, therefore, that the Corporation validly exists as a *de jure* Corporation;⁷⁴
- (B) subject to the succeeding clause (C), an opinion giver is entitled to rely on the provisions of Section 3.001(d) and Section 4.005(d) of the TBOC without so stating;⁷⁵ and
- (C) if, however, the Corporation’s certificate of formation on its face states a circumstance under which the Corporation has ceased to exist (such as a limitation on corporate existence to a term of years that has passed), the opinion giver should not give a valid existence opinion until the problem has been corrected by appropriate corporate action and by filing an amendment to the certificate of

⁷² *TriBar 1998 Report* at 641 (limitation of an opinion framed in customary terms needs to be clear, ordinarily by an express statement; omission of the adverb “validly” from, for example, the validly existing opinion does not adequately communicate any limit on the meaning of the opinion).

⁷³ *See infra* Section 2.3 (*Due Incorporation Opinion*).

⁷⁴ If the Secretary of State issues a certificate of fact as to the filing of a Corporation’s certificate of formation and the existence of the Corporation, then the opinion giver may rely on that certificate to give an opinion that the Corporation validly exists as a *de jure* corporation. However if the certificate of fact states that the Corporation no longer exists or that the Secretary of State has no record of the Corporation, then a valid existence opinion should not be given even if the Corporation would otherwise be treated as a *de facto* corporation. *See* GLAZER § 6.2.1, at 200–03 (Supp. 2024).

⁷⁵ *But see* GLAZER § 6.2.2, at 203–05 (Supp. 2024) (customary practice requires review of a corporation’s charter documents as certified by the applicable secretary of state to give a valid existence opinion).

formation pursuant to Sections 3.051 through 3.063 of the TBOC, by filing a certificate of correction under Sections 4.101 through 4.106 of the TBOC, or by any other process authorized by law.⁷⁶

Subsection 2.1(b) Work Required to Support a Valid Existence Opinion. Because of the “conclusive evidence” rule set forth in Section 3.001(d) and Section 4.005(d) of the TBOC and the practice that has developed, as a matter of customary practice an opinion that an entity is a Corporation or that a Corporation validly exists may be based on a review of:

- (1) a certificate of fact, issued by the Secretary of State and dated as of or shortly before the date of the opinion letter, confirming the filing of the Corporation’s certificate of formation with the Secretary of State and its existence as a corporation in Texas;⁷⁷ and
- (2) a Certified Certificate of Formation.⁷⁸

⁷⁶ See *infra* text accompanying notes 82 and 86–87 for discussions of non-public actions that ordinarily need not be investigated for a valid existence (or due incorporation) opinion but do need to be considered, as described in note 87, when recognized as applicable by the opinion preparers.

⁷⁷ The form of certificate of fact currently used by the Secretary of State complies with Section 3.001(d) and Section 4.005(d) of the TBOC; in the current form, the Secretary of State certifies that (i) a particular entity’s certificate of formation was filed in the Office of the Secretary of State on a specified date and (ii) the entity’s status in Texas is “in existence.” See *supra* note 74.

Although officer’s certificates and representations of the Corporation may only be relied on as to matters of fact, an opinion giver may rely on a *legal* conclusion in a certificate of an appropriate government official. *Statement of Opinion Practices* §§ 5.2, 5.4; see also *supra* Section 1.2 (*Factual Matters; Reliance on Certificates, Representations, and Assumptions; Opinions Speak as of the Opinion Letter Date Unless Otherwise Indicated*). Although titled a “certificate of fact,” the Secretary of State’s certificate addresses more than just facts and may be relied on as to all of the matters it covers.

⁷⁸ GLAZER § 6.2.2, at 203 (Supp. 2024) (“As a matter of customary practice, a stand-alone opinion that the company is validly existing as a corporation may be based solely on a review of the company’s charter and all amendments and restatements, as certified by the Secretary of State as being on file in his office

In addition to the foregoing, many opinion givers choose to obtain a certificate of fact early in a transaction to confirm the Corporation's existence well before closing, as well as an additional certificate of fact to "bring down" the information on the date of the opinion letter. Further, because opinion letters speak as of their date,⁷⁹ many opinion givers also obtain a "bring down" certificate of fact on the date of the opinion letter even when they have obtained a certificate of fact shortly before that date. Some opinion givers also obtain, in addition to a certificate of fact, an officer's certificate or other confirmation from the Corporation that no corporate or other known non-public action has occurred to commence, or cause, the cessation of the Corporation's existence.⁸⁰

The opinion preparers should review the certificate of formation (including amendments) to confirm that the Corporation is the one to which the certificate of fact and certificate of formation relate and that the certificate of formation does not contain a provision (such as a limitation on corporate existence to a term of years⁸¹) that has resulted in the termination of the Corporation's existence. In the event of such a defect, a valid existence opinion cannot be given notwithstanding the issuance of the certificate of fact by the Texas Secretary of State and the provisions of the "conclusive evidence" rule set forth in Section 3.001(d) and Section 4.005(d) of the TBOC.

In giving this opinion, an opinion giver is not required to review corporate minute books or other records or an officer's certificate as to such matters.⁸²

and on a Secretary of State's certificate ... confirming the company's legal existence.") For a discussion of how some opinion givers limit the work they do to support this opinion, see *infra* notes 88–90 and accompanying text.

⁷⁹ See *supra* note 25 and accompanying text. For a discussion of opinion practice relating to "bringdowns" of Secretary of State certifications of certificates of formation, see *supra* Glossary of Terms (definition of "*Certified Certificate of Formation*").

⁸⁰ See *infra* note 87 and accompanying text.

⁸¹ Under the TBOC, a domestic entity (including a Corporation) exists perpetually unless otherwise provided in the certificate of formation of the entity. TBOC § 3.003.

⁸² See GLAZER § 6.2.2 (Supp. 2024) (quoted *supra* note 75); *TriBar 1998 Report* § 6.1.3(b), at 645. But see *supra* Glossary of Terms (definition of "*Certified*

The Committee concluded in the *Texas 1992 Report*, based on then opinion practice, that to give a valid existence opinion an opinion giver should confirm that no involuntary dissolution proceedings had been commenced against the Corporation by the State of Texas.⁸³ Currently, in some circumstances, the TBOC authorizes the Texas attorney general to file an action against a Corporation in the name of the State of Texas seeking the termination of a Corporation's existence.⁸⁴ In addition, the Secretary of State may terminate a Corporation's existence after a finding that certain specified deficiencies have not been timely cured and providing notice to the Corporation.⁸⁵ However, notwithstanding the aforementioned provisions of the TBOC and the conclusion in the *Texas 1992 Report*, under current customary practice a valid existence opinion on a Corporation does *not* require a confirmation that (i) the attorney general has not commenced termination proceedings against the Corporation or (ii) the Corporation has not received a notice from the Secretary of State addressing deficiencies under Section 11.251(b) of the TBOC because neither are matters of public record.⁸⁶ The opinion also does not address non-public action taken by the Corporation. However, in giving a valid existence opinion on a Corporation, some opinion givers elect to include in their backup officer's certificate a statement to the effect that the Corporation has not taken any action or received any notice, which

Certificate of Formation") regarding the use of officer's certificates as to certificates of formation or as "bring-downs" of Secretary of State certifications; and see also *infra* note 87 and accompanying text, regarding officer's certificates that some opinion givers choose to obtain as to certain actions and notices relating to winding up and termination.

⁸³ *Texas 1992 Report* at 81, 83. Chapter 11 of the TBOC does not use the term "dissolution" from its predecessor statute, but instead sets forth the process of "winding up and termination" of a Corporation (and other entities).

⁸⁴ TBOC § 11.303.

⁸⁵ *Id.* § 11.251.

⁸⁶ NORTH CAROLINA 2004 REPORT at 27 (opinion that a company "is a corporation" means that, among other things, the company has not "ceased to exist, for example through merger or dissolution"); PENNSYLVANIA REPORT at 20 (a valid existence opinion can be given notwithstanding the existence of facts that would enable the state to bring an action to revoke the charter); see also MICHIGAN REPORT app. B (Aug. 1, 1991 Report) at 17 n.39 (the term "'validly existing' means that the corporation has not in fact been dissolved").

would include a notice of deficiencies, that could result in the Corporation's winding up and termination.⁸⁷

Instead of performing the work described in both steps (1) and (2) set out in the first paragraph of this Subsection 2.1(b), many opinion givers expressly state that their valid existence opinion is based solely on step (1) (*i.e.*, their review of a certificate of fact issued by the Secretary of State confirming the Corporation's existence⁸⁸). This approach is often taken, for example, in commercial loan transactions. While these opinions may be of limited value to their opinion recipients when relevant provisions of the certificates of formation have not been reviewed,⁸⁹ if an opinion recipient is willing to accept this express limitation, this approach can be followed, because under customary practice customary diligence can be

⁸⁷ See, e.g., paragraph (e) of the illustrative officer's certificate in Annex A. See also CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 41 (for a valid existence opinion, opinion givers customarily review the minute book to ensure no dissolution proceedings have been commenced and an officer's certificate); FLORIDA REPORT at 42 and Form E-2 (to give an existence opinion, an opinion giver should confirm that no steps leading to the corporation's dissolution have been taken and that the corporation has not received notification of any action of the Florida Department of State to administratively dissolve the corporation, with the recommended practice being a certificate from the corporation). For a discussion of reliance on an officer's certificate, see *supra* notes 23–28 and accompanying text.

If the opinion preparers are aware of any of the factual matters referred to in the text in clauses (i) and (ii) or of any action taken by the Corporation that could result in the Corporation's winding up and termination, they will need to consider, depending upon the circumstances, whether the opinion can be given and what qualifications, disclosures or other appropriate action, if any, may be needed.

⁸⁸ For a discussion of the wording of a certificate of fact issued by the Secretary of State, see *supra* note 77.

⁸⁹ See *supra* text accompanying note 76. The value of such an opinion to the recipient may be even more limited when the opinions being given extend beyond existence and cover additional matters where review of the Corporation's current certificate of formation is required—for example (as discussed in Section 3.1 (*A Corporate Power Opinion*)) when an opinion is being given on the Corporation's power to execute, deliver, and perform its obligations under the Transaction Documents.

varied by an express statement in the opinion letter or by an understanding with the opinion recipient or its counsel.⁹⁰

Section 2.2 Opinions on Corporate Status: A Good Standing Opinion.

*Illustrative Opinion Form: The Company is a corporation in good standing under the laws of the State of Texas.*⁹¹

Subsection 2.2(a) Meaning of a Good Standing Opinion. An opinion on the status of a corporate entity frequently addresses its good standing in its state of formation. The meaning, however, of good standing varies from state to state depending on differences in state law and the wording of certificates available from government officials.⁹² In Texas, a good standing opinion as to a Corporation means that the Corporation is in good standing for state franchise tax purposes as determined under the rules and procedures of the Texas Comptroller of Public Accounts (the “**Comptroller**”). Currently, based on the Comptroller’s rules and

⁹⁰ *Statement of Opinion Practices* § 10 (quoted *supra* note 38); see also GLAZER § 6.2.2 (Supp. 2024) quoted *supra* note 78.

⁹¹ As discussed earlier, the good standing and valid existence opinions are often given together. See *supra* note 67 (which provides an illustrative opinion form for when those opinions are given together) and accompanying text.

⁹² GLAZER § 6.5, at 213 (Supp. 2024) (“Because the state-specific nature of the opinion is so well understood, opinion preparers who give an opinion on a corporation’s good standing in its state of incorporation are not expected to explain in their opinion letter what the opinion means. Instead, the burden is on the recipient to inquire if it has any questions or concerns When good standing certificates are available in a state [from state officials], a good standing opinion is generally understood to cover the matters (and only the matters) addressed by the certificates that lawyers giving an opinion on a corporation’s good standing in that state customarily obtain to support the opinion.”); *TriBar 1998 Report* § 6.1.4, at 645 (“good standing” is understood as a matter of customary practice to cover the matters in the certificates of government officials customarily obtained by lawyers to support the opinion). See generally GLAZER § 6.5, at 213–16 (Supp. 2024).

procedures, the good standing opinion in Texas means the entity's right to transact business in Texas is "active."⁹³

The Comptroller's office responds to inquiries regarding franchise tax account status by addressing the status of a taxable entity's right to transact business in Texas through an online search mechanism that is available on the Comptroller's website. In response to such an online search for a specific taxable entity, the Comptroller's website produces a printable page bearing the heading "Franchise Tax Account Status" and dated as of a specified date and time (such a printable page, "**Statement of Franchise Tax Account Status**"). If a taxable entity's right to transact business in Texas has not been terminated as a result of the entity's failure to file a franchise tax report or to pay a franchise tax, the Statement of Franchise Tax Account Status shows the entity's right to transact business in Texas is "active" as of the date specified in the Statement.

A good standing opinion in Texas does not mean that all franchise tax filing requirements have been met and no franchise tax is due. The opinion may be given even when the Corporation is delinquent in filing its tax reports or paying its franchise taxes and the Comptroller may even have sent a delinquency notice to the Corporation. This is because until the Comptroller forfeits the Corporation's right to transact business, the Statement of Franchise Tax Account Status will continue to show that the Corporation's right to transact business in Texas is "active." Although not necessary, some opinion givers state in their opinion letters that they are relying solely on a Statement of Franchise Tax Account Status, dated as of a specified date, from the Comptroller's website.⁹⁴

⁹³ *Texas Supplement No. 6* at 204–205. A certificate of fact issued by the Secretary of State confirming the existence of a Corporation does not address its good standing. *See supra* note 77 and accompanying text.

⁹⁴ Prior to May 5, 2013, the Comptroller issued a Certificate of Account that meant that all franchise tax filing requirements had been met and no franchise tax was due. This former Certificate also contained a statement that the Certificate was valid through a specified future date on which the entity's next franchise tax report would be due. However, since May 5, 2013, the Statement of Franchise Tax Account Status available on the Comptroller's website does not mean that all franchise tax filing requirements have been met and that no franchise tax is due, and it does not specify that the Statement is valid through a future date. TEX. TAX CODE ANN. § 171.251 requires the Comptroller to forfeit a Corporation's corporate privileges if the Corporation (a) does not file, in accordance with Chapter 171 of the TEX. TAX CODE ANN. and within forty-five days after the date

Subsection 2.2(b) Work Required to Support a Good Standing Opinion. In light of the Comptroller’s current procedures, as a matter of customary practice an opinion that a Corporation is in good standing under the laws of the State of Texas may be based on the following:⁹⁵

- (1) use of the Comptroller’s online search mechanism to determine the status of the Corporation’s franchise tax account as of or shortly before the date of the opinion letter; and
- (2) if the resulting Statement of Franchise Tax Account Status states that the Corporation’s status is “active” as of

on which the Comptroller mails a notice of forfeiture to the taxable entity, a report required by Chapter 171, or (b) does not pay, within 45 days after the date on which the Comptroller mails a notice of forfeiture to the taxable entity, a tax imposed by Chapter 171 or a penalty imposed by Chapter 171 relating to such tax. Under this Section of the TEX. TAX CODE ANN. there is a 45-day gap period when the status of a Corporation can be “active” but the Corporation is not in compliance with the TEX. TAX CODE ANN.

As indicated in the text, as a matter of customary practice a good standing opinion as to a Corporation means only that an online search on the Comptroller’s website shows that the Corporation’s status is “active” as of or shortly before the date of the opinion letter.

For those opinion givers who want to state expressly in their opinion letters that they are relying solely on a Statement of Franchise Tax Account Status when giving an opinion on good standing, the following illustrative opinion qualification is based on sample language provided in *Texas Supplement No. 6*:

In rendering our opinion in paragraph [●] above as to the good standing of the Company in Texas, we have relied solely upon a Statement of Franchise Tax Account status dated [●] obtained through the website of the Office of the Comptroller of Public Accounts of Texas, which statement shows that, as of the date thereof, the right of the Company to transact business in Texas is “active”.

See generally *Texas Supplement No. 6* for further discussion of the Comptroller’s 2013 policy and procedure changes with respect to good standing of Corporations and other taxable entities.

⁹⁵ As discussed *infra* Section 2.5 (*Opinion on Authorization to Transact Business and Good Standing of a Foreign Corporation in Texas*), these procedures apply as well to an opinion on the good standing of a non-Texas corporation doing business in Texas.

or shortly before the date of the opinion letter, reliance on that Statement without further inquiry and without (i) obtaining any additional certificate or other writing (other than a certificate of fact issued by the Secretary of State showing that the Corporation's status in Texas is "in existence") or (ii) taking any related assumption or qualification in the opinion.

In addition to the foregoing, some opinion givers choose to obtain an initial Statement of Franchise Tax Account Status from the Comptroller's website early in a transaction to determine if any franchise tax issues exist requiring attention prior to closing. Although it is not necessary to do so, both because opinion letters speak as of their date⁹⁶ and because of the ease of doing a search, opinion givers often obtain a "bring down" Statement on the date of the opinion letter even when their earlier search of the Comptroller's website was conducted shortly before that date. Those opinion givers that do not do such a "bring-down" search on the date of the opinion letter may instead rely on representations dated on or as of the opinion date, in the Transaction Documents or an officer's certificate, to "bring down" the Corporation's franchise tax status to the date of the opinion letter. Some opinion givers, even when they do perform a "bring-down" search on the date of the opinion letter, rely as well on representations, also dated on or as of the opinion date, in the Transaction Documents or an officer's certificate.

Section 2.3 A Due Incorporation Opinion.

Illustrative Opinion Form: The Company is a corporation duly incorporated,⁹⁷ validly existing, and in good standing under the laws of the State of Texas.⁹⁸

⁹⁶ See *supra* note 25 and accompanying text.

⁹⁷ The TBOC refers to the "formation" of filing entities, including Corporations. TBOC § 3.001. Notwithstanding the TBOC's use of the term "formation" for all filing entities, based on the historical usage and usage in other states and to avoid confusion, the Committee recommends that an opinion on due incorporation, if given, should continue to use the phrase "duly incorporated" rather than "duly formed."

⁹⁸ In the Committee's experience, an opinion that a Corporation has been duly incorporated is typically given together with an opinion as to the valid existence and good standing of the Corporation, which is why all three are included in the

Subsection 2.3(a) Meaning of a Due Incorporation Opinion.

As a matter of customary practice an opinion that a corporate entity has been “duly incorporated” means that the steps required to form the entity were properly taken under the corporation statute in effect at the date of its incorporation.⁹⁹ Under the TBOC, formation of a Corporation requires that its certificate of formation (i) be signed by each organizer of the Corporation as required by Section 3.004(b) of the TBOC, (ii) comply with the requirements of Sections 3.005 and 3.007 of the TBOC, and (iii) be filed with the Secretary of State in accordance with Chapter 4 of the TBOC.¹⁰⁰ However, as discussed above in Section 2.1 (*Valid Existence Opinion*), Section 3.001(d) of the TBOC provides (and Article 3.04 of the BCA before it provided) that an acknowledgment by the Secretary of State of the filing of a certificate of formation, without more, is *conclusive* evidence of (1) the formation and existence of a Corporation and (2) the satisfaction of all conditions precedent to the formation of a Corporation.¹⁰¹ However, for a Corporation formed prior to enactment on September 6, 1955 of the BCA that is, therefore, not entitled to the benefit of these conclusive evidence provisions, the opinion preparers should examine the requirements of the law in effect at the date of its incorporation.¹⁰²

Subsection 2.3(b) Work Required to Support a Due Incorporation Opinion. Although customary practice is clear as to the meaning of a due incorporation opinion, state opinion reports differ as to the work required to support the opinion, with the work required often

illustrative opinion form. The meanings of the valid existence and good standing opinions are the same as those discussed in Section 2.1 (*Corporate Status Opinions: A Valid Existence Opinion*) and 2.2 (*Corporate Status Opinions: A Good Standing Opinion*).

⁹⁹ See, e.g., GLAZER § 6.3, at 205 (Supp. 2024); *TriBar 1998 Report* § 6.1.1, at 642; CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 40.

¹⁰⁰ TBOC § 3.001(a).

¹⁰¹ *Id.* § 3.001(d) and § 4.005(d). The conclusive evidence rule under Section 3.001(d) applies “except in a proceeding by the state to terminate the existence of a filing entity.”

¹⁰² See *supra* note 9 for a discussion of the history of Texas corporation laws. For a Corporation formed before the effectiveness of the BCA, it may be difficult if not impossible to find a copy of the Texas corporation statute in effect at the date of the incorporation and if so, opinion preparers should consider what qualifications may be needed to give the duly incorporated opinion.

depending on the evidentiary value the state's statute accords its secretary of state's or other government official's certification as to the existence of the company. Opinion reports relating to the laws of some states provide that a due incorporation opinion requires a review by the opinion preparers of the applicable law and the company's original charter document (and potentially other records) to confirm compliance with the requirements of the corporation statute at the time of incorporation.¹⁰³ However, under other opinion reports relating to the laws of states where the secretary of state's or other appropriate government official's certification serves as *conclusive* evidence of existence, as a matter of customary practice the work required to give the opinion is limited to a review by the opinion preparers of that governmental certification together with the company's charter document.¹⁰⁴

Because of the conclusive evidentiary value accorded by Sections 3.001(d) and 4.005(d) of the TBOC (and, prior to the TBOC, Article 3.04 of the BCA¹⁰⁵), as a matter of customary practice a due incorporation

¹⁰³ See, e.g. GLAZER § 6.3, at 208 (Supp. 2024); *TriBar 1998 Report* § 6.1.1, at 642; PENNSYLVANIA REPORT at 14.

¹⁰⁴ See, e.g., CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 40; WASHINGTON REPORT at A-11 n.52 (no meaningful distinction in diligence required for existence and due incorporation opinions because certificate of existence conclusively evidences a corporation's existence and due incorporation); see also FLORIDA 2021 SUPPLEMENT at 3 (incorporated or duly incorporated opinion can be based solely on the Florida corporate statute and a certificate from the Department of State confirming the articles of incorporation have been filed); NORTH CAROLINA REPORT § 6.0 a., c., at 31-32 (opinion that a company is duly incorporated "may be given solely in reliance on a Certificate of Existence as of the date of the Certificate" [which states the company is "duly incorporated under the laws of this State"]).

¹⁰⁵ Article 3.04 of the BCA provided as follows when the *Texas 1992 Report* was published:

Upon the issuance of the certificate of incorporation [by the Texas Secretary of State], the corporate existence shall begin, and such certificate of incorporation shall be conclusive evidence that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this Act, except as against the State in a proceeding for involuntary dissolution.

