

Opinions Standards Committee

Florida Business Law Section

“Up the Chain” Diligence

Exposure Draft

July 7, 2022

5. Other Entities. When Opining Counsel provides an opinion that an LLC has authorized a Transaction or has authorized the execution, delivery and/or performance of the Transaction Documents, Opining Counsel should determine whether authorization by the LLC requires the consent and/or approval of any managers, managing members, non-managing members, and certain other persons further up the organizational chain that are themselves organizational entities. In giving an opinion that the LLC has authorized the Transaction or has authorized the execution, delivery and/or performance of the Transaction Documents, Opining Counsel does not give an implied opinion that those other entities have also authorized the Transaction or has authorized the execution, delivery and/or performance of the Transaction Documents. However, as a matter of due diligence, if authorization by the LLC requires the consent and/or approval of any managers, managing members, non-managing members, and certain other persons further up the organizational chain, Opining Counsel should confirm that the required consents and/or approvals, if any, of any Florida entities that are members and/or managers of the LLC, and other Florida entities further up the organizational chain, up to the first entity that is not a Florida entity, have been obtained. If Opining Counsel cannot satisfy themselves in that regard, then Opining Counsel should expressly set forth in the opinion letter any limitations on the scope of Opining Counsel’s opinion as a result of not having been able to satisfy themselves regarding consents and/or approvals that are required by such Florida entities that are members and/or managers of the LLC and other Florida entities further up the organizational chain, up to the first entity that is not a Florida entity.

Opining Counsel rendering an opinion that an LLC has authorized a Transaction or has authorized the execution, delivery and/or performance of the Transaction Documents should also determine (i) whether, under the LLC’s operating agreement, any non-Florida entities that are members or managers of the LLC must provide written consent and/or approval for the LLC to authorize the Transaction or to authorize the execution, delivery and/or performance of the Transaction Documents, and (ii) whether any non-Florida entities further up the organizational chain must provide written consent and/or approval for the LLC to authorize the Transaction or to authorize the execution, delivery and/or performance of the Transaction Documents. If so, then Opining Counsel should confirm that a person purporting to represent each such entity has signed a consent and/or approval on behalf of that entity. However, Opining Counsel has no responsibility to review organizational documents for such non-Florida entities to ensure that each such non-Florida entity has itself authorized the signature of the person signing the consent and/or approval on its behalf. In that instance, Opining Counsel may assume, without so stating, that the signature of any non-Florida entities has been properly authorized by those entities, together with those of

any other entities whose consent is required therefor, unless Opining Counsel is aware of facts (red flags) that would make such assumption unreliable to a reasonable Opining Counsel). [Opining counsel has no responsibility to confirm the signatures or authority of non-Florida entities in the organizational chain that are not members or managers of the Florida entity for which the opinion is being given.] [NTD: probably need to discuss further] Often, even though no such review is required to give the opinion, Opining Counsel will decide to look at or review the organizational documents of non-Florida entities, such as operating agreements. However, whether Opining Counsel does or does not look at or review such organizational documents, Opining Counsel is not giving an implied opinion that those entities have authorized the signatures on their consents and/or approvals, and Opining Counsel may assume that such signatures are authorized, unless Opining Counsel is aware of facts (red flags) that would make such assumption unreliable to a reasonable Opining Counsel).

The Opinion Recipient should be on notice that Florida Opining Counsel is not giving an opinion with respect to the authorization of the Transaction or the authorization of the execution, delivery and/or performance of the Transaction Documents by up the chain non-Florida entities for several reasons. First, as a general matter Florida Opining Counsel should not be expected to be giving an opinion with respect to up the chain non-Florida entities. Second, if Florida Opining Counsel does not list organizational documents relating to those non-Florida entities as documents that have been reviewed, then the Opinion Recipient should be on notice that Florida Opining Counsel has undertaken no such review and that no opinion is being given based on those organizational documents or the non-Florida entities to which they relate. Third, customarily, opinions by Florida Opining Counsel are expressly limited to matters of Florida law. Finally, as a general matter, opinions Florida opining Counsel exclude any and all implied opinions.