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FIRST SUPPLEMENT TO
THIRD-PARTY LEGAL OPINION CUSTOMARY PRACTICE IN FLORIDA REPORT

I. CORPORATIONS - ISSUANCE OF PREFERRED SHARES

II. LIMITED LIABILITY COMPANY – ISSUANCE OF MEMBERSHIP INTERESTS

III. MARGIN STOCK – OPINION WITH RESPECT TO REGULATION U

IV. [REVISIONS TO CERTAIN EXISTING SECTIONS OF THE REPORT]

V. ADDITIONS TO THE REPORT

_____ __, 2017

BACKGROUND TO THIS FIRST SUPPLEMENT TO THE REPORT

This First Supplement (the "**First Supplement**") to the "Report on Third-Party Legal Opinion Customary Practice in Florida" dated December 3, 2011 (the "**Report")** has been prepared to supplement the Report with respect to three areas of the law: (i) issuance of preferred shares by a Florida corporation, (ii) issuance of membership interests by a Florida limited liability company, (iii) margin stock, (iv) [revisions to certain existing sections of the Report] and (v) certain additions to the Report.

This First Supplement is a joint effort of the Legal Opinion Standards Committee (the "**Business Law Section Committee**"**)** of the Business Law Section of The Florida Bar (the "**Business Law Section**"**)** and the Legal Opinions Committee (the "**RPPTL Section Committee**"**,** and, together with the Business Law Section Committee, the "**Committees**"**)** of the Real Property, Probate and Trust Law Section of The Florida Bar (the "**RPPTL Section").** The Business Law Section and the RPPTL Section have a long and active history of providing guidance to Florida lawyers regarding third-party legal opinion issues, and the Report (in conjunction with this First Supplement) reflects an effort to update and consolidate all of the guidance previously published.

Materials Considered in the Preparation of this First Supplement to the Report

In the preparation of this First Supplement, in addition to the Report, the Committees actively reviewed and considered the following state and local bar reports:

1. TriBar Opinion Comm., "Legal Opinions to Third Parties: An Easier Path", 34 Bus. Law 1891 (1979) (the "**1979 TriBar Report**").

2. "Special Report of the TriBar Opinion Committee: Duly Authorized Opinions on Preferred Stock" report issued in 2008 by the TriBar Opinion Committee and published in *The Business Lawyer*, Vol. 63 at page 921 (the "**2008 TriBar Report");**

3. Corp. Comm. Of the Bus. Law Section of the State Bar of Cal., Legal Opinions in Business Transactions (Excluding the Remedies Opinion) (May 2005)(2007 revision)(the "**2007 California Business Transactions Report**").

4. "Report on Selected Legal Opinion Issues in Venture Capital Financing Transactions" (the "**California VC Financing Report")** issued by the Business Law Section of the State Bar of California (the "**California Business Law Section"),** issued in 2009 and published in *The Business Lawyer*, Vol. 65; and

5. Permanent Editorial Board for the Uniform Commercial Code. PEB Commentary No. 17. "Limited Liability Partnerships Under the Choice of Law Rules of Article 9" dated June 29, 2012. The American Law Institute and the National Conference of Commissioners on Uniform State Laws;

6. Supplemental TriBar LLC Opinion Report: Opinions on LLC Membership Interests issued in 2011 by the TriBar Opinion Committee and published in The Business Lawyer, Vol66 at page 1065 (the "**2011 TriBar Report**").

In the preparation of this First Supplement, the Committees relied heavily on the reports of other bar associations and sections of bar associations that are set forth above. In that regard, the Committees viewed their task as first to determine the customary practice of Florida counsel with respect to third-party legal opinions and second to document those practices. Wherever the work of other bar associations best reflected what the Committee believed to be the customary third-party legal opinion practices in Florida, the Committee borrowed liberally from such work. Although specific attribution to particular reports is not included for each section of this Report, the Committees acknowledge their use of all of these reports and thank each of these bar associations and sections of bar associations for their fine thinking and cogent analysis that helped shape this First Supplement to the Report.

To the extent legally permissible, copies of the bar association reports and reference materials that are referenced in this Report are expected to be available in the future on the webpages of the Business Law Section Committee and the RPPTL Section Committee. Many of these same materials are also available in the "Legal Opinion Resource Center" contained on the webpage of the ABA Committee.

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OPINIONS WITH RESPECT TO PREFERRED SHARES OF SECURITIES OF CORPORATIONS

In Transactions in which a Florida corporation is issuing equity securities, Opining Counsel may be asked to render opinions regarding the Client's preferred equity securities ("**preferred shares**" or "**preferred stock**"). Below are examples of those opinions, together with a discussion of the opinion language and the diligence recommended with respect to each opinion.

This First Supplement to the Report only addresses opinions regarding issuances of preferred shares by Florida corporations. This First Supplement to the Report does not address opinions regarding issuances of securities by limited partnerships or general partnerships. The Committees plan on covering issuances of securities by limited partnerships and general partnerships in one or more future supplements to the Report.