1955 Tex. Gen. Laws 239, 264 (repealed eff. Jan. 1, 2010).

opinion as to a Corporation may be based, as in other states with similar conclusive evidence rules,¹⁰⁶ on a review of the Corporation's charter document (its certificate of formation in Texas) and the certificate of fact issued by the Secretary of State confirming the Corporation's existence. Opinion givers are not required, for example, to compare the original certificate of formation of the Corporation with the corporate statute in effect on the date of filing of the original certificate to confirm compliance with that statute.¹⁰⁷ Instead, as a matter of customary practice a due incorporation opinion for a Corporation may be based on the same work required to support a valid existence opinion as described above in Section 2.1(a) (*Meaning of a Valid Existence Opinion*).¹⁰⁸

¹⁰⁶ Unlike Section 4.005(d) of the TBOC, the conclusive evidentiary value accorded by Section 3.001(d) of the TBOC *does* have an exception for proceedings "by the state to terminate the existence of a filing entity." However, other states with similar limitations have taken the same position taken in this report that as a matter of customary practice a due incorporation opinion may be based solely on a review of a corporate entity's charter document and certificate of existence, in reliance upon the conclusive evidentiary standard in that state's statute despite a statutory exception for specified state actions. *See, e.g., CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT* at 40–41, citing CAL. CORP. CODE § 209 (opinion givers rely solely on a certified copy of the articles to deliver the duly incorporated opinion, because a copy of the articles certified by the California Secretary of State is conclusive evidence of due incorporation except in an action in the nature of quo warranto [that is, an action by the Attorney General for a determination of defective incorporation]); *FLORIDA REPORT* at 39 (opinion may be based, under Florida customary practice, solely on Department of State certificate which is conclusive proof except in a proceeding brought by the state).

¹⁰⁷ If a Corporation was formed prior to enactment of the BCA, the opinion preparers should compare the Corporation's original certificate of formation with the applicable legislation and consider what assumptions, qualifications or other appropriate actions, if any, may be needed to give the due incorporation opinion. *See supra* note 9.

¹⁰⁸ The Committee notes that opinion practice on giving a due incorporation opinion has evolved since the *Texas 1992 Report*. The Committee took the position in the *Texas 1992 Report* that, although an opinion giver could get some comfort from the conclusive evidence provisions of Article 3.04 of the BCA (the predecessor to Section 3.001(d) of the TBOC), a due incorporation opinion required more exhaustive diligence procedures because a due incorporation opinion required "absolute compliance with all statutory requirements for incorporation at the time of incorporation and [did] not allow for immaterial defects." *Texas 1992 Report* at 82. As discussed in the text, the position taken in

Given that the same work is required to support the valid existence and due incorporation opinions, the Committee recommends that, when possible, opinion givers give a valid existence opinion rather than a due incorporation opinion.¹⁰⁹

Section 2.4 A Due Organization Opinion.

***Illustrative Opinion Form:** The Company is a corporation duly organized, validly existing, and in good standing under the laws of the State of Texas.*¹¹⁰

Subsection 2.4(a) Appropriateness and Meaning of a Due Organization Opinion. Because the requirements for organizing a corporation vary from state to state, the exact meaning of a “duly organized” opinion depends on the particular state statute in effect at the time the corporation was organized.¹¹¹ Even then, the meaning of “organized” can be uncertain. In Texas, an opinion that a Corporation has been “duly organized” means that, under the corporate law in effect at the time the Corporation was formed, the Corporation was duly incorporated¹¹² and, in addition, the other steps necessary to organize the

the *Texas 1992 Report* on this opinion does not reflect current Texas opinion practice.

¹⁰⁹ Although not necessary, depending on the facts and circumstances, an opinion giver of a duly incorporated opinion on a Corporation may wish to consider the recommendation in the NORTH CAROLINA REPORT at 32, that when the opinion recipient is outside the state, the opinion giver consider disclosing the limited work it has performed to give the opinion.

¹¹⁰ Like the duly incorporated opinion, valid existence and good standing opinions are typically given with a due organization opinion. The meanings of the valid existence and good standing opinions are the same as those discussed in Section 2.1 (*Corporate Status Opinions: A Valid Existence Opinion*) and 2.2 (*Corporate Status Opinions: A Good Standing Opinion*). See *supra* note 98.

¹¹¹ See, e.g., GLAZER § 6.4, at 211 (Supp. 2024); CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 40 (citing *TriBar 1998 Report* § 6.1.2); *TriBar 1998 Report* § 6.1.2, at 643; VIRGINIA REPORT at 29 (addressing post-incorporation steps covered in a “duly organized opinion”).

¹¹² See *supra* Section 2.3 (*Meaning of a Due Incorporation Opinion*). If the Corporation is a Pre-Code Entity, the opinion giver should examine requirements of applicable predecessor statutes to the TBOC as in effect at the time the Corporation was formed.

corporation were properly taken. The TBOC provides that after the filing of a certificate of formation takes effect, an organizational meeting shall be held for the purpose of adopting bylaws and electing officers.¹¹³

The Committee already has noted in the *Texas 1992 Report* that opinion givers may have difficulty ascertaining whether the statutory conditions for organization were met at the time of a Corporation's formation, particularly if the Corporation was organized under a legislative action or a predecessor statute, and that, absent a specific need for this opinion in a particular transaction, it is generally not appropriate for an opinion recipient to insist on this opinion.¹¹⁴ The Committee strongly reaffirms this position and also concurs with more recent authorities that, because of the difficulty of researching corporate records that may be many years old, opinions on due organization are usually limited to Corporations that have been organized recently or are being formed specifically for the transactions addressed by the opinion.¹¹⁵

¹¹³ TBOC § 21.059(b). The requirement of an organizational meeting may be met by a unanimous written consent of the Directors unless provided otherwise in the certificate of formation or bylaws. *Id.* § 21.415(b). The officers to be elected at the organizational meeting must include a president and secretary. *Id.* § 21.417. Other steps sometimes taken at an organizational meeting of the Board that are not specifically required by the TBOC include opening bank accounts, approving forms of share certificates, and issuing shares.

¹¹⁴ *Texas 1992 Report* at 83.

¹¹⁵ GLAZER § 6.4, at 212 (Supp. 2024) (citations omitted) (“At one time ‘duly organized’ opinions were frequently requested and sometimes given. Today they are rarely requested and even more rarely given. The change in practice is due to the limited benefit of the opinion, the absence of a consensus in many states over the meaning of the opinion and, especially when a company was incorporated years ago, the cost of the investigation required to support the opinion.”); *TriBar 1998 Report* § 6.1.2, at 643 (inquiring into organizational matters following incorporation can be very difficult for old corporations; this opinion is most often given for corporations recently organized or formed specifically for the transaction addressed by the opinion, or when the opinion giver has previously given the opinion); CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 41 (duly organized opinion is most often given when the corporation is recently organized or the opinion giver has represented the company since its incorporation) (citing *TriBar 1998 Report* § 6.1.2 as to the opinion's most often being given in the context of a recent organization).

Subsection 2.4(b) Work Required to Support a Due Organization Opinion.

Based on the foregoing, as a matter of customary practice a due organization opinion for a Corporation may be based on confirmation of each of the following:

- (1) the Corporation's due incorporation;¹¹⁶
- (2) that appropriate action was taken to organize the Corporation, as required by the statutory requirements for the Corporation's organization, by review of:
 - (A) the corporation statute in effect at the time of organization; and
 - (B) copies, certified by an officer's certificate,¹¹⁷ of all meetings of the Board of Directors and shareholders relating to the organization of the Corporation, including minutes of the organizational meeting of the Board (or, if permitted at the time of organization, a unanimous written consent in lieu of an organizational meeting); and
- (3) any other actions required for organization at the time in question, including, in the case of a Corporation formed under the BCA, the issuance of shares for the amount and type of consideration determined by the Board.¹¹⁸

¹¹⁶ See *supra* Section 2.3(b) (*Work Required to Support a Due Incorporation Opinion*).

¹¹⁷ Typically an officer's certificate is dated on or as of the date of the opinion letter, because an opinion is understood to speak as of that date. See *supra* note 25 and accompanying text. For an illustrative officer's certificate see Annex A.

¹¹⁸ *Texas 1992 Report* at 82–83. As to these requirements for Pre-Code Entities, the following statement from the *Texas 1992 Report* bears quoting: “[a]lthough it is not free from doubt, many practitioners believe that the corporation must actually have received the minimum capital (\$1,000.00) required by [Article 3.05 of the BCA] to transact business in order for the corporation to be duly organized.” *Id.* at 83. Article 3.05 of the BCA was repealed at 2003 Tex. Gen. Laws 1073,

Section 2.5 Opinions on Authorization to Transact Business and Good Standing of Foreign Corporations in Texas.

***Illustrative Opinion Form:** The Company is authorized to transact business as a foreign corporation in, and is in good standing under the law of, the State of Texas.*

Opinions on a foreign corporation’s authorization to transact business and good standing¹¹⁹ are typically based solely on certificates issued by public officials.¹²⁰ In giving these opinions, some opinion givers use the word “authorized” as does the illustrative opinion form set out above. Other opinion givers, however, use a variant of the word “register” instead, because the TBOC requires “registration” for a foreign corporation to transact business in Texas; so their opinions might be worded: *“The Company is registered to transact business as a foreign corporation in, and is in good standing under the law of, the State of Texas.”* Still other opinion givers use a variant of the word “qualify” instead, since opinion recipient requests and bar association reports are often phrased in that manner; so their opinions might be worded: *“The Company is qualified to transact business as a foreign corporation in, and is in good standing under the law of, the State of Texas.”*

Whether they use “authorized,” “registered,” or “qualified” to transact business, or variants of those words, these opinions are understood to have the same meaning.

1098. Thus, this requirement does not apply to Corporations formed under the TBOC.

¹¹⁹ Under the TBOC, the word “foreign” when used in respect of a type of entity, such as a corporation, is an entity formed under, and the internal affairs of which are governed by, the laws of a jurisdiction other than the state of Texas. TBOC §§ 1.002(27), 1.002(28).

¹²⁰ See, e.g., FLORIDA REPORT at 59 (opinion as to foreign entity’s authorization to transact business in Florida may be based solely on a certificate of status issued by the Florida Department of State); VIRGINIA REPORT at 31 (opinion that a foreign corporation is authorized to transact business in Virginia may be based on a certificate of good standing for the foreign corporation without further investigation); WASHINGTON REPORT at A-13 n.52 (certificate of registration from the Washington secretary of state is conclusive evidence that the foreign corporation is authorized to transact business in Washington).

Subsection 2.5(a) Meaning of an Opinion on Authorization to Transact Business as a Foreign Corporation in Texas. A foreign corporation must register under Chapter 9 of the TBOC to transact business in Texas.¹²¹ Registration requires the foreign corporation to file an application for registration with the Secretary of State pursuant to the procedures set forth in Chapter 4 of the TBOC.¹²² As with the existence of a Corporation,¹²³ under Section 9.008(b) of the TBOC, an acknowledgment issued by the Secretary of State of a foreign corporation's having filed an application for registration is "conclusive evidence" of the authority of that foreign corporation to transact business in Texas.¹²⁴ In addition, under Section 4.005(e) of the TBOC, a certificate of fact issued by the Secretary of State stating that a foreign corporation is in existence or registered may be relied on as "conclusive evidence" that the foreign corporation is registered and authorized to transact business in Texas (subject to any stated qualification therein). So, in giving a foreign authorization opinion under the TBOC, as a matter of customary practice an opinion giver is entitled to rely without so stating on Section 4.005(e) and Section 9.008(b) of the TBOC.

Although not necessary, some opinion givers expressly state that their opinion on a foreign corporation's authorization to transact business in Texas is based solely on a certificate of fact issued by the Secretary of State.

Subsection 2.5(b) Work Required to Support an Opinion on Authorization to Transact Business as a Foreign Corporation in Texas. In light of the provisions of Sections 4.005(e) and 9.008(b) of the TBOC, as a matter of customary practice an opinion that a foreign corporation is authorized to transact business in Texas may be based on a review of a certificate of fact, dated on or shortly before the date of the opinion letter, issued by the Secretary of State as to the filing of the foreign corporation's application for registration and its "existence" in Texas.¹²⁵

¹²¹ TBOC § 9.001(a). Section 9.251 of the TBOC contains a non-exclusive list of activities that do not constitute the transaction of business in Texas.

¹²² *Id.* § 9.004(a).

¹²³ *See supra* notes 68–76 and accompanying text.

¹²⁴ TBOC § 9.008(b).

¹²⁵ The form of certificate of fact currently used by the Secretary of State in connection with foreign registrations complies with Section 9.008(b) of the

Because opinion letters speak as of their date,¹²⁶ depending on the circumstances, some opinion givers also choose to obtain a “bring down” certificate of fact on the date of the opinion letter even when they have obtained a certificate of fact shortly before that date, and some opinion givers choose (in addition to or in lieu of the foregoing) to obtain an officer’s certificate, dated on or as of the opinion date, to “bring down” to the date of the opinion letter the certificate of fact obtained shortly before the date of the opinion.

Subsection 2.5(c) An Opinion on Good Standing of Foreign Corporations in Texas.

The procedures for giving Texas good standing opinions on non-Texas corporations registered as foreign corporations in Texas are the same as the procedures for giving Texas good standing opinions on Texas Corporations, and the work required is the same as that described above in Section 2.2(b) (*Work Required to Support a Good Standing Opinion*).

Section 2.6 An Opinion on Qualification and Good Standing of a Texas Corporation as a Foreign Corporation Outside of Texas.

Sometimes opinion recipients request an opinion that a Corporation has satisfied the requirements to transact business in states other than Texas where foreign qualification is required for the conduct of the Corporation’s business. For example, a recipient may request an opinion that a Corporation is qualified to do business “wherever such qualification is necessary” or “wherever the failure to so qualify would have a material adverse effect on the corporation or its business, financial condition or operations.”¹²⁷ Similarly, opinion recipients sometimes request an opinion regarding a Corporation’s good standing in such jurisdictions. The Committee took the position in the *Texas 1992 Report* that such opinions should be avoided whenever possible,¹²⁸ because they require highly factual determinations as to the nature and extent of the Corporation’s business and operations in every potentially relevant state,

TBOC; in the current form, the Secretary of State certifies that (a) a particular foreign entity has filed its Application for Registration on a specified date and (b) the entity is “in existence” in Texas.

¹²⁶ See *supra* note 25 and accompanying text.

¹²⁷ *Texas 1992 Report* at 84.

¹²⁸ *Id.*

as well as some knowledge of the legal requirements of jurisdictions other than the State of Texas. Based on these considerations as well as current opinion practice in Texas and other states, the Committee now believes it is not appropriate for an opinion giver to be asked to give these opinions and an opinion giver may appropriately decline to give them.¹²⁹

As an alternative, more specific opinions are sometimes requested that a Corporation is qualified to transact business as a foreign corporation and is in good standing in one or more *specified states* other than Texas. Although not requiring the extensive factual diligence of the opinions discussed in the preceding paragraph, these more specific opinions, if given, are typically based solely on certificates issued by government officials in other states and add little of value to the certificates themselves (which are typically also ordered by or provided to the opinion recipient). For these reasons, the Committee believes even these more specific forms of opinion ordinarily should not be requested and an opinion giver ordinarily may appropriately decline to give them.¹³⁰

¹²⁹ *Guidelines* § 4.1, at 879 (“An opinion giver should not be asked for an opinion that the opinion giver’s client is qualified to do business as a foreign corporation in all jurisdictions in which its property or activities require qualification or in which the failure to qualify would have a material adverse effect on the client.”); *see also* GLAZER § 7.1.1.1, at 224–29 (Supp. 2024) (noting that § 4.1 of the Guidelines opposes requests for such foreign qualification opinions and that opinion givers almost universally refuse to give them regardless of the nature of the transaction); *TriBar 1998 Report* § 6.1.6, at 646 (“Although at one time foreign qualification opinions sometimes stated that the Company was qualified in all states in which a failure to qualify would have a material adverse effect on its financial condition, the opinion now usually refers simply to the states in which the Company has qualified.”); CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 43 (generally accepted that an opinion should not be requested that a company is qualified to do business as a foreign corporation in all jurisdictions where its property or activities require qualification or in which failure to qualify would have a material adverse effect on the company); FLORIDA 2021 SUPPLEMENT at 17 (opinion as to authorization to transact business in every jurisdiction where qualification is required or where failure to qualify would have a material adverse effect is an inappropriate opinion request).

¹³⁰ *See* GLAZER § 7.1.2, at 231–32 (Supp. 2024) (opinion practice would be well served if opinion recipients stopped requesting foreign qualification and good standing opinions or at least did not persist when opinion givers resist); *TriBar 1998 Report* § 6.1.6, at 647:

Section 2.7 What Corporate Status Opinions Do Not Cover.

Corporate status opinions as a matter of customary practice do not address, among other things, (i) the Corporation's compliance with legal requirements for its operations including licenses and permits the Corporation is required to hold or (ii) the potential liability of shareholders for the obligations of the Corporation, such as may exist under a piercing-the-corporate-veil theory.¹³¹

Because opinion preparers customarily base foreign qualification and foreign good standing opinions solely on certificates of government officials, which normally are presented at closing, those opinions usually add little (if anything) of value other than confirming that the opinion preparers do not know the certificates on which the opinions are based to be unreliable. The [TriBar Opinion] Committee believes that the opinion process could be streamlined without any meaningful detriment to opinion recipients if absent specific circumstances the practice of rendering foreign qualification and foreign good standing opinions were discontinued and opinion recipients were to rely directly on the certificates themselves.

See also CALIFORNIA 2007 TRANSACTION REPORT at 43 (certificates of public officials without an opinion ordinarily sufficient); MARYLAND 2007 REPORT at 46 (opinion generally not appropriate); WASHINGTON REPORT at A-12 to -13 n.52 (foreign qualification opinion requests are inappropriate).

This opinion is not included in any of the following sample opinion forms: the *Boston Streamlined Opinion*; the Illustrative Opinions appended to the *TriBar 1998 Report* Appendices A-1 through B-2, at 667-74; and the CALIFORNIA 2014 SAMPLE OPINION REPORT at 8, n.17.

¹³¹ GLAZER § 6.1, at 199 (Supp. 2024); *TriBar 1998 Report* § 6.1, at 642. *See also supra* Section 1.4 (*Laws and Legal Opinions Beyond the Scope of this Report*) for a discussion of other matters excluded from the coverage of these opinions.

CHAPTER III

CORPORATE POWER AND CORPORATE ACTION OPINIONS

Opinions on Corporations¹³² also frequently address whether a Corporation has the corporate power, and has taken the requisite corporate action, to execute and deliver Transaction Documents to which it is a party and to perform its obligations under those documents. Illustrative language for these opinions, together with a discussion of their meaning and the work required to support them, are set forth below. While this Chapter addresses opinions on performance, sometimes opinions address “consummation” rather than performance. When that is the case, the illustrative opinion formulations provided below can be adjusted to address “consummation”, and the analysis in this Chapter as to opinions on corporate power and authorization as they relate to “performance” is generally applicable to these opinions when they address “consummation”.¹³³

¹³² This report does not address opinions relating to nonprofit corporations, special purpose corporations, professional corporations, close corporations or public benefit corporations. *See supra* note 8.

¹³³ In some transactions, all or substantially all of the material obligations of the Corporation under a Transaction Document covered by an opinion are performed on the date of the opinion letter (*e.g.*, the issuance and sale of equity securities or the acquisition or merger of an entity). In other transactions, such as a typical commercial financing transaction, obligations commence on the date of closing and continue for the duration of the related debt obligation.

To limit the coverage of their opinion to obligations performed by the Corporation up to but not after the delivery of the opinion letter, some opinion givers prefer to limit their opinion on corporate authorization to the “consummation” of transactions contemplated by the Transaction Documents rather than on the performance by the Corporation of its obligations under the Transaction Documents. *See, e.g.*, GLAZER § 13.2.3, at 582 (Supp. 2024) (citations omitted) (discussing a no violation opinion not covered by this report) (“If an opinion addresses the consummation of the transaction, it covers only the obligations of the company prior to the closing. If, however, [an opinion] refers to ‘performance by the company of its obligations,’ it also covers the company post-closing obligations to be performed by the company after the date of the opinion letter.”).

The illustrative opinion forms in this report cover “performance” because, in many types of transactions, neither the corporate power nor the duly authorized opinions are limited to “consummation.”

Section 3.1 A Corporate Power Opinion.

Illustrative Opinion Form: *The Company has the corporate power to execute and deliver the Transaction Documents to which it is a party and to perform its obligations thereunder.*

Subsection 3.1(a) Meaning of a Corporate Power Opinion.

The corporate power opinion means that under (i) the TBOC¹³⁴ and (ii) the Corporation’s certificate of formation and bylaws,¹³⁵ each as in effect on the date of the opinion letter, the Corporation has the power to take the actions and engage in the activities specifically addressed in the opinion, which in the illustrative opinion form set out above are the execution, delivery and performance of the Transaction Documents.¹³⁶

FIELD & SMITH § 9:3.1[A], at 356 (“The performance aspect of the [power] opinion gives the opinion recipient assurance that, at least regarding the entity statute and entity governing documents, the Company has the power to do what it has undertaken to do in the transaction documents.”); GLAZER § 8.3, at 246–47 (Supp. 2024) (the power opinion “requires the opinion preparers to consider the power of the company to perform the obligations the agreement requires it to perform *after* (as well as up to) the closing”).

¹³⁴ The TBOC addresses a Corporation’s *powers* in various sections by (i) delineating its general powers (Section 2.101 of the TBOC (introductory paragraph)), (ii) specifying a non-exclusive list of permitted powers (Section 2.101 of the TBOC (clauses (1)–(22))), and (iii) further addressing the Corporation’s permitted powers to engage in specific activities (Section 2.103 of the TBOC (incurring indebtedness)); Section 2.104 of the TBOC (making of guarantees); and Section 2.105 of the TBOC (additional powers of certain pipeline businesses). A number of other Sections of the TBOC place limitations on a Corporation’s power. *See infra* notes 137–38 and accompanying text.

¹³⁵ Under Section 2.113 of the TBOC, a Corporation is not authorized to exercise a power that is inconsistent with a limitation on the Corporation’s *purposes or powers* as set forth in its certificate of formation or bylaws.

¹³⁶ FIELD & SMITH § 9:3.1[A], at 356 (power opinion limited to the applicable entity statute, as narrowed by entity documents); GLAZER § 8.2, at 239 (Supp. 2024); *TriBar 1998 Report* § 6.3, at 653; CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 43; NORTH CAROLINA 2004 REPORT at 38; PENNSYLVANIA REPORT at 21–22; VIRGINIA REPORT at 31–32; WASHINGTON REPORT at A–15 n.57.

If the corporate power opinion addresses any prior action of the Corporation, such as a prior execution and delivery of a Transaction Document, the opinion

Under the TBOC, a Corporation generally is permitted to have any lawful purpose or purposes,¹³⁷ but may not engage in certain businesses and activities that are specified in the TBOC (for example, banking or insurance).¹³⁸ To give the corporate power opinion, the opinion giver should confirm that the Corporation's execution, delivery, and performance of the Transaction Documents do not involve the Corporation's being engaged in any of those specified businesses or activities prohibited under the provisions of the TBOC or in any activity inconsistent with the Corporation's certificate of formation or bylaws.¹³⁹ Although Section 2.003(1) of the TBOC also limits a Corporation's purposes and activities to those that are lawful under Texas law generally,¹⁴⁰ as a matter of customary practice the corporate power opinion addresses only the requirements of the TBOC and the Corporation's certificate of formation and bylaws, but not restrictions imposed on the Corporation by other laws.¹⁴¹

giver would also need to consider the power of the Corporation on the date that prior action is taken and the date of any subsequent validating action.

¹³⁷ TBOC § 2.001 (a Corporation has any lawful *purpose* unless otherwise provided by the TBOC).

¹³⁸ *Id.* § 2.003(2) (a Corporation may not operate as a bank, trust company, savings association, insurance company, cemetery organization (except as otherwise authorized by Texas law), or as an abstract or title company (that is governed by another Texas statute)); § 2.007 (Corporations may not operate as certain types of organizations or engage in certain specified businesses or activities).

¹³⁹ *Id.* § 2.113 (a Corporation is not authorized to exercise a power in a manner inconsistent with a limitation on its purposes or powers contained in its certificate of formation or bylaws, the TBOC, or other Texas law).

¹⁴⁰ *Id.* § 2.003(1) (a Corporation may not engage in a business or activity that: (i) is expressly unlawful or prohibited by Texas law or (ii) cannot lawfully be engaged in by that entity under Texas law).

¹⁴¹ GLAZER § 8.3, at 246 (Supp. 2024) (as a matter of customary practice the corporate power opinion does not cover an activity of the corporation that violates a law other than the governing corporate statute); *see also* FIELD & SMITH § 9:3.1[A], at 356 (the corporate power opinion addresses the applicable entity statute and the entity's governing documents and not restrictions on power imposed by other statutes); *TriBar 1998 Report* § 6.3, at 653 (corporate power opinion relates to a corporation's power under corporation law; the opinion "does not address whether those actions are restricted by other laws, such as those requiring the receipt of licenses or permits"); CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 43 (corporate power opinion addresses whether a

The TBOC provides in Section 11.051¹⁴² that upon occurrence of an event that requires a Corporation to wind up its business, unless the winding up is revoked or canceled, the Board of Directors must as soon as reasonably practicable cause the Corporation to cease conducting business (except as necessary to wind up its business), collect and sell its property, and perform other acts required to wind up its business and affairs.¹⁴³ Accordingly, to give a corporate power opinion on activities that are not consistent with the winding up of the Corporation's business, the opinion giver must determine that no event set out in Section 11.01 of the TBOC

corporation is permitted pursuant to the corporate law of its jurisdiction of incorporation and its articles to engage in a specified activity or enter into a specified agreement; the opinion does not speak to whether the action is restricted by laws other than the corporate law of the jurisdiction of incorporation, such as laws requiring licenses or permits).

¹⁴² Section 11.051 of the TBOC states:

Winding up of a domestic entity is required on: (1) the expiration of any period of duration specified in the domestic entity's governing documents; (2) a voluntary decision to wind up the domestic entity; (3) an event specified in the governing documents of the domestic entity requiring winding up, dissolution, or termination of the domestic entity, other than an event specified in another subdivision of this section; (4) an event specified in other sections of this code requiring the winding up or termination of the domestic entity, other than an event specified in another subdivision of this section; or (5) a decree by a court requiring winding up, dissolution, or termination of the domestic entity, rendered under this code or other law.

For purposes of the above-quoted Section 11.051(3) of the TBOC, Section 11.059 of the TBOC states that the requisite event must be specified in the Corporation's certificate of formation or its bylaws adopted in the same manner as an amendment to its certificate of formation.

The TBOC neither defines nor uses the term "dissolution" to describe the process of ending the existence of a Corporation, although subdivisions (3) and (5) of Section 11.051 quoted above retain the reference to "dissolution" to include prior or other laws. A voluntary winding up by the Corporation requires either the unanimous written consent of shareholders or the adoption by the Board of Directors of a resolution recommending the Corporation's winding up and requisite shareholder approval. TBOC § 21.502.

¹⁴³ *Id.* § 11.052. During winding up, the Corporation may prosecute or defend a civil, criminal, or administrative action.

exists that requires the winding up of the Corporation.¹⁴⁴ This determination is customarily accomplished by a review of the certificate of formation and bylaws and a certificate of fact from the Texas Secretary of State indicating that the Corporation still exists¹⁴⁵ and reliance on a statement in an officer's certificate to the effect that no proceedings for the winding up or termination of the Corporation have been taken or are pending.¹⁴⁶

The corporate power opinion is commonly requested because an act by a Corporation for which it lacks corporate power under the TBOC or its certificate of formation or bylaws is generally considered an *ultra vires* act. Although Section 20.002 of the TBOC affords protection to third parties dealing with Corporations by precluding a Corporation from asserting that an act of the Corporation was *ultra vires*,¹⁴⁷ the purpose of

¹⁴⁴ See *supra* note 142. For a discussion of the relationship of winding up and dissolution to the power opinion, see GLAZER § 8.3, at 245 (Supp. 2024); FLORIDA REPORT at 69.

¹⁴⁵ It will not be evident from the records of the Secretary of State that a Corporation has commenced voluntary winding up because no notice of commencement of voluntary winding up is required to be filed in any public records. Upon completion of voluntary winding up, the Corporation is required to file a certificate of termination with the Secretary of State. TBOC § 11.101. If a Corporation is involuntarily terminated for an event specified in the TBOC, the Secretary of State will issue a certificate of termination and deliver a copy of the certificate to the Corporation at its registered office or principal place of business. *Id.* § 11.252. If a Corporation is terminated by judicial decree, the clerk of the court issuing the decree is required to file the decree with the Secretary of State. *Id.* § 11.315. Following involuntary winding up and termination, a status certificate of fact from the Secretary of State will show that the Corporation's status in Texas is "forfeited existence" and will give the date that the Corporation became inactive.

Following voluntary winding up and termination, a status certificate of fact from the Secretary of State will show that the Corporation "has been voluntarily dissolved" and will give the date that the Corporation became inactive. Thus even though the TBOC no longer uses the terms "dissolved" or "dissolution", as of the date of this report the term "dissolved" is still used by the Secretary of State in its form of certificate of fact.

¹⁴⁶ An illustrative officer's certificate is contained in Annex A of this report.

¹⁴⁷ Section 20.002 of the TBOC, which addresses *ultra vires* acts, states (in part):

(a) Lack of capacity of a corporation may not be the basis of any claim or defense at law or in equity.

the corporate power opinion is to provide assurance to the recipient that the activities covered by the opinion are within the Corporation's corporate power. Accordingly, the opinion is understood to be given without reliance on statutory provisions invalidating the *ultra vires* defense, such as the provisions of Section 20.002 of the TBOC, because those provisions do not negate the *ultra vires* nature of an act.¹⁴⁸ Furthermore, under Section 20.002(c) of the TBOC, even though a Corporation is precluded from asserting the *ultra vires* nature of an act, an injunction proceeding can be brought by the Texas Attorney General or a shareholder to prevent the Corporation from performing the unauthorized act.¹⁴⁹

Opinions that cover *performance*, as in the illustrative opinion form, cover the Corporation's corporate power to perform its obligations

(b) An act of a corporation or a transfer of property by or to a corporation is not invalid because the act or transfer was:

- (1) beyond the scope of the purpose or purposes of the corporation as expressed in the corporation's certificate of formation; or
- (2) inconsistent with a limitation on the authority of an officer or director to exercise a statutory power of the corporation, as that limitation is expressed in the corporation's certificate of formation.

¹⁴⁸ FIELD & SMITH § 6:2.1, at 216–217; GLAZER § 8.2, at 239–40 & n.3 (Supp. 2024).

¹⁴⁹ Section 20.002 of the TBOC states (in part):

(c) The fact that an act or transfer is beyond the scope of the expressed purpose or purposes of the corporation or is inconsistent with an expressed limitation on the authority of an officer or director may be asserted in a proceeding:

- (1) by a shareholder or member against the corporation to enjoin the performance of an act or the transfer of property by or to the corporation;
- (2) by the corporation, acting directly or through a receiver, trustee, or other legal representative, or through members or shareholders in a representative suit, against an officer or director or former officer or director of the corporation for exceeding that person's authority; or
- (3) by the attorney general to:
 - (A) terminate the corporation;
 - (B) enjoin the corporation from performing an unauthorized act; or
 - (C) enforce divestment of real property acquired or held contrary to the laws of this state.

not only before and on, but also after, the date of the opinion letter¹⁵⁰ under the provisions of the Transaction Documents as in effect on the date of the opinion letter.¹⁵¹ In addressing obligations that are to be performed after the date of the opinion letter, the opinion giver is entitled to assume, without so stating, that the Corporation will perform its obligations after the closing in a manner consistent with its corporate power to the extent it has discretion to do so.¹⁵² Thus, if the performance of a Corporation's obligation under a provision of the Transaction Documents is beyond its corporate power, the opinion giver would need to exclude that provision from the opinion's coverage.

The illustrative opinion form modifies the term "power" with the adjective "corporate" to clarify that it addresses only a Corporation's power under the TBOC and its certificate of formation and bylaws; however, as a matter of customary practice omitting that adjective does not expand or otherwise change the meaning or scope of this opinion.¹⁵³

Similarly, although the *Texas 1992 Report* used the phrase "corporate power *and authority*" in its proposed form of corporate power opinion, this report intentionally omits the words "and authority" in its illustrative opinion form to clarify that the corporate power opinion does not cover any matters other than the Corporation's power under the TBOC and its certificate of formation and bylaws.¹⁵⁴ However, given the understanding under customary practice of the limited coverage of a corporate power opinion, an opinion giver's inclusion of the words "and

¹⁵⁰ For a discussion of opinions that are sometimes given on "consummation" rather than "performance," see *supra* note 133 and accompanying text.

¹⁵¹ See *supra* note 25 and accompanying text.

¹⁵² GLAZER § 8.3, at 246–47 (Supp. 2024).

¹⁵³ *Id.* § 8.2, at 253 (Supp. 2023) (citing *TriBar 1998 Report*); *TriBar 1998 Report* § 6.3, at 652 n.138 (first paragraph); VIRGINIA REPORT at 32.

¹⁵⁴ The corporate power opinion does not cover, for example, *actions* required on the part of the Corporation to authorize any matters, such as the execution, delivery, and performance of the Transaction Documents. GLAZER § 8.2, at 240 (Supp. 2024) (a corporate power opinion does not mean that a specified action was duly authorized by directors or shareholders; corporate power and due authorization are different concepts typically covered in separate opinions).

authority” in the opinion, although no longer recommended, does not expand or otherwise change its meaning or scope.¹⁵⁵

Some formulations of the corporate power opinion use the phrase “full power” or add other words of similar import to “corporate power” or “power.” Because those formulations do not have generally understood meanings,¹⁵⁶ the illustrative opinion form does not use them. However, the Committee believes use of any of those formulations, although not recommended, does not change the meaning of the opinion.

Sometimes a recipient requests an opinion that the Corporation has all necessary corporate power to own and operate its properties or to conduct its business as currently conducted. This request raises significant issues as to: (i) the scope of the factual inquiry needed to support the opinion; (ii) the meaning of the opinion, including any additional assumptions and other qualifications such an opinion might entail; and (iii) the relevance or value of the opinion to the recipient given the added time and expense required to support it.¹⁵⁷ As a result, absent

¹⁵⁵ *Id.* § 8.2, at 241 (Supp. 2024); *TriBar 1998 Report*, § 6.3, at 652 n.138; CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 44; FLORIDA REPORT at 68; *see also* NORTH CAROLINA 2004 REPORT at 38–39 (“inclusion of the term ‘authority’ in this opinion traditionally has been considered to mean the same thing as power”; however using only the words “corporate power” is suggested to avoid the implication of an expanded scope for the opinion); WASHINGTON REPORT at A–15 to –16 n.57 (use of the term “authority” could create confusion).

¹⁵⁶ *See* GLAZER § 8.2, at 241 (Supp. 2024); *TriBar 1998 Report* § 6.3, at 652 n.138 (third paragraph) (“Opinion recipients sometimes request a ‘full power’ opinion. The phrase ‘full power’ has no generally accepted meaning and its use, therefore, should be avoided.”); PENNSYLVANIA REPORT at 67; VIRGINIA REPORT at 32.

¹⁵⁷ *See* VIRGINIA REPORT at 32, stating (footnotes omitted):

Some discourage giving or requiring this opinion because of the potentially expansive interpretation of the opinion and the extensive due diligence that would be required if the opinion were broadly interpreted. Others suggest that the opinion has limited value absent special circumstances (*e.g.*, for special purpose entities or those operating in regulated industries) because most entities are permitted by statute to engage in any lawful activity. The Committee believes that, as a general matter, it is not appropriate to request an opinion on the Company’s power to conduct its business and own its properties given the fact-intensive nature of the opinion.

special circumstances,¹⁵⁸ these expanded corporate power opinions are not ordinarily requested or given. In circumstances when they are, opinion givers generally rely for factual matters on descriptions provided by the Corporations of the subject properties or businesses (contained, for example, in documents submitted as part of public registrations or private placements of securities or in officer's certificates), and when they do, the opinion givers should identify the source of that description in the opinion letter¹⁵⁹ or as an alternative, include in the opinion letter an express assumption as to the relevant factual matters.

Subsection 3.1(b) What a Corporate Power Opinion Does Not Cover.

Because the coverage of the corporate power opinion is limited to the Corporation's power under the TBOC and its certificate of formation and bylaws, the corporate power opinion does not address a Corporation's compliance with other laws, including any authorizations, approvals, licenses, permits, or filings it may need to conduct its business.¹⁶⁰ Nor does the opinion address whether any actions of the Corporation result in a breach of, or default under, any of its contractual obligations or require any third-party consents, including consents under shareholders'

See also FLORIDA REPORT at 69 (discouraging an expansive corporate power opinion); WASHINGTON REPORT at A-16 n.57 (stating it is appropriate to decline opining on a corporation's corporate power to conduct its business and own its properties). *Cf.* FIELD & SMITH § 9:5.1[A], at 399-400 (opinion covering a company's power to conduct all of its current business covers only entity power and "[i]t does not cover whether there are valid governmental licenses or business arrangements to conduct the current business. Thus, the opinion is of limited value to recipients and is ordinarily not requested.").

¹⁵⁸ Special circumstances for giving this type of expanded corporate power opinion may include opinions given in an equity offering or related to a special purpose entity. *See* VIRGINIA REPORT at 32.

¹⁵⁹ *See, e.g.*, GLAZER § 8.1, at 239 (Supp. 2024); *Boston Streamlined Opinion* at 1070 n.10; CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 44; PENNSYLVANIA REPORT at 24.

For further discussion of reliance on factual matters set out in an officer's certificate, see Section 1.2 (*Factual Matters; Reliance on Certificates, Representations, and Assumptions; Opinions Speak as of the Opinion Letter Date Unless Otherwise Indicated*).

¹⁶⁰ *See supra* note 141 and accompanying text.

agreements.¹⁶¹ These other matters, if addressed by an opinion, would be covered in one or more separate opinions beyond the scope of this report.

As noted earlier, the corporate power opinion also does not address the actions required for the Corporation to authorize the execution, delivery, or performance of the Transaction Documents.¹⁶² These matters, if covered by an opinion, would be addressed by the corporate action opinion discussed in Section 3.2 (*Duly Authorized Opinion*).

Subsection 3.1(c) Work Required to Support a Corporate Power Opinion. Based on the foregoing, as a matter of customary practice an opinion that a Corporation has the corporate power to execute and deliver Transaction Documents to which it is a party, and perform its obligations thereunder, may be based on the following:

- (1) the work required to support an opinion on the valid existence of the Corporation as of the date of the opinion letter, including review of a certificate of fact issued by the Secretary of State dated, to the extent practicable, as of or shortly before the date of the opinion letter;¹⁶³

¹⁶¹ See, e.g., FLORIDA REPORT at 68; PENNSYLVANIA REPORT at 22. Although a shareholders' agreement may require consent of all or a specified percentage of one or more classes of shareholders for the Corporation to take certain actions, compliance with such an agreement (other than a Section 21.101 Shareholders' Agreement) would *not* be covered by a corporate power opinion, because a breach of the agreement would not impair the Corporation's *power* to take action. Rather, the question of whether such a shareholders' agreement has been breached would be a breach of contract question and, if addressed by an opinion, would be covered by a separate "no breach of contract" opinion, which is beyond the scope of this report. However, provisions governing the exercise of the power of a Corporation in a Section 21.101 Shareholders' Agreement *would* need to be considered in giving a corporate power opinion, but these agreements are rare. For further discussion of Section 21.101 Shareholders' Agreements, see *infra* note 179.

¹⁶² For a discussion on this limited scope of the corporate power opinion, see *supra* note 154 and accompanying text.

¹⁶³ For a discussion on the work required to support a valid existence opinion, see *supra* Subsection 2.1(b) (*Work Required to Support a Valid Existence Opinion*). If an opinion giver instead gives a due incorporation or due organization opinion, the work required to support the matters referred to in this clause (1) would be satisfied by the work required to support the due incorporation or due organization opinion. For discussions of these other opinions, see *supra* Sections 2.3(b) (*Work*

- (2) review of the Transaction Documents executed and delivered by the Corporation on or before the date of the opinion letter¹⁶⁴ to identify the obligations to be performed on and after the date of the opinion letter by the Corporation under the provisions of those documents;
- (3) review of the TBOC¹⁶⁵ to determine whether the Corporation's execution, delivery, and performance of Transaction Documents to which it is a party are within its permitted powers and purposes under the TBOC;
- (4) review of copies of the Certified Certificate of Formation and bylaws, each certified by an officer's certificate,¹⁶⁶ to determine whether any provision prohibits or restricts the Corporation's execution, delivery, or performance of the Transaction Documents covered by the opinion; and
- (5) confirmation by review of an officer's certificate that the Corporation has not taken any action or received a notice

Required to Support a Due Incorporation Opinion) and 2.4(b) (*Work Required to Support a Due Organization Opinion*).

Any express limitations in an opinion letter on the work performed in giving any of the above-mentioned existence, due incorporation or due organization opinions (each, a "predicate opinion") should be understood to apply implicitly to the corporate power, duly authorized and duly executed and delivered opinions as well as to any other opinions, including those relating to stock and enforceability, that are given in the same opinion letter and depend on the Corporation's existence, due incorporation or due organization at the relevant time or times addressed by the predicate opinion. However, to avoid misunderstanding, the opinion giver may want to make those further limitations on such other opinions express.

¹⁶⁴ Regarding Transaction Documents dated after the date of the opinion letter, see *supra* note 13.

¹⁶⁵ For an overview of applicable provisions of the TBOC, see *supra* notes 134–41 and accompanying text.

¹⁶⁶ This Subsection refers more than once to an "officer's certificate". Typically an officer's certificate is dated on or as of the date of the opinion letter, because an opinion is understood to speak as of that date. See *supra* note 25 and accompanying text. For an illustrative officer's certificate, including an example of this certification, see Annex A.

from any governmental official that relates to or could result in the Corporation's winding up or termination.¹⁶⁷

Section 3.2 Opinions on Corporate Action: A Duly Authorized Opinion.

Illustrative Opinion Form: *The execution and delivery by the Company of the Transaction Documents to which it is a party, and the performance by the Company of its obligations thereunder, have been duly authorized by all requisite corporate action on the part of the Company.*¹⁶⁸

The “*corporate action*” opinions address the actions taken by the Corporation (i) to authorize the execution, delivery, and performance by the Corporation of the Transaction Documents to which it is a party and (ii) to execute and deliver those Transaction Documents to make them binding on the Corporation. Although these are separate opinions, they are often given together when addressed by the same opinion giver. This Section 3.2 discusses the duly authorized opinion set out in the illustrative opinion form above, and Section 3.3 discusses the duly executed and delivered opinion.

Subsection 3.2(a) Meaning of a Duly Authorized Opinion.

A duly authorized opinion means the Corporation has been authorized by its Board of Directors¹⁶⁹ (and, if required, one or more classes of the Corporation's shareholders),¹⁷⁰ in accordance with the

¹⁶⁷ For an example of this type of certification, see paragraph (e) of the illustrative officer's certificate in Annex A.

¹⁶⁸ In the *Texas 1992 Report* at 86, the following more abbreviated form of the “duly authorized” opinion was recommended: “The Transaction Documents have been duly authorized by all necessary corporate action on the part of the Company” For greater clarity, the illustrative opinion form in this report replaces the phrase “Transaction Documents” with the specific actions of “execution, delivery, and performance” of the Transaction Documents. However, as a matter of customary practice use of the phrase “the Transaction Documents have been duly authorized” is understood to have the same meaning.

¹⁶⁹ See *supra* Glossary of Terms (definition of “*Board of Directors*” identifying the three types of governing persons authorized by the TBOC to act as the Corporation's Board of Directors).

¹⁷⁰ CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 45; FLORIDA REPORT at 76; NORTH CAROLINA 2004 REPORT at 40; PENNSYLVANIA REPORT at 25. The

TBOC¹⁷¹ and the Corporation’s certificate of formation and its bylaws,¹⁷² each as in effect on the date of the corporate authorization or any subsequent validating action (and as in effect on the date of the opinion letter),¹⁷³ to execute and deliver the Transaction Documents to which the

required authorization of “shareholders” as used in the parenthetical in the text refers to shareholders acting at the time solely in their capacity as shareholders for purposes of granting the shareholder approval required by the TBOC (as generally described *infra* note 171) and the Corporation’s certificate of formation or bylaws and not acting as members of, or in exercising any authority of, the Board of Directors pursuant to a Section 21.101 Shareholders’ Agreement. This required shareholder authorization also does not refer to requirements for shareholder approval under any other type of shareholders’ agreement that is not a Section 21.101 Shareholders’ Agreement. *See also infra* note 184.

¹⁷¹ In addition to authorization by the Board of Directors, a Corporation is required under the TBOC to obtain the *approval of its shareholders* for either a “fundamental action” or a “fundamental business transaction”.

Under Section 21.364(a) of the TBOC, a “fundamental action” means:

- (1) an amendment of a certificate of formation, including an amendment required for cancellation of an event requiring winding up in accordance with Section 11.152(b);
 - (2) a voluntary winding up under Chapter 11;
 - (3) a revocation of a voluntary decision to wind up under Section 11.151;
 - (4) a cancellation of an event requiring winding up under Section 11.152(a);
- or
- (5) a reinstatement under Section 11.202.

Shareholder voting requirements for a “fundamental action” are set out in Section 21.364(b)–(g) of the TBOC.

Under Section 1.002(32) of the TBOC, a “fundamental business transaction” means: “a merger, interest exchange, conversion, or sale of all or substantially all of an entity’s assets.” Procedures for shareholder approval of a “fundamental business transaction” are set out in Sections 21.451–462 of the TBOC.

In addition to TBOC requirements, a Corporation’s certificate of formation or bylaws may require a Corporation to obtain approval by one or more classes of shareholders for specified transactions.

¹⁷² The certificate of formation may establish or vary some voting requirements set forth in the TBOC. *See, e.g.*, TBOC §§ 21.358(b), .413 (quorum requirement at shareholder or Director meeting), §§ 21.363, .365 (shareholder vote on a matter).

¹⁷³ *See, e.g.*, GLAZER § 9.3.3.1, at 271 (Supp. 2024); *TriBar 1998 Report* § 6.4, at 654; CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 45–46; NORTH CAROLINA 2004 REPORT at 40–44; PENNSYLVANIA REPORT at 25.

Corporation is a party and to perform¹⁷⁴ its obligations thereunder (including obligations to be performed after the date of the opinion letter).¹⁷⁵

The illustrative opinion form includes the phrase “authorized by all *requisite corporate action* on the part of the Corporation” to emphasize the limited scope of the opinion, which covers only authorizations, approvals, and consents of the Board of Directors (and shareholders, if required) and other approvals, if any, specified in the certificate of formation and bylaws; the opinion does not cover governmental approvals or action by a third party, such as a waiver by a party to a contract.¹⁷⁶ Because this limited coverage of a duly authorized opinion is widely recognized, an opinion giver’s use of the phrase “duly authorized” without the phrase “requisite corporate action” (although not recommended) does not change the limited meaning or scope of the opinion.¹⁷⁷ Because the opinion also has the same meaning whether or not the adverb “duly” or a variant of the word “due” is included or omitted, if the opinion giver wishes to limit the meaning of the opinion, it should do so by an express statement of the limitation.¹⁷⁸

Sections 21.902 and .903 of the TBOC address ratification of a defective corporate act, as that term is defined in Section 21.901(2) of the TBOC.

¹⁷⁴ For further discussion on the meaning of “performance” and when “consummation” is sometimes addressed instead of “performance”, see *supra* note 133.

¹⁷⁵ It has been suggested (as for example when a further public offering needs to be taken to satisfy a registration rights agreement) that a due authorization opinion is not intended to provide any assurance that the Corporation has taken the corporate action to approve obligations after the date of the opinion letter when the corporate action to approve those obligations can be taken only at a future date. GLAZER § 9.3.3.1, at 274–75. However, this understanding of the due authorization opinion regarding future obligations is not widely supported by the opinion literature at the time of this report.

¹⁷⁶ GLAZER § 9.3.3.1, at 275 (Supp. 2024); CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 45; TENNESSEE REPORT § 2.4(b)(1), at 11.

¹⁷⁷ GLAZER § 9.3.3.1, at 275–76 (Supp. 2024); CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 45.

¹⁷⁸ See *TriBar 1998 Report* at 641 (omission of adverb “duly” from “duly authorized” opinion does not adequately communicate an opinion giver’s concerns to limit the customary meaning of the opinion).

The procedures required for the Board to authorize the execution, delivery, and performance of the Transaction Documents consist of acts required by the TBOC¹⁷⁹ and the Corporation's certificate of formation

¹⁷⁹ The TBOC provides procedures for taking corporate action. TBOC §§ 21.411–.415, .418 (general procedures of the Board of Directors), §§ 21.052–.055 (procedures to amend the certificate of formation), §§ 21.451–.458 (procedures to approve a fundamental business transactions). Chapter 6 of the TBOC also provides governance procedures generally applicable to any form of business entity.

Section 21.101 of the TBOC sets forth a list of various provisions relating to the authority and composition of the Board of Directors and other corporate governance matters that may be included in a Section 21.101 Shareholders' Agreement that could alter the normal functioning of the Board. A Section 21.101 Shareholders' Agreement (i) must (A) be approved by all shareholders at the time of the agreement and contained in the Corporation's certificate of formation or bylaws or (B) be a written agreement signed by all shareholders at the time of the agreement and made known to the Corporation, and (ii) can be amended only by all shareholders at the time of the amendment unless the agreement provides otherwise. A Section 21.101 Shareholders' Agreement ceases to be effective, however, when the Corporation's shares are listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national or affiliated securities association. *Id.* § 21.109(a). The existence of a Section 21.101 Shareholders' Agreement must be noted conspicuously on each certificate for outstanding shares or on the information statement required to be provided to the owner of uncertificated shares; however, the failure to note the existence of the agreement on the share certificate or information statement does not affect its validity or any action taken pursuant to the Section 21.101 Shareholders' Agreement. *Id.* § 21.103. A Section 21.101 Shareholders' Agreement should be considered a governing document, and whenever this report references the other governing documents of a Corporation (that is, its certificate of formation and bylaws) the reference should be understood to include a Section 21.101 Shareholders' Agreement in the case of a Corporation that is subject to such an agreement.

If the authority of the board of directors for the matters covered by the duly authorized opinion has been modified by the terms of a Section 21.101 Shareholders' Agreement, the opinion giver should determine that (i) the Section 21.101 Shareholders' Agreement was properly adopted by the Corporation's shareholders in compliance with Section 21.101 of the TBOC, (ii) the terms of the Section 21.101 Shareholders' Agreement relevant to the Corporation's authorization of the Transaction Documents comply with Section 21.101 of the TBOC, and (iii) the authorization of the Transaction Documents covered by the opinion was valid under the terms of the Section 21.101 Shareholders' Agreement. In confirming the procedures and actions taken by the shareholders exercising the authority of the Board of

and bylaws, including either (i) duly noticing, calling, and holding (with requisite quorum) a meeting of the Board and the approval of resolutions authorizing such execution, delivery, and performance for inclusion in the Corporation's corporate records or (ii) in lieu of an actual meeting, obtaining approval through a permitted written consent. As a matter of customary practice opinion givers do not have to verify the due election of the Directors or, for shareholder approval, the authority of voters of shares, and may rely on recitals in minutes of meeting or on representations in Transaction Documents or officers' certificates.¹⁸⁰

If Board action was taken by a committee of the Board of Directors designated pursuant to Section 21.416 of the TBOC, the committee needs to have been properly designated in accordance with the Corporation's certificate of formation and bylaws and the TBOC, and to have acted within the authority permitted by such designation and the enabling resolutions or other actions of the Board of Directors.¹⁸¹

Directors, the opinion giver is entitled to rely on factual information certified in an officer's certificate or set forth in representations in the Transaction Documents. For a further discussion of reliance as to factual matters, see *supra* Section 1.2 (*Factual Matters; Reliance on Certificates, Representations, and Assumptions; Opinions Speak as of the Opinion Letter Date Unless Otherwise Indicated*).

Because Section 21.101 Shareholders' Agreements are rare, this report does not address all of the work required to give any of the opinions covered by this report on a Corporation subject to such an agreement.

¹⁸⁰ GLAZER § 9.3.3.1, at 273–74 (Supp. 2024) (citations omitted), stating in part:

As a matter of customary practice, opinion preparers are not required to make an independent investigation into the due election of the directors who approved the agreement. Similarly, as a matter of customary practice, if stockholder approval was required, opinion preparers are not required to confirm the validity of the shares voted in favor of the agreement or the authority of those, including proxy holders, who voted those shares. Instead, they may rely on recitals in the minutes of relevant meetings and officers' certificates.

¹⁸¹ See TBOC § 21.416.

If shareholder approval for a transaction is required by the TBOC or the Corporation’s certificate of formation or bylaws, specified voting and procedural requirements must be satisfied to obtain that approval.¹⁸²

To confirm such actions of the Board and shareholders, an opinion giver typically relies on an officer’s certificate as to the corporate resolutions or other enabling actions of the Board or shareholders. Opinion givers are also entitled to rely on factual information set forth in representations in the Transaction Documents.¹⁸³

Subsection 3.2(b) What a Duly Authorized Opinion Does Not Cover.

Like the corporate power opinion, the “duly authorized” opinion does not address any of the matters referenced in the first paragraph of Subsection 3.1(b) (*What a Corporate Power Opinion Does Not Cover*).¹⁸⁴

¹⁸² See *supra* note 171 for further detail on Section 21.364 of the TBOC (shareholders’ vote to approve a “fundamental action”) and Sections 21.451–.459 (shareholders’ vote to approve a “fundamental business transaction”). See also Sections 21.351–.358, .363–.372 of the TBOC on procedures for meetings of shareholders.

¹⁸³ See, e.g., CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 45–46 (reliance on officer’s certificate); PENNSYLVANIA REPORT at 26. See *infra* Subsection 3.2(c) (*Work Required to Support a Duly Authorized Opinion*). For an example of such an officer’s certification, see also paragraph (c) of the illustrative officer’s certificate in Annex A. For further discussions of reliance on factual information in certificates, records, and representations, including the satisfaction of procedural matters required to adopt or approve corporate actions, and as to when reliance on information in certificates, records, and representations may be inappropriate, see *supra* Section 1.2 (*Factual Matters; Reliance on Certificates, Representations, and Assumptions; Opinions Speak as of the Opinion Letter Date Unless Otherwise Indicated*). As to reliance on recitals in minutes of meetings, see GLAZER § 9.3.4, at 284-86 (Supp. 2024) (for approvals at board meetings opinion preparers may rely on recitals in minutes of the meeting concerning procedural matters for valid action at the meeting and for shareholder approval on statements in the minutes of the shareholder meeting or an officer’s certificate regarding the matters approved and votes cast and they may assume adequate disclosure to shareholders).

¹⁸⁴ As with the corporate power opinion, discussed *supra* note 161, requirements in shareholders’ agreements, other than a Section 21.101 Shareholders’ Agreement, are not addressed by the “duly authorized” opinion. If the opinion recipient wants an opinion as to the absence of any breach or default under a

The “duly authorized” opinion also does not cover whether the Directors, in taking the relevant actions of the Board, based their decisions on information sufficient to meet the appropriate standard of care, had no conflicts of interest or met any disclosure obligations regarding the existence of personal interests, or otherwise complied with their fiduciary duties. These matters are not covered because their analyses involve complex questions of fact and inquiries into subjective intent that are not appropriate subjects of an opinion.¹⁸⁵ Instead, an assumption as to these matters is implicit and need not be stated expressly in opinion letters.¹⁸⁶

shareholders’ agreement, that opinion, if given, would be covered by a “no breach of contract” opinion that is beyond the scope of this report. *See, e.g.*, GLAZER § 9.3.3.1, at 275 (Supp. 2024); CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 45 (due authorization opinion does not address authorization under laws other than the corporate statute or by a governmental authority or other third party); MICHIGAN REPORT app. B (Aug. 1, 1991 Report) at 20, stating:

“Due authorization” speaks to actions necessary under the law, the corporation’s Articles and Bylaws, but does not address contractual restrictions or requirements. As an example, a due authorization opinion does not mean that, in approving a transaction, there has been no violation of a shareholder or voting agreement which may impose limitations on the corporation or its shareholders in authorizing corporate action. However, any such restrictions would normally be implicated by the “no conflicts” or “enforceability” opinion and would therefore have to be considered and addressed by the opining lawyer.

But see FLORIDA REPORT at 76.

¹⁸⁵ *See Statement of Opinion Practices* § 5.6 (opinion giver should not be asked to confirm factual matters); CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 46 (“Fiduciary duty questions are largely factual and subjective in nature.”); CALIFORNIA 2009 VC LEGAL OPINION ISSUES REPORT at 189 (questions of fiduciary duty involve inquiry into subjective intent); MICHIGAN REPORT app. B (Aug. 1, 1991 Report) at 20 (whether a fiduciary duty has been discharged is a factual question and the subject is not appropriate for a transactional opinion); TENNESSEE REPORT § 2.4(b)(2) at 12 (“analysis of fiduciary duties involves complex factual issues and subjective judgments” not normally appropriate for a legal opinion).

¹⁸⁶ GLAZER § 9.3.3.3, at 279–80 (Supp. 2024) (citations omitted); stating:

The “duly authorized” opinion does not require the opinion preparers to satisfy themselves that the board, in approving the transaction, met the applicable standard of care or otherwise discharged its fiduciary duty to the company or its stockholders. Nor does it require them to satisfy themselves that directors fulfilled their obligation to disclose any personal interests in the transaction or that the board met any disclosure

Although not necessary, some opinion givers disclaim coverage of fiduciary duties in their opinion letters, and the statement of such an express disclaimer does not imply the absence of an implicit assumption as to all of the matters discussed in this paragraph.¹⁸⁷ The Committee believes it is not appropriate for an opinion recipient to insist on receiving an opinion on any of these matters.¹⁸⁸

Subsection 3.2(c) Work Required to Support a Duly Authorized Opinion. Based on the foregoing, as a matter of customary practice an opinion that a Corporation has duly authorized the execution and delivery of Transaction Documents to which it is a party, and the performance of its obligations thereunder, may be based on the following:

- (1) the work required to support the opinions on valid existence and corporate power;¹⁸⁹

obligation it might have. Assumptions with regard to these matters are implicit in every closing opinion.

See also TriBar 1998 Report § 3.5.2(b), at 629, § 6.4, at 654; CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 46; PENNSYLVANIA REPORT at 27; TENNESSEE REPORT § 2.4(b)(2), at 12; VIRGINIA REPORT at 34.

¹⁸⁷ *Statement of Opinion Practices* § 5.5 (“Stating expressly a particular assumption that could have been unstated does not imply the absence of other unstated assumptions.”)

¹⁸⁸ *See* CALIFORNIA 2009 VC LEGAL OPINION ISSUES REPORT at 190 (inappropriate to request an opinion on compliance with fiduciary duties).

¹⁸⁹ For a discussion on the work required to support a valid existence opinion, see *supra* Subsection 2.1(b) (*Work Required to Support a Valid Existence Opinion*). If an opinion giver instead gives a due incorporation or due organization opinion, the work required to support the matters referred to in clause (1)(A) in the text would be satisfied by the work required to support the due incorporation or due organization opinion. For discussions of these other opinions, see *supra* Subsections 2.3(b) (*Work Required to Support a Due Incorporation Opinion*) and 2.4(b) (*Work Required to Support a Due Organization Opinion*). For a discussion regarding the work required to support the corporate power opinion, see *supra* Subsection 3.1(c) (*Work Required to Support a Corporate Power Opinion*).

Any express limitations in an opinion letter on the work performed in giving any of the above-mentioned existence, due incorporation or due organization opinions (each, a “predicate opinion”) should be understood to apply implicitly to the corporate power, duly authorized and duly executed and delivered opinions as well as to any other opinions, including those relating to stock and enforceability,

- (2) *regarding authorization by the Board of Directors, confirmation that the Corporation’s execution, delivery, and performance of its obligations under the Transaction Documents have been approved by the Board by review of:*
- (A) the TBOC;¹⁹⁰
 - (B) copies of the Certified Certificate of Formation and bylaws, each certified by an officer’s certificate;¹⁹¹ and
 - (C) copies of corporate resolutions or other enabling actions of the Board, certified by an officer’s certificate as having been duly adopted, authorizing the Corporation’s execution, delivery, and performance of the Transaction Documents;¹⁹²

that are given in the same opinion letter and depend on the Corporation’s existence as a corporation, due incorporation or due organization at the relevant time or times addressed by the predicate opinion. However, to avoid misunderstanding, the opinion giver may want to make those further limitations on such other opinions express.

¹⁹⁰ For discussions and references related to the TBOC, see *supra* notes 169, 172, 179, 181 and accompanying text.

¹⁹¹ This Subsection refers throughout to an “officer’s certificate”. Typically an officer’s certificate is dated on or as of the date of the opinion letter, because an opinion is understood to speak as of that date. See *supra* note 25 and accompanying text. For a discussion of opinion practice relating to “bringdowns” of Secretary of State certificates of fact and certifications of certificates of formation, see *supra* text accompanying notes 79–80, and Glossary of Terms (definition of “*Certified Certificate of Formation*”). For an illustrative officer’s certificate, including an example of this certification, see Annex A.

¹⁹² Regarding procedures for actions taken by the Board (including by a committee), see *supra* notes 179–81, 183 and accompanying text.

If the authority of the Board has been modified by a Section 21.101 Shareholders’ Agreement, a copy of that agreement should be reviewed. Regarding the requirements for a Section 21.101 Shareholders’ Agreement modifying the authority of the Board, see *supra* note 179.

If, pursuant to Section 21.416 of the TBOC, a committee has been designated to have the authority of the Board relevant to the Corporation’s execution, delivery, and performance of the Transaction Documents, corporate resolutions

- (3) *regarding shareholder approval, if required under the TBOC or the Corporation's certificate of formation or bylaws, confirmation of shareholder approval by review of:*
 - (A) the TBOC;¹⁹³
 - (B) copies of the Certified Certificate of Formation and bylaws, certified by an officer's certificate;¹⁹⁴ and
 - (C) copies of corporate resolutions or other enabling actions of the shareholders, certified by an officer's certificate as having been duly adopted, evidencing their approval of the action to be taken by the Corporation; and
- (4) confirmation that the terms of the Transaction Documents are within the scope of the Board's (and, if required, the shareholders') authorization, by review of the Transaction Documents executed and delivered by the Corporation on or before¹⁹⁵ the date of the opinion letter.

or other enabling actions of the Board designating the committee should be reviewed. For a discussion regarding the designation of a committee to exercise authority of the Board as to specified matters, see *supra* note 181 and accompanying text.

¹⁹³ Regarding actions requiring shareholder approval, see generally discussion *supra* notes 171, 182 and accompanying text.

¹⁹⁴ See *supra* note 191.

¹⁹⁵ Regarding Transaction Documents dated after the date of the opinion letter, see *supra* note 13.

Section 3.3 Opinions on Corporate Action: A Duly Executed and Delivered Opinion.

Illustrative Opinion Form: *The Transaction Documents to which the Company is a party have been duly executed and delivered by the Company.*¹⁹⁶

Subsection 3.3(a) Meaning of a Duly Executed and Delivered Opinion.

As to each Transaction Document covered by the opinion, a duly executed and delivered opinion means that:

- (1) each person shown in the Transaction Document as a signatory for the Corporation, at the time that person executed the document, and each person who delivered the document at the time of delivery,¹⁹⁷ had actual authority to do so on behalf of the Corporation either by virtue of the office held by that person or as authorized by the resolutions or other enabling actions of the Board authorizing execution and delivery of the Transaction Document;
- (2) the Transaction Document has been executed and delivered on behalf of the Corporation in compliance with the Corporation's certificate of formation and bylaws, and, if any, resolutions or other enabling actions of the Board authorizing execution and delivery of the Transaction Document;¹⁹⁸ and

¹⁹⁶ *Id.* The illustrative opinion form assumes that each Transaction Document covered by the opinion letter is executed and delivered on or before the date of the opinion letter.

For further discussion of this corporate action opinion, see *supra* the introductory paragraph of Section 3.2 following note 168.

¹⁹⁷ For a discussion of electronic signatures and delivery by electronic means, see *supra* Section 1.5 (*Electronic Signatures and the Opinions Addressed in this Report*), and *infra* notes 202, 208, 210 and accompanying text.

¹⁹⁸ See, e.g., GLAZER § 9.4.1, at 291–92 (Supp. 2024) (citations omitted) (a duly executed opinion means “the agreement was signed in the name of the company by someone having authority to do so. The opinion also means that the manner

- (3) the Transaction Document has been executed and delivered on behalf of the Corporation in accordance with any applicable Texas contract and agency law,¹⁹⁹ without condition (or upon satisfaction of any condition), with the intent to make the Corporation’s obligations binding on it.²⁰⁰

in which the agreement was signed complied with applicable legal requirements and the requirements, if any, of the company’s charter and bylaws and board resolutions.”); *TriBar 1998 Report* § 6.4, at 654 (a duly executed opinion means that “[t]he persons identified in the agreement as signatories had actual authority to execute the agreement on behalf of the Company [and] that all required signatures were obtained.”); *see also* CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 45–46; NORTH CAROLINA 2004 REPORT at 40, 42, 44.

¹⁹⁹ See *infra* notes 205–07 and accompanying text for a discussion of Texas agency and contract law regarding execution and delivery.

²⁰⁰ See, e.g., GLAZER § 9.5, at 301–02 (Supp. 2024) (a duly delivered opinion means “[t]he agreement has been delivered by the company in a manner that manifests the intent of the company to be contractually bound (but only to the extent the opinion covers the law governing delivery)”; *TriBar 1998 Report* § 6.4, at 654 (a duly delivered opinion means “[t]he Company delivered the executed agreement (or caused it to be delivered) in a manner permitted by applicable law.”); CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 45 (“‘Duly delivered’ means that the [c]ompany has delivered the[a]greement to the other party or parties to the transaction to create a binding contract.”); FLORIDA REPORT at 88 (a duly delivered opinion means the company has given “in some fashion” the executed documents to the recipient “intending to create a legally binding contract”); NORTH CAROLINA 2004 REPORT at 40 (opinion means “persons having authority to bind the [c]ompany have ... delivered [the documents] in a manner to make them binding”); *id.* 44 (opinion as to delivery means any conditions thereto have been satisfied); VIRGINIA REPORT at 34 (a duly delivered opinion means “the executed document has been appropriately transmitted to the opinion recipient without condition and with the intent to create a legally binding contract.”); WASHINGTON REPORT at A–17 n.66, stating (emphasis added):

The delivery opinion means that the borrower has delivered the transaction documents to the lender with an intent to be bound (meaning there are no unfulfilled conditions or contingencies that must be satisfied before the documents would be binding on the borrower). Conditions *to the effectiveness* of the documents contained within the documents themselves do not prevent a legally effective delivery.

As is the case with the “duly authorized” opinion, because the duly executed and delivered opinion has the same meaning whether or not the adverb “duly” or a variant of the word “due” is included or omitted, if the opinion giver wishes to limit the meaning of the opinion, it should do so by an express statement of the limitation.²⁰¹

In giving a duly executed opinion, opinion givers are entitled to assume, as a matter of customary practice and without so stating, that the signature of each person authorized to sign a Transaction Document on behalf of the Corporation is genuine.²⁰² Although not necessary, opinion givers sometimes expressly assume the genuineness of signatures. The duly executed opinion does not require the opinion preparers to observe the signing of a Transaction Document and does not cover whether the person whose name appears as signatory on the Transaction Document is

²⁰¹ Cf. *supra* note 178 and accompanying text (addressing “duly authorized”).

²⁰² *Statement of Opinion Practices*, § 5.5; see also FIELD & SMITH § 9:3.1[E], at 362; GLAZER § 9.4, at 298 (Supp. 2024); *TriBar 1998 Report* § 2.3(a), at 615 and § 6.4, at 654 n.147.

The unstated assumption as to the genuineness of signatures also applies to electronic signatures. GLAZER § 9.4.2, at 300 (Supp. 2024) (“The authenticity of [an electronic] signature, ... , is not an opinion problem because due execution opinions are based on a factual assumption which may be unstated that signatures are genuine.”) For a general discussion regarding electronic signatures, see *supra* Section 1.5 (*Electronic Signatures and the Opinions Addressed in this Report*).

The genuineness of signatures is a factual matter and generally an inappropriate subject of a legal opinion. GLAZER § 9.4.1, at 298 n.27 (Supp. 2024) (stating:

The [*Maryland Report*] at 176 n.486 takes the position (correctly, in the view of the authors of [GLAZER]), that a request for an opinion confirming the genuineness of a signature, including the signature of the person signing on behalf of the company, is inappropriate in most instances because the genuineness of signatures (as opposed to the *authority* of a signer to sign on behalf of a company) is a factual not a legal matter).

The *Texas 1992 Report* at 86–87 states that a duly executed opinion addresses “the validity” of signatures of the officers executing the documents covered by the opinion, while also noting that validity of signatures is frequently expressly assumed in the opinion letter. That statement that a duly executed opinion addresses validity of signatures, however, no longer reflects customary practice, whether in Texas or elsewhere, and should be disregarded.

the person who signed it.²⁰³ When not personally observing the execution and delivery of the Transaction Documents, an opinion giver nevertheless may give an opinion that Transaction Documents to which a Corporation is a party have been duly executed by that Corporation by relying on an officer's incumbency certificate that shows the named signatory on the Transaction Document is a person authorized to execute the document.²⁰⁴

Due execution and delivery are not only matters of Texas corporation law under the TBOC and matters of the law governing electronic signatures; they are also matters of applicable Texas contract and agency law.²⁰⁵ Because the duly executed and delivered opinion is

²⁰³ GLAZER § 9.4.1, at 297-98 (Supp. 2024) (footnote omitted) (“A due execution opinion can be given even though the opinion preparers have not personally observed the signing of the agreement or verified in some other way the genuineness of the signature of the person signing on behalf of the company.”).

²⁰⁴ For a discussion of the incumbency certificate, see *infra* note 214 and accompanying text.

²⁰⁵ GLAZER § 9.4.1, at 291-92 (Supp. 2024) (due execution covers corporation law and also agency law and contract law, and is subject to special requirements of the Corporation's certificate of formation, bylaws and the resolution authorizing execution of the agreement); *TriBar 2004 Remedies Report* 1486 n.22 (due execution is a function of corporation and agency law and also a matter of contract law requirements governing due execution, such as the Statute of Frauds, which will normally be those of the state whose law governs the agreement); *TriBar 1998 Report* § 6.4, at 654 (a duly delivered opinion means the Company delivered the executed agreement, or caused it to be delivered, in a manner permitted by applicable law); PENNSYLVANIA REPORT at 25 (due execution means the documents were executed in conformity with requirements of applicable contract and corporation laws, the corporation's articles and bylaws, and the authorizing resolutions); VIRGINIA REPORT at 33-34 (a duly executed opinion means that the persons identified as signatories had “actual authority to execute the Agreement on behalf of the Company, that all required signatures were obtained, that the Agreement was signed in a manner consistent with the requirements of applicable corporate (or other entity) law, contract law (e.g., statute of frauds, if applicable) and the Company's organizational documents and authorizing resolutions”).

Considerable authority exists that the law of the jurisdiction governing a contract also governs the contractual requirements for execution and delivery of that contract. GLAZER § 9.4.1, at 296 & n.21 (Supp. 2024) (under the Restatement (Second) Conflict of Laws, formalities required to make a valid contract normally are determined by the law of the state that is chosen in the agreement as the governing law). See, also *TriBar 2004 Remedies Report* at 1486 n.22 (citing to

typically based on express authorization in corporate resolutions, agency law (outside of the TBOC) is rarely an issue.²⁰⁶ Under Texas contract law,

Restatement (Second) of Conflict of Laws §§ 198–207 (1971)) (“[T]he contract law requirements governing due execution ... normally will be those of the state whose law governs the agreement.”)

So, for example, if a Transaction Document expressly chooses Texas law as its governing law, a duly executed and delivered opinion given as to Texas law means that requirements of Texas contract and agency law applicable to due execution and delivery (as well as the requirements of the TBOC, and the Corporation’s certificate of formation and bylaws, if executed and delivered by a Corporation) have been satisfied. Alternatively, if a Transaction Document chooses the law of another jurisdiction as its governing law, the requirements for due execution and delivery under that other jurisdiction’s law need to be satisfied. Sometimes opinion recipients request the opinion even though Texas law is not the law chosen to govern the document and is not applicable. If the opinion nonetheless is given in that circumstance, it should be understood to mean the document has been duly executed and delivered only to the extent Texas law may be applicable; a due execution and delivery opinion covering Texas law does *not* address the requirements for due execution and delivery under the law of any other jurisdiction (even when that law has been chosen to govern a Transaction Document); nor does the due execution and delivery opinion address the effectiveness of any choice of law provision in any Transaction Document. If a party is executing a Transaction Document while located in a jurisdiction, other than Texas, whose laws would invalidate or impose restrictions on the signature, a due execution and delivery opinion as to Texas law would *not* address that other jurisdiction’s laws. *See generally* GLAZER § 9.4.1, at 296–97 (Supp. 2024); *see also id.* § 9.14.1, at 362–63 n.2 (Supp. 2024) (noting the consequences of violating the Massachusetts’ Sunday closing law); FIELD & SMITH § 6.2.1, at 216 (noting Sabbath laws as an example of how the jurisdiction where a document is signed might restrict how or when an agreement can be signed).

²⁰⁶ *See* GLAZER § 9.4.1, at 295 (Supp. 2024) (normally, corporate resolutions approving an agreement expressly authorize execution by specific officers of the Corporation, which provides them express authority to act on behalf of the Corporation and permits opinion givers to avoid having to determine whether the persons signing the agreement had implied authority).

The actual authority of persons signing on behalf of the Corporation, as a matter of agency law, may be either express or implied. *Id.* § 9.4.1, at 293 (Supp. 2024). For a discussion on implied authority of a person signing on behalf of an entity, *see id.* § 9.4.1, at 294 (Supp. 2024).

An example of when agency law outside of the TBOC should be considered is the unusual circumstance of when a document is signed and delivered pursuant

an opinion addressing the delivery of a Transaction Document refers to a party having manifested an intent to be bound.²⁰⁷

Historically, the parties to a transaction or their representatives personally attended a closing where they physically exchanged manually signed Transaction Documents. Today, parties to a transaction and their counsel often are not present at a single physical closing at which all parties physically execute and deliver the Transaction Documents. Instead, Transaction Documents are now typically finalized, executed (either physically or electronically), and delivered by electronic transmission²⁰⁸ to a central party to the transaction, and then considered released and delivered to the relevant parties, by means of separate acts coordinated by parties to the transaction and their counsel. When not personally observing physical delivery of the Transaction Documents, an opinion giver nevertheless may give an opinion that Transaction Documents to which a Corporation is a party have been duly delivered by that Corporation by relying on agreed-upon arrangements to confirm delivery and the Corporation's intention to be bound. For example, the opinion giver may agree with officers or other representatives of the Corporation, as well as with counsel to the opinion recipient (and perhaps other counsel in the transaction), on specific procedures that will constitute "delivery" or specific notices to be given to confirm release and delivery of documents. Such arrangements are often made informally, consistent with the professional judgment of the opinion giver.²⁰⁹ When delivery of

to a power of attorney. See, for example, note 6 to the illustrative officer's certificate in Annex A.

²⁰⁷ *Huckaba v. Ref-Chem, L.P.*, 892 F.3d 686, 689 (5th Cir. 2018); *Alaga v. Stubblefield*, 174 S.W.2d 627, 629 (Tex. App.—El Paso 1942, no writ). Other bar reports have also recognized this principle. See, e.g., VIRGINIA REPORT at 34.

²⁰⁸ GLAZER § 9.5, at 301–02 (Supp. 2024) ("Whether the [Transaction] agreement is delivered physically or electronically, however, an opinion that the company has 'duly delivered' the agreement means that the agreement has been delivered by the company in a manner that manifests the intent of the company to be contractually bound...." But an opinion as to due delivery of a document applies only if the law covered by the opinion is the law that governs the document's delivery and not if, for example, the Transaction Document selects the law of different jurisdiction to govern the document.)

²⁰⁹ See, e.g., CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 46 (if the opinion giver is not present at the delivery of the transaction documents, the "duly delivered" opinion means the opinion giver is "otherwise satisfied as to the implementation of procedures for actual delivery."); FLORIDA REPORT at 88 (if

Transaction Documents to which the Corporation is a party, including signature pages, is performed by electronic means, the opinion giver may assume, without so stating, that the electronic exchange of Transaction Documents signed by the Corporation (or of signed signature pages), together with the express or implied authorization of the Corporation to deliver such documents, or to attach such signed signature pages to the applicable documents, constitute delivery by the Corporation of those Transaction Documents.²¹⁰

Subsection 3.3(b) Work to Support a Duly Executed and Delivered Opinion.

Based on the foregoing, as a matter of customary practice an opinion that the Corporation has duly executed and delivered the

the opinion giver is not present for the delivery of transaction documents, it should otherwise satisfy itself regarding their actual delivery); NORTH CAROLINA 2004 REPORT at 44 (“If delivery is to be accomplished other than by actual physical transfer, inquiry should be made to determine that the Company in fact intends to be bound at the pertinent point in time.”); VIRGINIA REPORT at 34 (if the opinion giver is not present at delivery of the transaction documents, it should “otherwise satisfy himself or herself that delivery has occurred (e.g., escrow or document transmittal letter /fax/e-mail; cross-receipt; certificate to counsel).”).

Various bar reports on opinion practice describe approaches that practitioners take to address their concerns when they do not personally observe the delivery of their client’s executed documents, such as (i) utilizing a closing escrow letter or obtaining officer certifications as to factual elements of execution and delivery (see, e.g., FLORIDA REPORT at 88–89; NORTH CAROLINA 2004 REPORT at 42–43; VIRGINIA REPORT at 34) and (ii) stating in the opinion letter that execution and delivery were not observed, and describing the factual matters and certificates relied on (see, e.g., CALIFORNIA 2014 SAMPLE OPINION REPORT at 9 n.19 (noting this is an approach taken by some opinion preparers not comfortable relying on customary practice); FLORIDA REPORT at 90) (providing a sample opinion qualification).

²¹⁰ See, e.g., CALIFORNIA 2014 SAMPLE OPINION REPORT at 9 n.19 (opinion givers may assume without so stating that “an electronic exchange of signature pages, coupled with express or implied authorization to attach them to the relevant documents, is an appropriate procedure to constitute actual delivery”); VIRGINIA REPORT at 34; see also, GLAZER § 9.4.1, at 297 n.26 (Supp. 2024) (the fact that executed signature pages are not attached to the final documents when delivered to counsel does not create an opinion problem so long as their later attachment is pursuant to authority granted by the signer).

Transaction Documents to which it is a party may be based on the following:

- (1) the work required to support the opinions on valid existence, corporate power and the due authorization of the execution and delivery of the Transaction Documents;²¹¹
- (2) confirmation, as to all of the persons shown in the Transaction Documents as signatories for the Corporation, of (i) their authority, in their capacities as officers or other designees of the Corporation, to execute and deliver the Transaction Documents on behalf of the Corporation, and (ii) the satisfaction of the requirements, if any, that certain types of documents be signed by (or by a specified number of) specified officers or designees, by review of:
 - (A) copies of the Certified Certificate of Formation and bylaws,²¹² each certified by an officer's certificate;²¹³ and
 - (B) a copy of corporate resolutions or other enabling actions of the Board (in each case including, if required, of any committee), certified by an officer's certificate as having been duly adopted;
- (3) confirmation that all of the persons shown in the Transaction Documents as signatories for the Corporation are officers or other designees authorized, pursuant to the resolutions or other enabling actions referred to above, to execute and deliver the Transaction Documents on behalf of the Corporation by review of an officer's incumbency

²¹¹ For discussions of the work required to support an opinion on each of the matters referred to in this paragraph (1), see *supra* note 189 and Subsection 3.2(c) (*Work Required to Support a Duly Authorized Opinion*).

²¹² See TBOC § 3.103(b) (officers have authority as provided in the Corporation's certificate of formation and bylaws.)

²¹³ For further information on the officer's certificates referred to in this Subsection, see *supra* note 191.

certificate²¹⁴ certifying that, on the date of the certificate (and any prior date of execution of any Transaction Document, if executed prior to the date of the certificate), all of the persons shown in the Transaction Documents as signatories for the Corporation are duly elected or appointed and acting officers or other designees of the Corporation, holding the respective positions or capacities specified in the certificate;

- (4) confirmation, by review of the Transaction Documents executed and delivered by the Corporation on or before the date of the opinion letter,²¹⁵ that:
 - (A) the name or office or other designation of each person shown in any of the Transaction Documents as signatories for the Corporation corresponds to a name or office or other designation authorized in the resolutions or other enabling actions of the Board and certified in the officer's certificate as to incumbency; and
 - (B) each Transaction Document has been signed by the number and in the capacity of signers required by the Certified Certificate of Formation, bylaws, and such resolutions or other enabling actions;
- (5) consideration of applicable Texas contract and agency law, if any, imposing requirements on the manner of

²¹⁴ For an example of such a certification see, paragraph (d) of the illustrative officer's certificate in Annex A, which includes a specimen of each designated person's signature. See GLAZER § 9.4.1, at 297-98 (Supp. 2024) (opinion preparers ordinarily rely on an officer's certificate to confirm the signer of the documents was duly elected to and holds the designated office specified in the authorizing resolution and are entitled to assume that signatures are genuine without so stating). For a discussion of the unstated assumption for genuineness of signatures, see *supra* notes 202-03 and accompanying text.

²¹⁵ Regarding Transaction Documents dated after the date of the opinion letter, see *supra* note 13.

execution or delivery of the particular Transaction Documents covered by the opinion;²¹⁶ and

- (6) confirmation (based on the facts and circumstances of the transaction, including any arrangements of the client or other parties) that the Corporation has completed delivery of the Transaction Documents to which it is a party to make them binding on the Corporation, including the release of any escrowed executed signature pages.²¹⁷

²¹⁶ See discussion *supra* notes 206–07 and accompanying text.

²¹⁷ For a discussion on determining that delivery has occurred, see *supra* notes 200, 207–09 and accompanying text.

CHAPTER IV

CORPORATE SHARES OPINIONS

When shares of a Corporation are issued in a transaction, the recipients often request an opinion that those shares (the “**Opinion Shares**”) have been duly authorized and are validly issued, fully paid and nonassessable. Illustrative language for this opinion, together with a discussion of its meaning and the work required to give it, are set forth below.²¹⁸

Illustrative Opinion Form: The Opinion Shares have been duly authorized and are validly issued, fully paid and nonassessable.

Section 4.1 Opinion Shares Have Been Duly Authorized.

Subsection 4.1(a) Meaning of the Duly Authorized Shares Opinion.

An opinion that Opinion Shares have been duly authorized²¹⁹ means that under the TBOC²²⁰ and the Corporation’s certificate of

²¹⁸ The discussions in Sections 4.1 and 4.2 are limited to opinions on the issuance of a specific number of shares. For a discussion of opinions that address the entire equity capitalization of a Corporation, see *infra* Section 4.3 (*Broader Equity Capitalization Opinions*).

²¹⁹ The phrase the “Opinion Shares have been duly authorized” refers to the creation of the class or series of the Opinion Shares and confirms they are authorized for issuance in accordance with the TBOC and the Corporation’s certificate of formation. The “duly authorized” character of shares is different from “validly issued;” valid issuance refers to the issuance of shares in a specific transaction that has been “authorized” by the Board of Directors or other required action such as shareholder approval. GLAZER § 10.3, at 448 (Supp. 2024); *TriBar 1998 Report* § 6.2.1, at 648 n.125. For a discussion of the meaning of “validly issued,” see *infra* Subsection 4.2(a) (*Meaning of the Validly Issued, Fully Paid and Nonassessable Shares Opinion*).

²²⁰ Effective January 1, 2006, the TBOC replaced, among others, the prior statute applicable to corporations, the BCA. See *supra* notes 9–10 and Section 1.6 (*Opinions on Corporations Formed under the Predecessor Statute to the TBOC*) for more detailed information. The TBOC, however, has a special grandfathering provision applicable to shareholders’ statutory preemptive rights. See *infra* note 289. If the TBOC was not effective as to the Corporation at the time the Opinion

formation²²¹ the Opinion Shares at the time of their issuance are included within the shares the Corporation has the corporate power and authority to issue.²²² The opinion means (i) at both the time of creation of the Opinion Shares, or the time of any subsequent ratification²²³ or modification, if applicable, and at the time of their issuance, the terms of the Opinion Shares (that is, their designation, preferences, limitations, and relative rights) complied with the certificate of formation and the TBOC²²⁴ (or if applicable, the BCA), (ii) if the Opinion Shares were created by an amendment to the Corporation's certificate of formation or by resolution adopted by the Board pursuant to authority contained in the certificate of formation, the amendment or Board resolution was duly adopted in accordance with the TBOC and the Corporation's certificate of formation and bylaws,²²⁵ and (iii) at the time the Opinion Shares are issued, the

Shares were created, then the reference to the TBOC in the text at note 224 would refer instead to the BCA.

²²¹ References in this Chapter to "certificate of formation" include any statements of resolutions adopted by the Board and filed with the Secretary of State to designate a new series of preferred stock, which are treated as amendments. *See infra* notes 233–34 and accompanying text.

²²² *TriBar 1998 Report* § 6.2.1, at 648; *TriBar Op. Comm., Special Report of the TriBar Opinion Committee: Duly Authorized Opinions on Preferred Stock*, 63 BUS. LAW. 921 (2008) at 925; CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 67.

²²³ TBOC §§ 21.901–917 contains provisions for the ratification of certain defective corporate acts that otherwise would be void or voidable.

²²⁴ For example, Section 3.007 of the TBOC provides that for each class of authorized shares, the Corporation's certificate of formation must state the par value of each share or state that each share is without par value. If the certificate of formation does not do so, the shares are not considered properly authorized. *See* TBOC §§21.151–154 (requirements for and optional characteristics of a Corporation's shares). *See also* GLAZER §§ 10.3, 10.4.2.1, at 458–59 (Supp. 2024). A defect in the creation of the shares authorized by the certificate of formation may be corrected by ratification. The TBOC provides for the ratification of some defective corporate acts that would otherwise be void or voidable. TBOC §§ 21.901–917.

²²⁵ *See* discussion *infra* Subsection 4.1(a)(2) (*Creation of Opinion Shares after the Corporation's Formation*). *See also* GLAZER § 10.4.2.2, at 461–65 (Supp. 2024); *TriBar 1998 Report* § 6.2.1, at 648.

If the authority of the Board has been modified by a Section 21.101 Shareholders' Agreement, compliance with that Agreement would also be

Corporation has a sufficient number of authorized and unissued shares and treasury shares of the class or series of the Opinion Shares available under its certificate of formation to effect the issuance of the Opinion Shares.²²⁶ This Section 4.1 discusses these three components of an opinion on the due authorization of particular shares.

The illustrative opinion form uses the phrase “duly authorized.” However, the opinion also means the same thing whether or not the adverb “duly” or a variant of the word “due” is included or omitted. If the opinion giver wishes to limit the meaning of the opinion, it should do so by an express statement of the limitation.²²⁷

This Chapter IV refers to an opinion that Opinion Shares have been duly authorized as a “duly authorized shares opinion” to avoid confusion with the “corporate action” due authorization opinion covered in Chapter III of this report.

Subsection 4.1(a)(1) Creation of Opinion Shares; Compliance with the TBOC and Certificate of Formation.

The certificate of formation must state the aggregate number of shares a Corporation is authorized to issue, and it may divide the Corporation's authorized shares into one or more classes and further divide one or more classes into one or more series.²²⁸ The Corporation's certificate of formation must authorize one or more classes or series of shares with specified designations, preferences, limitations, and relative

necessary. See *supra* Subsection 3.1(b), note 179 for a discussion of the Section 21.101 Shareholders Agreement.

²²⁶ TBOC § 21.151; *TriBar 1998 Report* § 6.2.1, at 648; CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 67.

²²⁷ *TriBar 1998 Report* at 641 (omission of adverb “duly” from “duly authorized” opinion does not adequately communicate any concerns or limit the meaning of the opinion).

²²⁸ TBOC §§ 3.007(a)(1), (b), 21.152(a).

rights,²²⁹ and each class and series must satisfy certain requirements.²³⁰ If more than one class or series is authorized, the certificate of formation must state the designated characteristics specified by the TBOC with regard to each class and series.²³¹ Further, if authorized by the certificate of formation, the TBOC permits a Corporation to issue shares containing various optional characteristics.²³²

The certificate of formation also may authorize the Board of Directors to establish one or more series of unissued shares of any class by adopting a resolution that specifies the characteristics of that series and filing a statement with the Secretary of State containing the resolution, among other things.²³³ Upon filing such statement with the Secretary of State, the resolution, without any additional filing, becomes an amendment to the certificate of formation.²³⁴ When the Board establishes a new series of shares that includes the Opinion Shares, the duly authorized shares opinion means that the Board acted in accordance with its authority under the Corporation's certificate of formation and bylaws and in compliance with the TBOC.²³⁵ If not restricted by the certificate of formation, the Board may also, by adopting an appropriate resolution and filing a related statement with the Texas Secretary of State, (i) increase or decrease the

²²⁹ One or more classes or series of shares together must have unlimited voting rights, and one or more classes or series of shares together (with or excluding voting shares) must be entitled to receive the net assets of the Corporation on winding up and termination. *Id.* § 21.152(d).

²³⁰ Shares of the same class must have the same par value or no par value and must be identical in all respects unless divided into series with all shares of the same series being identical. *Id.* § 21.152(b)–(c).

²³¹ *Id.* § 21.153.

²³² *Id.* §§ 21.153(b),(c), .154.

²³³ *Id.* §§ 3.007(b)(5)(D), 21.155(a)–(b), .156(a).

The Delaware corporate statute has similar provisions, DEL. CODE ANN. Tit. 8 § 151(g) (LEXIS 2025), and some practitioners familiar with the Delaware statute are accustomed to referring to this type of filing as a certificate of designations, the name given to such a filing under the Delaware statute. However, the TBOC does not use this terminology, and the Secretary of State has developed a form available on its website for such a filing titled “Resolution Relating to a Series of Shares.”

²³⁴ *Id.* § 21.156(a)–(b).

²³⁵ *TriBar 1998 Report* § 6.2.1, at 648.

number of unissued shares of a series that has been established by Board resolution (but may not decrease the number of shares of the series to a number fewer than the number of shares that are issued at the time of the decrease), (ii) delete the series (if no shares of the series are outstanding), or (iii) amend the terms of the series (if no shares of the series have been issued).²³⁶

Generally, compliance with the TBOC with respect to the designations, preferences, limitations, and relative rights of a Corporation's authorized shares can be readily and objectively determined under its certificate of formation and the TBOC. However, that may not always be the case, because the TBOC provides that some of those attributes may be made dependent on facts not contained in the certificate of formation if the manner in which those facts will operate is *clearly and expressly* stated in the certificate of formation.²³⁷ To give a duly authorized shares opinion in that circumstance, opinion preparers should consider what assumptions, qualifications, evidence of facts not contained in the certificate of formation or other appropriate actions need to be taken to give the opinion.

Subsection 4.1(a)(2) Creation of Opinion Shares after the Corporation's Formation.

If the Opinion Shares have been created after the Corporation's formation, the opinion preparers are responsible for confirming that the amendment to the certificate of formation (including any Board resolution to establish a series of shares or modify the number of unissued shares of such series)²³⁸ that created the Opinion Shares was properly adopted and approved²³⁹ or subsequently ratified.²⁴⁰ Provisions for approval of amendments to the certificate of formation are set forth in the TBOC²⁴¹

²³⁶ TBOC §§ 21.155(c)–(f), .156(a)–(b).

²³⁷ *Id.* § 21.153(c).

²³⁸ *See supra* notes 233–36 and accompanying text.

²³⁹ GLAZER § 10.4.1.2, at 450–52 (Supp. 2024).

²⁴⁰ *See supra* note 223 regarding TBOC ratification provisions.

²⁴¹ TBOC §§ 3.501–.054. The TBOC requires (except in limited circumstances) adoption of proposed amendments to the certificate of formation by the Board followed by approval of the amendments (voting by share class or series as specified in the certificate of formation) by shareholders holding at least two-

and also may be set forth in the Corporation's certificate of formation or bylaws. Procedures required for actions by the Board of Directors and by shareholders, typically set forth in the bylaws, include, if the action is taken at a meeting, (i) duly noticing, calling, holding and conducting a meeting of the Board or shareholders, as the case may be, (ii) attendance at each meeting of a quorum of duly elected Directors or shareholders, as the case may be, and (iii) obtaining the vote required to approve the proposed action at a meeting or if the action is taken by written consent, receipt of signed written consents from the required number of Directors or shareholders, as the case may be.²⁴² The opinion preparers may confirm these matters by reviewing the Corporation's corporate records or recitals or representations in the Transaction Documents or statements certified by an officer's certificate.²⁴³

Subsection 4.1(a)(3) Sufficiency of Shares.

To determine the availability of sufficient authorized shares of the relevant class or series of the Opinion Shares, the opinion preparers are responsible for verifying that, after reducing the number of shares authorized by the certificate of formation of the class or series of the Opinion Shares by the number of shares of such class or series that were previously issued (and not subsequently redeemed or acquired by the Corporation and held as treasury shares or canceled and restored to the status of authorized but unissued shares),²⁴⁴ a sufficient number of shares of such class or series remains available to issue the Opinion Shares.

thirds of the outstanding shares of the class or series (unless a different fraction, but not less than a majority, is specified in the certificate of formation) at a duly called meeting or by written consent of shareholders. *Id.* §§ 21.052–.055, .364, .365.

²⁴² *Id.* §§ 21.411–.415.

²⁴³ See *supra* text accompanying notes 28–29 for a discussion of reliance on an officer's certificate in lieu of independently confirming the status and capacity of approving persons or the satisfaction of procedural requirements. See generally *supra* Section 1.2 (*Factual Matters; Reliance on Certificates, Recitals, Representations, and Assumptions; Opinions Speak as of the Opinion Letter Date Unless Otherwise Indicated*).

²⁴⁴ Shares remain issued (although not considered outstanding) even though the Corporation subsequently acquires them, unless the shares are redeemable and have been redeemed or purchased by the Corporation. The redemption or purchase of redeemable shares has the effect of cancelling the shares and restoring

A Corporation sometimes commits to issue shares in the future either by issuing securities that are convertible into the shares under the provisions of its certificate of formation²⁴⁵ or by entering into contracts that provide for the potential issuance of shares, such as options, warrants, or convertible debt.²⁴⁶ In these circumstances, the Board may “reserve” shares for future issuance of the committed shares. In contrast to the laws of some other states, the TBOC neither requires a Corporation to keep unissued shares or treasury shares available to satisfy those commitments²⁴⁷ nor provides any legal effect to a “reservation” of shares by the Board or otherwise addresses reservation of shares for future issuance.²⁴⁸

the shares to the status of authorized but unissued shares, unless the Corporation’s certificate of formation precludes their reissuance. TBOC § 21.251(a). Shares, other than redeemable shares, that have been issued and subsequently acquired by the Corporation and not cancelled are called treasury shares. *Id.* § 21.002(13). The Board of Directors by resolution may cancel all or part of the Corporation’s treasury shares, and, when so cancelled, the shares are restored to the status of authorized but unissued shares. *Id.* § 21.252.

²⁴⁵ *Id.* § 21.154(a)(6). Under TBOC § 21.154(a)(5), a Corporation’s certificate of formation may also provide for the issuance of shares that are exchangeable for shares, obligations, indebtedness, evidence of ownership, rights to purchase securities of the issuer or other entities or other property. Considerations regarding exchangeable shares are beyond the scope of this report.

²⁴⁶ *Id.* § 21.168.

²⁴⁷ For example, the Delaware corporation statute contains a provision limiting the number of shares available for issuance by the number of shares committed to future issuance. DEL. CODE ANN. Tit. 8 § 161 (LEXIS 2025) states (emphasis added):

The directors may, at any time and from time to time, if all of the shares of capital stock which the corporation is authorized by its certificate of incorporation to issue have not been issued, subscribed for, or *otherwise committed to be issued*, issue or take subscriptions for additional shares of its capital stock up to the amount authorized in its certificate of incorporation.

See GLAZER § 10.6.1 and n.16, at 475–76 (Supp. 2024).

²⁴⁸ See GLAZER § 10.14, at 509 (Supp. 2024) (citations omitted) (“In many states a reservation of shares for future issuance has no legal effect, and the directors are free to rescind that reservation and issue shares for another purpose.”); see also CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 74 (the California corporation law does not provide any legal effect to reservation of shares).

For purposes of determining the availability of sufficient authorized shares, the duly authorized shares opinion does not address whether the Corporation is or will be in compliance with its obligations under contracts with other parties.²⁴⁹ For this reason, the opinion may be given without considering commitments that arise from a Corporation's contracts with other parties to issue in the future shares of the same class or series as the Opinion Shares and without regard to whether the Board has acted to "reserve" shares that may be issued under those contracts. However, if the opinion preparers recognize that the shares committed to be issued, after taking into account the shares being issued, could exceed the Corporation's authorized and treasury shares, in order to give the duly authorized shares opinion they should consider, depending upon the circumstances, if any qualifications, disclosures, or other appropriate actions may be needed.

A different issue arises upon the issuance of the Opinion Shares if (i) the Corporation has previously issued a class or series of securities authorized under its certificate of formation (e.g., convertible preferred stock) that are convertible into shares of the same class or series as the Opinion Shares and (ii) after giving effect to the issuance of the Opinion Shares, the full conversion in the future of such previously issued convertible securities in compliance with the terms of the Corporation's certificate of formation would cause an overissue of the class or series of the Opinion Shares. Texas law has not addressed the validity of the issuance of the Opinion Shares in such a situation, and in the foregoing circumstance opinion preparers should consider, depending upon the circumstances, if any qualifications, disclosures, or other appropriate

Because the TBOC does not address the reservation of shares, it is the Committee's view that an opinion request as to the effect of Board action to reserve shares is not appropriate, and an opinion giver may appropriately decline to give such an opinion. If an opinion giver nevertheless gives an opinion as to the Board's having taken action to reserve shares, it may want to consider whether under the circumstances it should clarify in the opinion such a reservation of shares has no legal effect under the TBOC.

²⁴⁹ GLAZER § 10.2.4, at 446–47 & 447 n.11 (Supp. 2024); *TriBar 1998 Report* § 6.2.2, at 649; NORTH CAROLINA 2004 REPORT at 47 n.93.

If addressed, contractual rights would be the subject of a separate opinion request by the recipient and, if given, would be covered by a separate opinion, typically a no breach of contract opinion, which is beyond the scope of this report.

actions may be needed to give the duly authorized shares opinion for the issuance of the Opinion Shares.

Subsection 4.1(b) What the Duly Authorized Shares Opinion Does Not Cover.

The duly authorized shares opinion does not cover the Corporation's compliance with state and federal securities laws or disclosure requirements, such as the accuracy of the description of the Opinion Shares in an offering document, a proxy statement or other information document used in connection with an approval of shareholders.²⁵⁰ This is implicit as a matter of customary practice and does not require an express qualification. In certain types of transactions, however, opinions as to compliance with securities laws *are* given; but those opinions are beyond the scope of this report.

Further, the duly authorized shares opinion does not cover whether the Directors, in taking the relevant actions of the Board, based their decisions on information sufficient to meet the appropriate standard of care, had no conflicts of interest or met any disclosure obligations regarding the existence of personal interests, or otherwise complied with their fiduciary duties. These matters are not covered because their analyses involve complex questions of fact and inquiries into subjective intent that are not appropriate subjects of an opinion. Instead, an assumption as to these matters is implicit and need not be stated expressly in opinion letters. Although not necessary, some opinion givers disclaim coverage of fiduciary duties in their opinion letters, and the statement of such an express disclaimer does not imply the absence of an implicit assumption as to all of the matters discussed in this paragraph. The Committee believes it is not appropriate for an opinion recipient to insist on receiving an opinion on any of these matters.²⁵¹

Although, the duly authorized shares opinion addresses whether the designations, preferences, limitations, and relative rights comply with

²⁵⁰ GLAZER § 10.4.1.2, at 453 & n.15 (Supp. 2024); *TriBar 1998 Report* § 6.2.1, at 649; CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 68; NORTH CAROLINA 2004 REPORT at 47; VIRGINIA REPORT at 36.

²⁵¹ For detail and citations regarding this exclusion from coverage, see also *supra* Subsection 3.2(b) (*What a Duly Authorized Opinion Does Not Cover*), notes 184–88 and accompanying text.

the certificate of formation and the TBOC, it does not address whether such terms will be given effect by a court in a particular situation, as that does not affect whether the shares are duly authorized.²⁵²

As noted in the preceding section,²⁵³ for purposes of determining the availability of sufficient authorized shares in connection with a duly authorized shares opinion, the opinion preparers do not have to take into account reserved or committed shares arising under the Corporation's contractual obligations to third parties to issue shares, such as options, warrants or convertible debt. If the Opinion Shares are convertible into other shares (of a different class or series), the opinion preparers also do not have to take into account or address that future conversion transaction or the other shares into which the Opinion Shares are convertible. Further, because opinions speak as of the date of the opinion letter, opinion preparers do not need to consider possible future increases in the number of issued shares that could result from other future events, such as future corporate financing transactions or antidilution clauses in convertible securities, options or warrants.²⁵⁴

Subsection 4.1(c) Work Required to Support a Duly Authorized Shares Opinion.

Based on the foregoing, as a matter of customary practice an opinion that the Opinion Shares have been duly authorized may be based solely on the following:

²⁵² GLAZER § 10.4.2.2, at 466 (Supp. 2024); Special Report of the TriBar Opinion Committee: Duly Authorized Opinions on Preferred Stock, 63 BUS. LAW. 921, 925 (2008):

[T]he opinion looks only to the Company's power under the applicable corporation statute and the Company's charter to create the class or series of preferred stock in question ... [and not] whether the terms of the preferred stock (assuming the Company has the power to create them) will be given effect by the courts [i.e. are enforceable] in a particular instance.

²⁵³ See *supra* notes 246–49 and accompanying text.

²⁵⁴ GLAZER § 10.6.3.1, at 475 n.17 (Supp. 2024).

- (1) confirmation of the valid existence of the Corporation at the time the shares were created (or subsequently ratified, if applicable);²⁵⁵
- (2) review of the TBOC (and, if applicable, the BCA²⁵⁶) and a copy of the Certified Certificate of Formation to confirm that at the time of creation of the Opinion Shares (or subsequent ratifying or modifying action, if applicable);
 - (i) the designations, preferences, limitations, and relative rights of the Opinion Shares comply with the certificate of formation and the TBOC (and, if applicable, the BCA); and
 - (ii) the certificate of formation contains all provisions required by the TBOC (and, if applicable, the BCA) regarding the Opinion Shares;

²⁵⁵ See GLAZER § 10.3, at 448 (Supp. 2024); VIRGINIA REPORT at 39. If the Opinion Shares were created when the Corporation was formed, Section 3.001(d) of the TBOC provides that the filing of the original certificate of formation with the Secretary of State is *conclusive evidence* of the Corporation's formation and existence, including the satisfaction of all conditions precedent to the Corporation's formation. See also GLAZER § 10.4.3, at 421–23 (discussing the work to give a duly authorized shares opinion).

Typically, a separate opinion will be given as to the Corporation's valid existence. If that valid existence opinion is limited (e.g. based solely on a Secretary of State's certificate), under customary practice it would be understood to apply as so limited to the duly authorized shares opinion being given in the same opinion letter on a current issuance of shares, because the opinion on current existence is a predicate for the duly authorized (and validly issued) opinion on the current issuance of shares. But the current existence opinion is not a predicate for an opinion on a prior issuance of shares, and any opinion given on the prior share issuance would not be based on such a limitation as to the valid existence of the Corporation unless stated expressly in the opinion on the prior issuance. See *supra* note 189.

²⁵⁶ For a Corporation formed before the effectiveness of the BCA, it may be difficult if not impossible to find a copy of the Texas corporation statute in effect at the time of the creation of the Opinion Shares and if so, opinion preparers should consider what qualifications may be needed to give the duly authorized shares opinion.

- (3) if the Opinion Shares were created by an amendment to the Corporation’s certificate of formation (including by filing the statement of Board resolution creating or modifying a new series of shares), confirmation of the adoption of the amendment by a review of:
- (i) the TBOC;
 - (ii) copies of the Certified Certificate of Formation and bylaws, each certified by an officer’s certificate;²⁵⁷ and
 - (iii) a copy of corporate resolutions or other enabling actions of the Board and shareholders, certified by an officer’s certificate, authorizing and adopting the amendment;²⁵⁸ or
 - (iv) if the Certified Certificate of Formation authorizes the Board to establish a series of unissued shares by resolution without shareholder approval pursuant to Sections 21.155 and 21.156 of the TBOC, review of the statement describing the series filed with the Secretary of State, together with the related Board resolution

²⁵⁷ This Subsection refers throughout to an “officer’s certificate”. Regarding the date on which an officer’s certificate is typically dated, see *supra* Glossary of Terms (definition of “*officer’s certificate*”). For an illustrative officer’s certificate see Annex A.

²⁵⁸ See *supra* note 241, which discusses the TBOC requirements to amend a Corporation’s certificate of formation. See *supra* text accompanying notes 28–29 for a discussion of reliance on an officer’s certificate in lieu of a requirement to verify independently the capacity in which approving persons act or the satisfaction of procedural requirements for meetings and other corporate action.

Under Section 21.416(c)(1) of the TBOC, a committee of the Board may not adopt an amendment to the certificate of formation except to establish a series of shares, or increase or decrease the shares of a series previously created by the Board. If a Board committee authorizes creation of the Opinion Shares of such a series, the officer’s certificate also should contain the Board resolution(s) that properly established that committee and appointed its members. GLAZER § 10.6.5, at 480 (Supp. 2024).

or enabling actions as certified by an officer's certificate, to verify (I) compliance with Sections 21.155 and 21.156 of the TBOC and (II) conformity of the statement describing the series with the Board resolution or actions; and

- (4) confirmation that at the time of issuance sufficient unissued (or treasury) shares of the class or series of Opinion Shares are available by:
 - (i) (A) review of the Certified Certificate of Formation for the number of authorized shares of the class and series of the Opinion Shares and (B) verification of the number of issued shares of the class and series of the Opinion Shares by relying on information provided by the Corporation's transfer agent or an officer's certificate or by reviewing the share transfer record book of the Corporation;²⁵⁹ and
 - (ii) review of the corporate records, or reliance on an officer's certificate, regarding the Corporation's treatment of any redemption or repurchase of shares or availability or cancellation of treasury shares.²⁶⁰

²⁵⁹ A review of the share transfer records of the Corporation may be impractical in many circumstances. These circumstances include a large number of shareholders, extensive share transactions, or the Corporation's reliance on electronic share transfer records in lieu of paper records. If the transaction involves a privately held corporation with a limited number of share issuances, the opinion preparers may be able to determine the number of issued shares from the Corporation's share transfer record book.

²⁶⁰ See *supra* note 244 and accompanying text for a discussion of treasury shares. If any Opinion Shares consist of previously issued treasury shares, then the opinion preparers would need to address in some manner whether these treasury shares were themselves "duly authorized" and were acquired by the Corporation in compliance with its certificate of formation and bylaws and the TBOC, and that the Board has authorized their sale. GLAZER § 10.6.3.1 n.15, at 475 (Supp. 2024).

Section 4.2 Opinion Shares Are Validly Issued, Fully Paid and Nonassessable.²⁶¹

Subsection 4.2(a) Meaning of the Validly Issued, Fully Paid and Nonassessable Opinion. An opinion that the Opinion Shares are validly issued, fully paid and nonassessable means that:

- (1) the issuance of the Opinion Shares to the recipient(s) was (i) authorized (or ratified²⁶²) by the Board of Directors²⁶³ or (ii) authorized by a plan of merger or plan of conversion;²⁶⁴
- (2) the issuance of the Opinion Shares (i) complies with any further requirements set out in the corporate action approving the issuance, (ii) does not violate the TBOC or the Corporation's certificate of formation or bylaws,²⁶⁵

²⁶¹ Typically, authorities and opinion reports consider separately each element of validly issued, fully paid and nonassessable. *See, e.g.*, GLAZER §§ 10.5–10.9 (Supp. 2024); *TriBar 1998 Report* §§ 6.2.2–6.2.4; CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 69–74; NORTH CAROLINA REPORT at 48–50; VIRGINIA REPORT at 37–39. Because Section 21.157(b) of the TBOC provides that receipt of consideration is a condition to the issuance of the shares and does not separately address nonassessability, this report treats validly issued, fully paid and nonassessable as a single opinion and addresses all three elements together.

²⁶² *See supra* note 223 regarding TBOC ratification provisions.

²⁶³ TBOC § 21.157(a), .160; GLAZER § 10.6.5, at 477–78 (Supp. 2024); *TriBar 1998 Report* § 6.2.2, at 649.

²⁶⁴ TBOC §§ 21.158, 10.001, .008(a)(8), .101, .106(6). A committee of the board of directors cannot approve a plan of merger or plan of conversion of the Corporation. *Id.* § 21.416(c)(3).

²⁶⁵ GLAZER §§ 10.6.1, at 470 (Supp. 2024); *TriBar 1998 Report* § 6.2.2, at 649; CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 69; NORTH CAROLINA 2004 REPORT at 48.

The validly issued shares opinion includes compliance with restrictions, if any, under the TBOC or the Corporations's certificate of formation or bylaws related to who is permitted to be a stockholder. Although this report does not cover professional corporations, an example of such a restriction is the requirement that all of the owners of a Texas professional corporation be licensed to provide the same professional service as is rendered by the professional corporation in order for the corporation to provide that service. TBOC §§ 301.003(5) and 301.006.

and (iii) if the Corporation operates in a regulated industry, complies with any applicable requirements for regulatory approval of the issuance of the Opinion Shares under a Texas statute other than the TBOC;²⁶⁶ and

- (3) consideration for the Opinion Shares determined in accordance with the TBOC has been paid or delivered to the Corporation as specified in the corporate action approving the issuance,²⁶⁷ and the holders of the Opinion Shares are not liable to the Corporation in respect of the Opinion Shares except the obligation to pay the full amount of consideration for which the Opinion Shares were issued.²⁶⁸

Implicit in the validly issued, fully paid and nonassessable opinion is an opinion that the Opinion Shares have been duly authorized, because the validly issued shares opinion requires that the Opinion Shares consist of properly created shares in accordance with the Corporation's certificate of formation and the TBOC and requires that the Corporation has sufficient authorized and unissued or treasury shares at the time of issuance of the Opinion Shares.²⁶⁹

²⁶⁶ For authority in the opinion literature and further discussion on the matters described in this clause (2)(iii), see *infra* Subsection 4.2(a)(4) (*Regulated Industry Approvals*) (noting, among other things, that guidance on opinions covering Corporations in regulated industries is beyond the scope of this report).

²⁶⁷ TBOC §§ 21.157–.162, 21.223(a)(1); GLAZER § 10.4, at 477 (Supp. 2024). The TBOC provides that shares may not be issued until the full amount of the consideration has been paid or delivered. Accordingly, in Texas, upon payment or delivery of proper consideration for shares, those shares become fully paid and nonassessable. See also *infra* notes 280–88 and accompanying text for further discussion of consideration for shares. See TBOC § 21.166 (regarding preformation subscription terms and payment).

²⁶⁸ See also *TriBar 1998 Report* § 6.2.4, at 651. For a discussion of limitations to the meaning of fully paid and nonassessable, see *infra* notes 306–09 and accompanying text.

²⁶⁹ *TriBar 1998 Report* § 6.2.2, at 649; CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 69.

The duly authorized shares opinion, including sufficiency of shares discussed *supra* Subsection 4.1(a)(3) (*Sufficiency of Shares*), is a predicate for the validly issued shares opinion.

A Corporation may issue shares for consideration if authorized by the Board of the Corporation and shares may not be issued until the consideration has been paid or delivered as required in connection with the authorization.²⁷⁰ A Corporation may also issue shares in connection with a merger or conversion of the Corporation. Shares issued pursuant to a plan of merger or plan of conversion are considered validly issued if the plan complies with, and is duly approved in accordance with, the TBOC and the Corporation's certificate of formation and bylaws.²⁷¹ Shares may also be issued by a Corporation in an interest exchange to acquire all outstanding shares of another Corporation or ownership or membership interests of another entity.²⁷² Under the TBOC a plan of exchange²⁷³ must be approved by the other corporation or other entity whose ownership or membership interests are being acquired in the interest exchange.²⁷⁴ Issuance of the shares by the acquiring Corporation in the exchange must be authorized by the Board of the acquiring Corporation²⁷⁵ in addition to being in the plan of exchange. Shares also may be issued in connection with a share split or reclassification effected by an amendment to the Corporation's certificate of formation,²⁷⁶ and the shares so issued are considered validly issued if the amendment is duly approved and effected

²⁷⁰ TBOC § 21.157(a)–(b).

²⁷¹ *Id.* § 21.158. The requirements for approval of plans of merger, conversion or exchange are beyond the scope of this Report. For a description of the approval requirements, see generally BYRON F. EGAN, EGAN ON ENTITIES (4th ed. 2023), §§ 1.4 and 2.3.

²⁷² *Id.* § 10.051. If the entity acquiring shares in the exchange is not governed by the TBOC, the acquiring entity must take all action required under laws of such entity's jurisdiction of formation and such entity's governing documents to effect the exchange, and issuance of ownership or membership interests by such entity in connection with the exchange must be permitted by (or not be inconsistent with) the laws of such entity's jurisdiction of formation. *Id.* § 10.051(d)–(e). The requirements for approval and issuance by an acquiring entity that is not a Corporation are beyond the scope of this report.

²⁷³ *Id.*

²⁷⁴ *Id.* § 10.051(b)(1). See *Id.* § 21.454 for the Board and shareholder approval requirements of the Corporation all of whose shares are acquired in the plan of exchange.

²⁷⁵ *Id.* §§ 10.051(b)(2), 21.157(a).

²⁷⁶ *Id.* § 3.051(b)(2).

under the TBOC and the certificate of formation and bylaws.²⁷⁷ Shares also may be issued pursuant to a share dividend approved by the Board.²⁷⁸

Subsection 4.2(a)(1) Consideration.

The TBOC lists the types of consideration for which shares may be issued²⁷⁹ and requires that the consideration be determined by the Board (or by a plan of merger or plan of conversion) unless the Corporation's certificate of formation reserves to the shareholders the right to determine the consideration in the case of shares without par value.²⁸⁰ The TBOC contains additional provisions regarding consideration for shares issued as a share distribution or on conversion or exchange of indebtedness or on the exercise of rights or options.²⁸¹ In the absence of fraud in the transaction, the judgment of the Board or the shareholders, as the case may be, is conclusive as to the value and sufficiency of the consideration received for shares.²⁸²

The consideration for shares having a par value may not be less than their par value,²⁸³ and shares issued for less than their par value are not validly issued, fully paid and nonassessable.²⁸⁴ When a share dividend is paid in authorized but unissued shares having a par value, an amount of surplus designated by the Directors that is not less than the aggregate par value of such shares must be transferred to the Corporation's stated

²⁷⁷ See *supra* note 241, which discusses the TBOC requirements to amend a Corporation's certificate of formation.

²⁷⁸ TBOC § 21.310.

²⁷⁹ *Id.* § 21.159.

²⁸⁰ *Id.* § 21.160(a)–(b).

²⁸¹ *Id.* § 21.161(b)–(d); see also *id.* § 21.311 (prohibition on the payment of a share dividend in authorized and unissued shares if the Corporation's surplus is less than the amount to be transferred from surplus to stated capital pursuant to Section 21.313 of the TBOC).

²⁸² *Id.* § 21.162; see also GLAZER § 10.8.2.2, at 489–90 (Supp. 2024) (opinion preparers entitled to rely on the Board's valuation regarding noncash consideration for shares, unless they have knowledge of fraud or other circumstances that would preclude reliance).

²⁸³ TBOC § 21.161(a).

²⁸⁴ GLAZER § 10.8.2.1, at 488–89 (Supp. 2024).

capital.²⁸⁵ In the case of a share dividend paid in authorized but unissued shares without par value, the shares will be issued for an amount designated by the Board, and that amount must be transferred from the Corporation's surplus to its stated capital.²⁸⁶

Issuance of shares in connection with conversions, mergers, exchanges, stock splits, or stock dividends involve numerous issues that need to be considered, the details of which are beyond the scope of this report.

If the Opinion Shares are to be issued and the consideration paid or delivered after the date of the opinion letter, the validly issued, fully paid and nonassessable opinion should include an express assumption that payment of the consideration to the Corporation, and satisfaction of any other requirements of the corporate action authorizing the issuance, will occur at or prior to the issuance of the Opinion Shares.²⁸⁷

Subsection 4.2(a)(2) Preemptive Rights.

Opinion Shares are not validly issued if they were issued in violation of statutory preemptive rights; these are preemptive rights provided in the TBOC (or when applicable the BCA) and the Corporation's certificate of formation.²⁸⁸ The TBOC does not provide shareholders preemptive rights unless set forth in the Corporation's certificate of formation. The law regarding preemptive rights changed in 2003, and different rules may apply to Corporations formed prior to September 1, 2003.²⁸⁹ The validly issued, fully paid and nonassessable

²⁸⁵ TBOC § 21.313(a).

²⁸⁶ *Id.* §§ 21.312, .313.

²⁸⁷ See GLAZER § 10.8.5, at 492–93 (Supp. 2024). An example of such an opinion is:

The Shares have been duly authorized and when issued, delivered and paid for in accordance with the Transaction Documents will be validly issued, fully paid and nonassessable.

²⁸⁸ GLAZER § 10.6.2, at 472–73 & n.10 at 473 (Supp. 2024); *TriBar 1998 Report* § 6.2.2, at 649.

²⁸⁹ The TBOC provides that shareholders do not have preemptive rights, except as provided in the certificate of formation (and then, only as limited by § 21.204). TBOC §§ 21.203–.204. However, prior to September 1, 2003 (which was the effective date of amendments to the BCA that changed this rule), the opposite rule

opinion addresses only statutory preemptive rights²⁹⁰ and does not cover rights of a shareholder to purchase shares under a contract with the Corporation (even if characterized as a “preemptive right”), such as preferential share purchase rights in a shareholders agreement or investor rights agreement. Violation of those contractual shares purchase rights would be merely a breach of contract by the Corporation and not cause the Corporation’s issuance of the Opinion Shares to be invalid.²⁹¹ However, if the opinion preparers recognize that contractual preemptive rights have been violated, they should consider, depending upon the circumstances, if any qualifications, disclosures, or other appropriate actions may be needed to give the validly issued shares opinion.

Subsection 4.2(a)(3) Certificated and Uncertificated Shares.

By common practice in Texas a Corporation’s outstanding shares typically have been certificated unless the shares were designated as uncertificated shares.²⁹² Under the TBOC uncertificated shares can be

applied—i.e. shareholders of a Texas Corporation formed before September 1, 2003 under the BCA or other predecessor corporation law had preemptive rights unless those rights were specifically denied in the Corporation’s certificate of formation. The TBOC addresses that situation by providing that shareholders of a Corporation formed before September 1, 2003 whose preemptive rights were not denied in the certificate of formation then in effect continue to have preemptive rights unless the certificate of formation is subsequently amended to limit or deny the preemptive rights. *Id.* § 21.208.

²⁹⁰ Preemptive rights apply if the Corporation’s “certificate of formation includes a statement that the Corporation elects to have a preemptive right” or similar statement except to the extent the certificate of formation expressly provides otherwise. *Id.* § 21.203(b). A share purchase right contained in a Corporation’s certificate of formation as part of the terms of a class or series of preferred shares that provides preemptive-type rights (whether or not designated as preemptive rights) is tantamount to and should be considered a statutory preemptive right to the class or series of shareholders, unless the certificate of formation expressly provides otherwise. Holders of shares of a class with preferential rights to corporate distributions, but without general voting rights, do not have statutory preemptive rights. *Id.* § 21.204(c).

²⁹¹ *See supra* note 249.

²⁹² Uncertificated shares were first recognized in the Model Business Corporation Act by an amendment in 1978 and by Texas in its 1983 amendment to Article 2.19 of the BCA. The Model Business Corporation Act has generally been the basis for Texas statutory corporation law since 1955 with the enactment of the BCA.

authorized or limited by the Corporation's certificate of formation or bylaws or by a resolution adopted by the Board of Directors providing that some or all of the classes or series, or of any class or series, of shares are to be uncertificated.²⁹³ For certificated shares, the TBOC sets forth requirements for the form, specified content, signatures and delivery of share certificates, and if share certificates are issued to evidence more than one class or series of shares, each certificate must conspicuously state the designation, preferences, limitations, and relative rights of the class or series.²⁹⁴ If a Corporation issues shares designated as uncertificated shares, the Corporation is required to notify the owner in writing of any information required to be stated on a share certificate²⁹⁵ unless the information is included in the certificate of formation or bylaws and copies of those documents are provided to the owner of the shares.²⁹⁶

The delivery of share certificates or furnishing of required information to holders of uncertificated shares is not, however, a requirement or condition to a Corporation's valid issuance of shares that is authorized by the Board of Directors. Section 21.157(b) of the TBOC provides that when the consideration for shares, determined in accordance with the TBOC, is paid or delivered the shares are considered issued, the person entitled to receive the shares becomes a shareholder of the shares, and the shares are considered fully paid and nonassessable.²⁹⁷ The

²⁹³ TBOC § 3.201(b).

²⁹⁴ *Id.* §§ 3.202–.204. If the shares are subject to a restriction on transfer, each certificate must state or provide a summary of the restrictions or a statement of the shareholder's right to obtain a copy of the document describing the transfer restrictions or its availability from the Secretary of State. *Id.* § 3.202(d). Section 1.005 of the TBOC sets out the following standard for when information is conspicuous: "Required information in a document is conspicuous if the font used for the information is capitalized, boldfaced, italicized, or underlined or is larger or of a different color than the remainder of the document."

²⁹⁵ *Id.* § 3.205(a). This information includes the state of organization (being Texas), the class of shares and their par value or no par value, the shareholder's name and number of shares owned, the designation, preferences, limitations and rights of the shares if more than one class or series is authorized, and any restrictions to which the shares are subject. *Id.* § 3.202.

²⁹⁶ *Id.* § 3.205(c).

²⁹⁷ TBOC §3.201(b), which states that ownership interests in a for-profit Corporation must be certificated unless designated to be uncertificated interests, appears to conflict with TBOC § 21.157(b), which does not require the issuance of certificates for a valid issuance of shares. However, the organizational

Committee notes that the *Texas 1992 Report*, published prior to enactment of the TBOC, stated that shares are validly issued if they are evidenced by appropriate certificates (or in the case of shares designated as uncertificated, initial transaction statements) that have been properly executed and delivered—but as stated above, those requirements as to delivery set out in the *Texas 1992 Report* for valid issuance are no longer required.²⁹⁸

structure of the TBOC reconciles the apparent conflict such that the provisions of TBOC § 21.157(b) prevail. See discussion *supra* note 10 on the “hub” and “spoke” structure of the TBOC and the interpretative rule that provisions in a “spoke” override any conflict with provisions in the “hub.”

TBOC Section 21.57(b) is consistent with a very early decision of the Texas Supreme Court in *Rio Grande Cattle Co. v. Burns*, 17 S.W. 1043, 1045 (Tex. 1891). In this case, decided before the enactment of modern corporation statutes, the Texas Supreme Court held that after the consideration for the shares has been paid no formal issuance of a certificate is necessary to fix the interest of an original shareholder in the corporation or for that shareholder to transfer his stock. *Accord* VIRGINIA REPORT at 38 n.153 and accompanying text.

Under the TBOC the shareholder has a right to obtain a certificate (if the shares are certificated.)

²⁹⁸ Although not necessary to give a valid issuance opinion, it is the practice of some opinion preparers to confirm delivery to recipients of the Opinion Shares certificates or, in the case of uncertificated shares to confirm the notice of certificate information, otherwise required by the TBOC, or by a stock exchange on which the Corporation’s shares are listed, the Corporation’s bylaws, or any corporate actions authorizing issuance of the Opinion Shares. Those opinion preparers, when confirming delivery of certificated shares or the notice for uncertificated shares, typically rely on factual information from the Corporation’s transfer agent or from the Corporation’s corporate records certified by an officer’s certificate.

Subsection 4.2(a)(4) Regulated Industry Approvals.

The opinions addressed in this report generally cover only the TBOC and the Corporation's certificate of formation and bylaws.²⁹⁹ One exception is the validly issued, fully paid and nonassessable opinion. If a Corporation formed under and governed by the TBOC operates its business in a regulated industry where approval of its issuance of shares is also required by the applicable regulatory authority under a Texas statute other than the TBOC, then as a matter of customary practice, the validly issued, fully paid and nonassessable opinion is understood to cover receipt of that regulatory approval absent an express qualification as to such matters in the opinion.³⁰⁰ Generally, in these circumstances, special regulatory counsel (whether within the opinion giver's firm or other counsel) is involved in the transaction to advise on the applicable regulatory requirements and to assist in giving the valid issuance opinion (or to address regulatory matters in a separate opinion letter). If an opinion giver is not covering regulatory approvals for the issuance of the Opinion Shares by such a Corporation, as for example where such matters are covered by an opinion letter of other counsel, coverage of such matters should be expressly disclaimed in the opinion letter or satisfaction of such regulatory requirements expressly assumed (possibly noting its coverage

²⁹⁹ See *supra* Section 1.4 (*Laws and Legal Opinions Beyond the Scope of this Report*).

³⁰⁰ GLAZER § 10.2.2, at 444 n.2 (Supp. 2024); *TriBar 1998 Report* § 6.2.2, at 650 (footnotes omitted) (stating:

In [some] states businesses in regulated industries are required to incorporate under the general business corporation statute but also are subject to a separate statute requiring regulatory approval of stock issuances. In those states, even though the requirement for regulatory approval is not contained in the corporation statute, as a matter of customary usage the opinion also is understood to cover receipt of those approvals.)

See also NORTH CAROLINA 2004 REPORT at 49 & n.102; PENNSYLVANIA REPORT at 28.

in the separate letter.)³⁰¹ Due to the highly specialized nature of the work required, guidance on how to give opinions covering Corporations in regulated industries is beyond the scope of this report.

Subsection 4.2(b) What a Validly Issued, Fully Paid and Nonassessable Opinion Does Not Cover.

The validly issued, fully paid and nonassessable opinion does not cover compliance with any securities laws.³⁰² Nor does the opinion address compliance with any law other than the TBOC, except for the narrow exception discussed in the preceding Subsection 4.2(a)(4) regarding any necessary approval by a regulatory authority under Texas law for the issuance of shares by a Corporation operating in a regulated industry.

As with the duly authorized shares opinion discussed in Section 4.1 (*Opinion Shares Have Been Duly Authorized*), the validly issued, fully paid and nonassessable opinion does not cover whether the Directors, in taking the relevant actions of the Board, based their decisions on information sufficient to meet the appropriate standard of care, had no conflicts of interest or met any disclosure obligations regarding the existence of personal interests, or otherwise complied with their fiduciary duties. These matters are not covered because their analyses involve complex questions of fact and inquiries into subjective intent that are inappropriate subjects of a legal opinion. Instead, an assumption as to these matters is implicit and need not be stated expressly in opinion letters. Although not necessary, some opinion givers disclaim coverage of fiduciary duties in their opinion letters, and the statement of such an express disclaimer does not imply the absence of an implicit assumption as to all of the matters discussed in this paragraph. The Committee also

³⁰¹ See *Statement of Opinion Practices* § 10 (customary practice may be varied by a statement in an opinion letter).

The alternative of covering regulatory matters in an opinion letter in reliance on other counsel (not in the opinion giver's firm) has become much less common.

³⁰² *TriBar 1998 Report* § 6.2.2, at 649 n.129.

believes it is not appropriate for an opinion recipient to insist on receiving an opinion on any of these matters.³⁰³

The validly issued, fully paid and nonassessable opinion addresses only statutory preemptive rights under the TBOC and the Corporation's certificate of formation and does not address rights of shareholders to purchase shares under contracts with the Corporation, such as preferential purchase rights in a shareholders agreement or an investors rights agreement.³⁰⁴ If addressed, these contractual rights would be the subject of a separate opinion request by the recipient and, if given, would be covered by a separate opinion, typically a no breach of contract opinion, which is beyond the scope of this report.³⁰⁵

In addition, the validly issued, fully paid and nonassessable opinion does not mean that the purchaser of the Opinion Shares has no further obligation to make additional payments in connection with purchasing the shares, as for example if the purchaser paid for the shares with a promissory note or promised to perform services in the future.³⁰⁶ The opinion also does not mean that a holder of Opinion Shares will be able to avoid certain other liabilities in connection with ownership of the shares, such as liabilities resulting from improper actions taken by a controlling shareholder, knowing receipt of unlawful dividends,³⁰⁷ causing the Corporation to perpetrate a fraud relating to a contractual obligation of

³⁰³ For detail and citations regarding this exclusion from coverage, see *supra* Subsection 3.2(b) (*What a Duly Authorized Opinion Does Not Cover*), notes 184–88 and accompanying text.

³⁰⁴ For a Corporation formed prior to September 1, 2003, the TBOC grandfathers preemptive rights provisions of the BCA. See *supra* notes 220 and 289.

³⁰⁵ See *supra* note 249. See the text following *supra* note 291 relating to whether, depending upon the circumstances, any qualifications, disclosures, or other appropriate actions may be needed to give the validly issued shares opinion.

³⁰⁶ GLAZER §§ 10.8.4, at 491, 10.9, at 496–97 (Supp. 2024). See TBOC §§ 21.157(c), .159 (a promissory note or a contract for services to be performed, among other things, is appropriate consideration for shares).

³⁰⁷ See, e.g., TBOC § 21.318(a).

the Corporation,³⁰⁸ piercing of the corporate veil,³⁰⁹ or simultaneously entering into a separate contract with the Corporation.

Subsection 4.2(c) Work Required to Support a Validly Issued, Fully Paid and Nonassessable Opinion.³¹⁰

Based on the foregoing, as a matter of customary practice, an opinion that the Opinion Shares are validly issued, fully paid and nonassessable may be based on the following:

- (1) the work required to support an opinion on the valid existence of the Corporation as of the date of the opinion letter, including a certificate of fact issued by the Secretary of State dated, to the extent practicable, as of or shortly before the date of the opinion letter;³¹¹

³⁰⁸ *Id.* § 21.223(b).

³⁰⁹ See GLAZER § 10.9, at 497 (Supp. 2024); *TriBar 1998 Report*, § 6.2.4, at 651.

³¹⁰ This Subsection refers throughout to an “officer’s certificate”. Regarding the date on which an officer’s certificate is typically dated, see *supra* Glossary of Terms (definition of “*officer’s certificate*”); see also *supra* note 27 and accompanying text. For a discussion of opinion practice relating to “bringdowns” of Secretary of State certificates of fact and certifications of certificates of formation, see *supra* text accompanying note 79 and Glossary of Terms (definition of “*Certified Certificate of Formation*”), respectively. For an illustrative officer’s certificate, including an example of this certification, see Annex A.

³¹¹ For a discussion on the work required to support a valid existence opinion, see *supra* Subsection 2.1(b) (*Work Required to Support a Valid Existence Opinion*). If an opinion giver instead gives a due incorporation or due organization opinion, the work required to support the matters referred to in this clause (1) would be satisfied by the work required to support the due incorporation or due organization opinion. For discussions of these other opinions, see *supra* Subsections 2.3(b) (*Work Required to Support a Due Incorporation Opinion*) and 2.4(b) (*Work Required to support a due Organization Opinion*).

Any express limitations in an opinion letter on the work performed in giving any of the above-mentioned existence, due incorporation or due organization opinions, to the extent they are relevant, should be understood to apply implicitly to the Corporation’s existence that is required to give the validly issued, fully paid and nonassessable shares opinion in the same opinion letter for the shares currently being issued. See *supra* note 255.

- (2) the work required to support an opinion as to the Opinion Shares being duly authorized at the time the Opinion Shares are issued, including the availability of sufficient unissued (and treasury) shares of the class or series of Opinion Shares on the date of issuance;³¹²
- (3) unless the opinion letter disclaims such coverage, determination of whether the Corporation is in a regulated industry subject to a separate Texas statute requiring regulatory approval for the Corporation's issuance of shares, and if so, confirmation that the required regulatory approval has been obtained;³¹³
- (4) confirmation that the issuance of the shares (x) does not violate the Corporation's certificate of formation or bylaws and (y) was approved by the Board and, if required, by shareholders, by review of:
 - (i) the TBOC;
 - (ii) copies of the Certified Certificate of Formation and bylaws, each certified by an officer's certificate; and
 - (iii) a copy of corporate resolutions or other enabling actions of the Board and, if required, of the shareholders, certified by an officer's certificate, approving the issuance, including (A) the number of Opinion Shares, (B) the consideration (in amount and form), and (C) any other requirements of the Transaction Documents;³¹⁴
- (5) confirmation that the issuance of the Opinion Shares complies with any further requirements set out in the

³¹² For a discussion of the work required to support an opinion on the due authorization of Opinion Shares, see *supra* Subsection 4.1(c) (*Work Required to Support a Duly Authorized Shares Opinion*). The work would be satisfied if that opinion is being given in the same opinion letter.

³¹³ See *supra* notes 300–01 and accompanying text.

³¹⁴ See *supra* note 271 and accompanying text; see also *supra* Subsection 4.2(a)(1) (*Consideration*).

- resolutions or other enabling actions described in clause (4)(iii) above;
- (6) confirmation by reliance on information in a receipt or other closing document, or in an officer's certificate or other appropriate evidence, of the payment or delivery of the consideration established by the Directors for the issuance of the Opinion Shares;³¹⁵
 - (7) if the Opinion Shares are being issued pursuant to a plan of merger or plan of conversion, confirmation of compliance with the substantive and procedural requirements to approve the plan and confirmation that the issuance of the Opinion Shares complies with the plan, by a review of:
 - (i) the TBOC;
 - (ii) copies of the Certified Certificate of Formation and bylaws, each certified by an officer's certificate; and
 - (iii) copies of the plan and the corporate resolutions or other enabling actions of the Board and shareholders, approving and adopting the plan of merger or plan of conversion, certified by an officer's certificate;³¹⁶
 - (8) if the Opinion Shares are being issued pursuant to a share split or reclassification effected by an amendment to the Corporation's certificate of formation, confirmation of compliance with the requirements to approve and to effect

³¹⁵ See *supra* note 270. Payment or delivery of the consideration is typically confirmed in a receipt document executed by the Corporation, or in a closing statement of funds and property, delivered as one of the closing documents for the transaction. If a receipt or closing statement is not delivered at the closing, then the opinion preparers may confirm payment or delivery to the Corporation of the requisite consideration by reliance on information provided in an officer's certificate; such information can be included with other matters certified as part of the transaction (see the illustrative form in Annex A) or set out in a separate officer's certificate.

³¹⁶ See *supra* note 271 and accompanying text.

the amendment to the Corporation's certificate of formation that effectuates the share split or reclassification by a review of:

- (i) the TBOC;
 - (ii) copies of the Certified Certificate of Formation and bylaws, each certified by an officer's certificate; and
 - (iii) a copy of the corporate resolutions or other enabling actions of the Board and shareholders, certified by an officer's certificate, authorizing and adopting the amendment;³¹⁷
- (9) if the Opinion Shares are being issued pursuant to a share dividend of shares of a specified class, confirmation that:
- (i) the issuance will comply with the requirements to approve and to effect the share dividend by a review of a copy of the corporate resolutions or other enabling actions of the Board, certified by an officer's certificate, authorizing and adopting the share dividend;
 - (ii) sufficient surplus of the Corporation is available and is transferred to the stated capital account by reliance on an officer's certificate or other appropriate evidence; and
 - (iii) the share dividend will not be made to a holder of any other class unless the Certified Certificate of Formation provides for the share dividend or the share dividend is approved by holders of a majority of the outstanding shares of the class to which distribution of the dividend will be made,³¹⁸ and

³¹⁷ See *supra* note 241 and accompanying text.

³¹⁸ TBOC § 21.311. See also *supra* note 278 and accompanying text.

- (10) confirmation that shareholders do not have statutory preemptive rights or, if they do, confirmation of compliance with any such preemptive rights of shareholders, by review of:
 - (i) the TBOC (or the BCA for a Corporation formed prior to the TBOC); and
 - (ii) a copy of the Certified Certificate of Formation.³¹⁹

Section 4.3 Broader Equity Capitalization Opinions.

In addition to opinions that shares issued in a particular transaction have been duly authorized and are validly issued, fully paid, and nonassessable, two broader forms of opinion may be requested by purchasers of shares or underwriters in acquisition and equity financing transactions in public or private offerings.

Subsection 4.3(a) Corporation's Current Equity Capitalization.

A current equity capitalization opinion states that all then outstanding shares of the Corporation have been duly authorized and validly issued and are fully paid and nonassessable.³²⁰ If given, this opinion is usually in addition to the opinion discussed above on the shares issued in a specific transaction.³²¹ It is a background opinion whose purpose is to confirm the absence of defects in prior issuances that might, for example, adversely affect or create uncertainties regarding the validity of shareholder corporate actions, the accuracy of financial disclosures, or

³¹⁹ See *supra* notes 289–90 and accompanying text.

³²⁰ The following is an example of this opinion:

All of the issued and outstanding common shares and preferred shares of the Corporation have been duly authorized and validly issued and are fully paid and nonassessable.

This opinion sometimes follows a statement listing the number of the authorized shares and the number of outstanding shares of the Corporation, for example as set forth in *infra* note 324, so that the shares covered by the current equity capitalization opinion have already been identified.

³²¹ See the Illustrative Form of Opinion at the beginning of this Chapter IV.

trading of the Corporation's shares, or that might result in claims by prior purchasers of the Corporation's shares.³²² The work required to give this opinion is much greater than that required for an opinion on the issuance of specific shares in a current transaction because the opinion preparers are responsible for confirming that for every issuance of the shares covered by the opinion those shares were duly authorized, validly issued and fully paid and nonassessable. This opinion, particularly in the case of a Corporation that has been in existence for a long time with prior issuances handled by counsel other than the opinion giver, requires extensive factual inquiry and heavy reliance on officers' certificates and presumptions in the event of gaps in corporate records. Underwriters almost always require this opinion in a public stock offering, especially in an initial public offering. In other sales of stock, because the matters covered by this opinion are not central to the transaction to issue the Opinion Shares and because of the expense, assumptions, and background nature of the opinion, the parties must decide whether its benefit justifies the cost.³²³ If given, this opinion should also be understood to exclude coverage of the same matters discussed in Subsections 4.1(b) (*What the Duly Authorized Shares Opinion Does Not Cover*) and 4.2(b) (*What a Validly Issued, Fully Paid and Nonassessable Opinion Does Not Cover*).

Subsection 4.3(b) Number of Authorized and Outstanding Shares.

This opinion is actually a confirmation of (i) the total number of shares the Corporation may issue, by class and series, as stated in its certificate of formation, and (ii) the number of these shares that are outstanding, by class and series.³²⁴ While often characterized as an

³²² GLAZER § 10.10, at 498–99 (Supp. 2024); *TriBar 1998 Report* § 6.2.5, at 652; VIRGINIA REPORT at 44.

³²³ GLAZER § 10.10, at 499 (Supp. 2024); *Guidelines* § 4.2, at 880; *TriBar 1998 Report* § 6.2.5, at 652; CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 75; NVCA Form Opinion n.10.

³²⁴ The following is an example from the NVCA Form Opinion ¶6:

The authorized capital stock of the Company consists of (i) _____ shares of Common Stock, \$0.01 par value, of which _____ shares are issued and outstanding, and (ii) _____ shares of Preferred Stock, \$0.01 par value, of which _____ shares have been designated Series A Preferred Stock, _____ shares of which are issued and outstanding, and

opinion, this confirmation is not really a legal opinion because it does not require the exercise of professional judgment regarding a legal issue, but instead it is merely a statement of fact.³²⁵ Furthermore, this confirmation is not a legal opinion as to the due authorization or valid issuance of any shares to which it refers. If given, this confirmation is made based on information in the certificate of formation and records of the Corporation or its transfer agent.

Some opinion givers are concerned that in a confirmation stating the current number of shares authorized in the certificate of formation and the number of outstanding shares, an opinion recipient might misinterpret the opinion as meaning that the stated number of authorized shares taken from the certificate of formation are “duly authorized” and the stated number of outstanding shares have been “validly issued,” notwithstanding that those characterizations do not appear in the opinion;³²⁶ and as a result the opinion recipient might mistakenly expect the opinion preparers to have undertaken the attendant work to support that unstated meaning. The Committee is of the view that under customary usage in opinion practice neither the words “duly authorized” nor “validly issued” should be inferred, nor should either of these attributes be inferred, when omitted from a statement as to the number of shares of a Corporation authorized, issued and outstanding.³²⁷ However, opinion givers with such concerns may wish to add in their opinion letter a qualification that makes explicit the limitation of the statements in this confirmation to clarify that an

_____ shares have been designated Series B Preferred Stock, none of which are issued and outstanding.

³²⁵ CALIFORNIA 2007 BUSINESS TRANSACTIONS REPORT at 66; VIRGINIA REPORT at 44.

³²⁶ See GLAZER § 10.11.1, at 501–02 (Supp. 2024) for commentary regarding this concern.

³²⁷ See Timothy G. Hoxie, Robert Evans, Herbert P. Fockler, Stanley Keller & Gail Merel, *Capitalization Opinions*, IN OUR OPINION (Legal Ops. Comm., ABA Bus. Law Section), Spring 2025, at 9, 14:

Other lawyers, however, point out that the common practice of giving a separate opinion on the “validly issued” status of shares when that is meant to be covered indicates that, when that opinion is not being expressly included, it is not being given: therefore, an opinion recipient is not entitled to read an opinion that just states the number of shares issued and outstanding as addressing the validly issued status of these shares.

opinion recipient is not entitled to read an opinion addressing the duly authorized and validly issued status of those shares into a statement describing only the number of shares authorized, issued and outstanding.³²⁸

³²⁸ See GLAZER § 10.11.1, at 502 (Supp. 2024) (recommendation that opinion letters having such limited meaning include a precise description of work performed to support statement of number of shares outstanding so that it is clear that it is a factual statement only); ABA MODEL M&A (STOCK PURCHASE) OPINIONS (No. 6) at 18 (introductory qualification of opinion given on number of outstanding shares by many opinion preparers states, “[b]ased solely upon our review of the Company’s [articles] [certificate] of incorporation and the Company’s shareholders’ list maintained pursuant to [statutory cite].”) The following is an example of a statement that includes language expressly limiting the basis of the factual information provided:

The Corporation’s certificate of formation provides that the Corporation has the authority to issue (i) [●] common shares, \$.01 par value per share, and (ii) [●] preferred shares, \$.01 par value per share, of which [●] shares have been designated Series A Preferred Shares. [The Corporation’s share records] [Records of the Corporation’s stock transfer agent] state [●] common shares and [●] Series A Preferred Shares are issued and outstanding.

ANNEX A

LEGAL OPINIONS COMMITTEE
BUSINESS LAW SECTION
STATE BAR OF TEXAS
REPORT ON CERTAIN
THIRD-PARTY LEGAL OPINIONS CONCERNING
FOR-PROFIT CORPORATIONS

**[CORPORATION NAME]
[ASSISTANT] SECRETARY'S CERTIFICATE¹**

Reference is made to that certain [name of Transaction Document], dated [as of] [●] (the “**Agreement**”), [between][among]

¹ This illustrative officer’s certificate is included as an example of the type of certificate that may be appropriate to satisfy the work required for delivery of some of the opinions discussed in this report. Typically, an officer’s certificate is dated on or as of the date of the opinion letter because an opinion is understood to speak as of that date. *See supra* note 25 and accompanying text. In many commercial transactions, this certificate is also often provided to the opinion recipient to satisfy one or more closing conditions under the Agreement that are separate and apart from the work needed for the delivery of the opinion letter. In addition to the factual matters covered by this certificate, other common opinions beyond the scope of this report can require certifications of additional factual matters, typically from an officer of the Corporation other than a Secretary or Assistant Secretary.

This illustrative certificate does not address certain additional statements that may be appropriate in a certificate for an opinion on the issuance or transfer of shares of a Corporation. For example, this illustrative certificate does not include sample language confirming payment of consideration. Where the opinion preparers are relying on an officer’s certificate, rather than or in addition to a receipt or other closing document, as to the payment of consideration, the opinion preparers should craft language suitable for the specific facts and circumstances of the transaction covered by the opinion. An example of such language is:

The Company has received payment for the Opinion Shares as required by the Transaction Documents and the resolutions attached hereto as Exhibit [●].

For discussion of the work required to confirm payment of consideration to support an opinion on the valid issuance of shares, see *supra* note 315. For further discussion of the work that may require other certifications relating to the issuance of shares, see *supra* notes 316–17 and accompanying text.

[name of entity], a Texas corporation (the “**Company**”), and [name of other party/parties to Agreement]. Capitalized terms used (but not otherwise defined) herein have the meanings provided in the Agreement. I, _____, the duly [elected][appointed] [Assistant] Secretary of the Company, hereby certify in my capacity as [Assistant] Secretary of the Company, as follows:

- (a) Attached hereto as Exhibit A is a true and complete copy of the Company’s [Amended and Restated] Certificate of Formation,² as amended to the date hereof, which is in full force and effect as of the date hereof [and certified by the Secretary of State of the State of Texas on [●]].
- (b) Attached hereto as Exhibit B is a true and complete copy of the Company’s [Amended and Restated] Bylaws dated [●], as amended to the date hereof, which are in full force and effect as of the date hereof.³
- (c) Attached hereto as Exhibit C is a true and complete copy of resolutions duly adopted by the Board of Directors of the Company [by unanimous consent][at a meeting duly called and held, at which a quorum was present], which have not been modified or revoked and remain in full force and effect and constitute the only resolutions adopted by the Board of Directors of the Company, or any committee thereof, relating to the transaction[s] contemplated by the Agreement.⁴

² If filed prior to the application of the TBOC to the Corporation, this document may be titled “Articles of Incorporation.”

³ If the Corporation’s shareholders have entered into a Section 21.101 Shareholders’ Agreement, that Section 21.101 Shareholders’ Agreement should also be included as an exhibit to this certificate and the text of the certificate appropriately modified. *See supra* Glossary of Terms, note 2 and accompanying text (definition of “*Section 21.101 Shareholders’ Agreement*”). Because Section 21.101 Shareholders’ Agreements are rare, this report does not address all of the work required to give the opinions covered by this report as to a Corporation subject to such an agreement. For further discussion of Section 21.101 Shareholders’ Agreements, see *supra* notes 179, 192 and accompanying text.

⁴ If a committee of the Board of Directors has been authorized to act as the Board to approve the transaction[s] contemplated by the Agreement, the resolution

- (d) Each of the persons whose name is set forth below is [and at all times since [●] has been]⁵ a duly elected or appointed and acting officer⁶ of the Company holding the office set forth opposite such individual's name as of the date hereof, and the signature written opposite the name and title of such officer is such officer's genuine signature:

<u>Name</u>	<u>Title</u>	<u>Signature</u> ⁷
_____	_____	_____
_____	_____	_____

- (e) The Company has not taken any action or received a notice from any governmental official that relates to or could result in the Company's winding up and termination.
- (f) [Name of Law Firm] is entitled to rely on this certificate in connection with the opinions it is rendering in

authorizing the committee to do so should also be certified by the officer's certificate. *See supra* note 192 and accompanying text.

⁵ The opinion giver may want the incumbency certificate to certify as to incumbency on one or more earlier dates if any of the Transaction Documents are executed prior to the date of the incumbency certificate, *See supra* note 214 and accompanying text.

⁶ If a power of attorney or other instrument is used to authorize a person who is not an officer as a signatory on behalf of the Corporation, the references to "officer" should be adjusted, and a copy of the related power of attorney or other instrument should also be attached to and certified by the officer's certificate.

⁷ As a matter of customary practice the opinion giver is entitled to assume the genuineness of all signatures, including those on behalf of the Corporation. *Statement of Opinion Practices* § 5.5. *See supra* notes 202–03. This certificate does not address electronic signatures that are not manual signatures delivered by electronic transmission, such as electronic signatures provided using processes offered by commercial providers such as AdobeSign, DocuSign, PactSafe, and SignNow. However, the authenticity of an electronic signature is not an opinion problem because due execution opinions generally are based on the unstated factual assumption that signatures are genuine. For a discussion of electronic signatures and delivery by electronic means see *supra* Section 1.5 (*Electronic Signatures and the Opinions Addressed in this Report*), and *supra* notes 208, 210 and accompanying text.

connection with the Agreement authorized by the resolutions attached as Exhibit C.⁸

IN WITNESS WHEREOF, I have hereunto set my hand as of the date first above written.

[Name]
[Assistant] Secretary
[Date]

I, [_____] , [Title of Officer] of the Company, do hereby certify on behalf of the Company that [_____] is the duly [elected][appointed] and acting [Assistant] Secretary of the Company and that the signature set forth above is [his/her] genuine signature.

[Name]
[Title]
[Date]

⁸ While some opinion givers choose to include an express authorization to rely on the officer's certificate in rendering their legal opinions, an opinion giver is entitled to rely on an officer's certificate regardless of whether the certificate expressly authorizes such reliance. *See supra* Section 1.2 (*Factual Matters; Reliance on Certificates, Representations, and Assumptions; Opinions Speak as of the Opinion Letter Date Unless Otherwise Indicated*).

ANNEX B

LEGAL OPINIONS COMMITTEE
BUSINESS LAW SECTION
STATE BAR OF TEXAS
REPORT ON CERTAIN
THIRD-PARTY LEGAL OPINIONS CONCERNING
FOR-PROFIT CORPORATIONS

STATEMENT OF OPINION PRACTICES¹

1 INTRODUCTION

Third-party legal opinion letters (“closing opinions”)² are delivered at the closing of a business transaction by counsel for one party (the “opinion giver”) to another party (the “opinion recipient”) to satisfy a condition to the opinion recipient’s obligation to close. A closing opinion includes opinions on specific legal matters (“opinions”) and, in so doing, serves as a part of the diligence of the opinion recipient.³

This Statement of Opinion Practices (this “*Statement*”) provides guidance regarding selected aspects of customary practice and other practices generally followed throughout the United States in the giving and receiving of closing opinions.⁴

¹ This *Statement* has been published in *The Business Lawyer*, 74 BUS. LAW. 807 (2019). At the time of its publication, this *Statement* publication, this *Statement* was approved by the bar associations and other lawyer groups identified in the Schedule of Approving Organizations. A current Schedule of Approving Organizations can be found at https://www.americanbar.org/content/dam/aba/administrative/business_law/buslaw/tribar/materials/statement_opinion_practices.pdf. Approval of this *Statement* by a bar association or other lawyer group does not necessarily represent approval by individual members of that association or group.

² The terms “opinion letters” and “closing opinions” are commonly used to refer to third-party legal opinion letters, defined in this *Statement* as “closing opinions.”

³ References in this *Statement* to an opinion recipient mean the addressee of a closing opinion and any other person the opinion giver expressly authorizes to rely on the closing opinion.

⁴ This *Statement* is drawn principally from: Comm. on Legal Op. of the Section of Bus. Law of the Am. Bar Ass’n, *Legal Opinion Principles*, 53 BUS. LAW. 831

2 CUSTOMARY PRACTICE

Closing opinions and the opinions included in them are prepared and understood in accordance with the customary practice of lawyers who regularly give those opinions and lawyers who regularly review them for opinion recipients.⁵ The phrase “customary practice” refers principally to the work lawyers are expected to perform to give opinions (“customary diligence”) and the way certain words and phrases commonly used in closing opinions are understood (“customary usage”). Customary practice applies to a closing opinion whether or not the closing opinion refers to it or to this *Statement*.⁶

3 LEGAL OBLIGATIONS AND RULES OF PROFESSIONAL CONDUCT

When giving closing opinions, lawyers are subject to generally applicable legal obligations and to the rules governing the professional conduct of lawyers.⁷

4 GENERAL

4.1 Expression of Professional Judgment

An opinion expresses the professional judgment of the opinion giver regarding the legal issues the opinion addresses. It is not a guarantee that a court will reach any particular result.

4.2 Bankruptcy Exception and Equitable Principles Limitation

(May 1998), and Comm. on Legal Op., *Guidelines for the Preparation of Closing Opinions*, 57 BUS. LAW. 875 (Feb. 2002). It updates the *Principles* in its entirety and selected provisions of the *Guidelines*. The other provisions of the *Guidelines* are unaffected, and no inference should be drawn from omissions from the *Guidelines* in this *Statement*. Each provision of this *Statement* should be read and understood together with the other provisions of this *Statement*.

⁵ See *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 BUS. LAW. 1277 (Aug. 2008) (the “*Customary Practice Statement*”), which has been approved by the bar associations and other lawyer groups listed at the end of that *Statement* and by additional groups following publication that can be found at [URL].

⁶ See *infra* Section 10 (*Varying Application of Customary Practice*).

⁷ These include the duties opinion givers have to their own clients. Counsel to opinion recipients also have duties to their clients, including duties relating to closing opinions.

The bankruptcy exception and equitable principles limitation apply to opinions even if they are not expressly stated.

4.3 Cost and Benefit

The benefit to the recipient of a closing opinion and of any particular opinion should warrant the time and expense required to give them.

4.4 Golden Rule

Opinion givers and counsel for opinion recipients should be guided by a sense of professionalism and not treat closing opinions as if they were part of a business negotiation. An opinion giver should not be expected to give an opinion that counsel for the opinion recipient would not give in similar circumstances if that counsel were the opinion giver and had the requisite competence to give the opinion. Correspondingly, before declining to give an opinion it is competent to give, an opinion giver should consider whether a lawyer in similar circumstances would ordinarily give the opinion.

4.5 Reliance by Recipients

An opinion recipient is entitled to rely on an opinion, without taking any action to verify the opinion, unless it knows that the opinion is incorrect or unless its reliance on the opinion is otherwise unreasonable under the circumstances. An opinion recipient is entitled to expect an opinion giver, in giving an opinion, to exercise the diligence customarily exercised by lawyers who regularly give that opinion.⁸

4.6 Good Faith

An opinion giver and an opinion recipient and its counsel are each entitled to presume that the other is acting in good faith with respect to a closing opinion.

5 FACTS AND ASSUMPTIONS

5.1 Reliance on Factual Information and Use of Assumptions

Because the lawyers preparing a closing opinion (the “opinion preparers”) typically will not have personal knowledge of all the facts they need to support the opinions being given, an opinion giver

⁸ See the *Customary Practice Statement*. See also *infra* Section 10 (*Varying Application of Customary Practice*).

ordinarily is entitled to base those opinions on factual information provided by others, including its client, and on factual assumptions.

5.2 Reliance on Facts Provided by Others

An opinion giver is entitled to rely on factual information from an appropriate source unless the opinion preparers know that the information being relied on is incorrect or know of facts that they recognize make reliance under the circumstances otherwise unwarranted.

5.3 Scope of Inquiry Regarding Factual Matters

Opinion preparers are not expected to conduct an inquiry of other lawyers in their law firm or a review of the firm's records to ascertain factual matters, except to the extent they recognize that a particular lawyer is reasonably likely to have or a particular record is reasonably likely to contain information not otherwise known to them that they need to give an opinion.⁹

5.4 Reliance on Representations That Are Legal Conclusions

An opinion giver should not base an opinion on a representation that is tantamount to the legal conclusion the opinion expresses. An opinion giver may, however, rely on a legal conclusion in a certificate of an appropriate government official.

5.5 Factual Assumptions

Some factual assumptions on which opinions are based need to be stated expressly; others do not. Factual assumptions that ordinarily do not need to be stated expressly include assumptions of general application that apply regardless of the type of transaction or the nature of the parties. Examples are assumptions that (i) the documents reviewed are accurate, complete and authentic, (ii) copies are identical to the originals, (iii) signatures are genuine, (iv) the parties to the transaction other than the opinion giver's client (or a non-client whose obligations are covered by the opinion) have the power and have taken the necessary action to enter into the transaction, and (v) the agreements those parties have entered into with the opinion giver's client (or the non-client) are enforceable against them. An opinion should not be based on an unstated assumption if the opinion preparers know that the assumption is

⁹ References in this *Statement* to a law firm also apply to a law department of an organization.

incorrect or know of facts that they recognize make their reliance under the circumstances otherwise unwarranted. A stated assumption is not subject to this limitation because stating the assumption puts the opinion recipient on notice of the particular matters being assumed.¹⁰ Stating expressly a particular assumption that could have been unstated does not imply the absence of other unstated assumptions.

5.6 Limited Factual Confirmations and Negative Assurance¹¹

An opinion giver ordinarily should not be asked to confirm factual matters, even if the confirmation is limited to the knowledge of the opinion preparers.¹² A confirmation of factual matters, for example, the accuracy of the representations and warranties in an agreement, does not involve the exercise of professional judgment by lawyers and therefore is not a proper subject for an opinion even when limited by a broadly-worded disclaimer. This limitation does not apply to negative assurance regarding disclosures in a prospectus or other disclosure document given to assist a recipient in establishing a due diligence defense or similar defense in connection with a securities offering.

6 LAW

6.1 Covered Law

When a closing opinion states that an opinion covers the law of a specific jurisdiction or particular laws, the opinion covers no other law or laws.

6.2 Applicable Law

An opinion on the law of a jurisdiction covers only the law of that jurisdiction that lawyers practicing in the jurisdiction, exercising customary diligence, would reasonably recognize as being

¹⁰ Basing an opinion on a stated assumption is subject to the generally applicable limitation described in Section 12 (*No Opinion That Will Mislead Recipient*). Even if a stated assumption (for example, one that is contrary to fact) will not mislead the opinion recipient, an opinion giver may decide not to give an opinion based on that assumption.

¹¹ This *Statement* also applies, when appropriate in the context, to confirmations.

¹² A confirmation that is sometimes requested and, depending upon the circumstances and its scope, sometimes given relates to legal proceedings against the client.

applicable to the client or the transaction that is the subject of the opinion. Even when recognized as being applicable, some laws (for example, securities, tax and insolvency laws) are not covered by a closing opinion. A closing opinion also does not cover municipal and other local law. An opinion may, however, cover law that would not otherwise be covered if the closing opinion does so expressly.¹³

7 SCOPE

7.1 Matters Addressed

The opinions included in a closing opinion should be limited to reasonably specific and determinable matters of law that involve the exercise of professional judgment. A closing opinion covers only those matters it specifically addresses.

7.2 Matters Beyond the Expertise of Lawyers

Opinion givers should not be expected to give opinions on matters that are not within the expertise of lawyers (for example, financial statement analysis, economic forecasting and valuation). When an opinion depends on a matter not within the expertise of lawyers, an opinion giver may rely on information from an appropriate source or an express assumption with regard to the matter.

7.3 Relevance

Opinion requests should be limited to matters that are reasonably related to the opinion giver's client or the transaction that is the subject of the closing opinion. Depending on the circumstances, limiting assumptions, exceptions and qualifications to those reasonably related to the client, the transaction and the opinions given can facilitate the opinion process.

8 PROCESS

8.1 Opinion Recipient and Customary Practice

An opinion giver is entitled to presume that the opinion recipient is familiar with, or has obtained advice about, customary practice as it applies to the opinions it is receiving from the opinion giver.

¹³ See *infra* Section 10 (*Varying Application of Customary Practice*).

8.2 Other Counsel's Opinion

Stating in a closing opinion reliance on an opinion of other counsel does not imply concurrence in the substance of that opinion. An opinion giver should not be expected to express concurrence in the substance of an opinion of other counsel.

8.3 Financial Interest in or Other Relationship with Client

Opinion preparers ordinarily do not attempt to determine whether others in their law firm have a financial interest in, or other relationship with, the client. Nor do they ordinarily disclose any such financial interest or other relationship that they or others in their firm have. If the opinion preparers recognize that such a financial interest or relationship exists, they should consider whether, even if disclosed, it will compromise their professional judgment with respect to the opinions being given.

8.4 Client Consent and Disclosure of Information

If applicable rules of professional conduct require a client's consent to the delivery of a closing opinion, an opinion giver may infer that consent from a provision in the agreement making delivery a condition to closing or from other circumstances of the transaction. Unless a client gives its informed consent, an opinion giver should not give an opinion that discloses information the opinion preparers know the client would not want to be disclosed or as to which the opinion giver is otherwise subject to a duty of non-disclosure under applicable rules of professional conduct.

9 DATE

A closing opinion speaks as of its date. An opinion giver has no obligation to update a closing opinion for events or legal developments occurring after its date.

10 VARYING APPLICATION OF CUSTOMARY PRACTICE

The application of customary practice, including those aspects of customary practice described in this *Statement*, to a closing opinion or any particular opinion may be varied by a statement in the closing opinion or by an understanding with the opinion recipient or its counsel.

11 RELIANCE

A closing opinion may be relied on only by its addressee and any other person the opinion giver expressly authorizes to rely.¹⁴

12 NO OPINIONS THAT WILL MISLEAD RECIPIENT

An opinion giver should not give an opinion that the opinion preparers recognize will mislead the opinion recipient with regard to a matter the opinion addresses.¹⁵

¹⁴ This section does not address whether anyone else might be permitted to rely as a matter of law. *See also supra* note 3.

¹⁵ An opinion, even if technically correct, can mislead if it will cause the opinion recipient, under the circumstances, to miscalculate the opinion. The risk of misleading an opinion recipient can be avoided by appropriate disclosure. An opinion giver may limit the matters addressed by an opinion through the use of specific language in the closing opinion (including a specific assumption, exception or qualification) so long as the opinion preparers do not recognize that the limitation itself will mislead the recipient. *See supra* Section 10 (*Varying Application of Customary Practice*). Omissions from a closing opinion of information unrelated to the opinions given do not mislead.