A. Corporations – Authorized Capitalization – Preferred Stock

Recommended opinion:

The Client's authorized capitalization includes_____shares of preferred stock, $ par value per share.

The authorized capitalization opinion for preferred stock means that, as of the date of the opinion, the Client is authorized to issue the number of shares of preferred stock set forth in its articles of incorporation filed with the Department, as amended to the date of the opinion letter. Pursuant to Section 607.01401(25) of the FBCA, the term "shares" means the units into which the proprietary interests in a corporation are divided.

Section 607.0202(1)(c) of the FBCA requires a corporation organized in Florida to set forth in its articles of incorporation the number of shares that it is authorized to issue. A Florida corporation does not have the legal authority to issue more shares than the number of shares set forth in its articles of incorporation. Section 607.0601 of the FBCA also requires the corporation to set forth in its articles of incorporation the classes of shares and the number of shares of each class of shares that it is authorized to issue. If more than one class of shares is authorized, the articles of incorporation must set forth a distinguishing designation for each class and, prior to the issuance of shares of a class, the preferences, limitations and relative rights of that class.

A corporation organized in Florida may increase or decrease its authorized capitalization by amending its articles of incorporation pursuant to Section 607.1006 of the FBCA. As a result, if a corporation has amended its articles of incorporation, Opining Counsel should review all articles of amendment to the corporation's articles of incorporation in order to determine the current authorized capitalization.

On a purely plain reading basis, the authorized capitalization opinion does not mean that Opining Counsel has reviewed the organization of the corporation, which is a matter covered by the "entity status and organization" opinion. See "Entity Status and Organization of a Florida Entity." However, because a corporation must have been organized and be active to authorize the issuance of shares, Opining Counsel should not render the authorized capitalization opinion, or any other opinion regarding issuances of the corporation's securities, unless Opining Counsel has confirmed (or expressly assumed in the opinion letter) that the corporation has been organized and is active. Because opinions regarding securities of Florida corporations are usually given at the same time as opinions on the entity status and organization of Florida corporations, this should rarely be an issue. Further, the authorized capitalization opinion does not mean that Opining Counsel has reviewed the documents with respect to the actions taken to approve a previous amendment to the articles of incorporation (or previously adopted amended and restated articles of incorporation). For purposes of rendering the authorized capitalization opinion, absent knowledge to the contrary (or knowledge of facts (red flags) that ought to cause a reasonable Opining Counsel to call the underlying assumptions into question), Opining Counsel may assume that each previous amendment to the Client's articles of incorporation was properly proposed and adopted based upon the acceptance of such filings by the Department.

Diligence Checklist – Corporation – Preferred Stock. To render the "authorized capitalization" opinion with respect to preferred stock of a Florida corporation, Opining Counsel should take the following actions:

- Obtain a copy of the corporation's articles of incorporation, as amended (preferably a certified copy obtained from the Department).
- If applicable, obtain a copy of the certificate of designations related to the preferred stock.
- Review the articles of incorporation (or, if applicable, the most recent restated articles of incorporation) to determine the classes of shares and the number of shares authorized for each class as set forth therein.
- If the articles of incorporation have been amended since the date of the initially filed articles of incorporation (or, if applicable, since the date of the most recent restated articles of incorporation), review all such amendments to determine the current classes of shares and the

B. Corporations – Number of Shares Outstanding – Preferred Stock

An opinion regarding the number of outstanding shares of preferred stock of a corporation is a factual confirmation. Often, a corporation will make a representation and warranty in the Transaction Documents regarding the number of its outstanding preferred shares. However, Opinion Recipients often request an opinion on this issue in an effort to obtain further assurance.

The recommended form of opinion is as follows:

Based solely on a certificate of _____, the Client has shares of its preferred stock outstanding.

The Committees believe that this opinion should generally be rendered based solely on a certificate from the Client's transfer agent and/or on a certificate from the Client. Although some Opining Counsel may elect to review the corporation's stock register and any other stock records contained in the corporation's minute book, such diligence is not necessary under Florida customary practice in order to render the opinion in its recommended form.

Notwithstanding the foregoing, if Opining Counsel engages in further diligence to support this opinion, the limitation contained in the recommended opinion should be expanded to describe whatever further diligence has been conducted. Further, Opining Counsel should be aware that, if, contrary to the position stated above, this opinion is rendered without the "based solely on" qualifying language, the Opinion Recipient may reasonably expect that the opinion was rendered based on a complete review by Opining Counsel of the corporation's stock register and the corporation's other stock records.

C. Corporations – Reservation of Shares – Preferred Stock

The "reserved shares" preferred stock opinion addresses the fact that certain securities of the corporation have been reserved for future issuance upon some future event, such as the conversion of convertible securities or the exercise of derivative securities (e.g., options or warrants to purchase shares of preferred stock). This opinion means that the corporation has taken the necessary corporate actions to reserve a portion of its authorized shares of preferred stock for future issuance.

The FBCA does not specifically address reservation of shares or provide any legal effect to this "reservation" by the board of directors of the corporation. If the "reserved shares" preferred stock opinion is rendered, it means that: (i) sufficient additional shares of preferred stock have been authorized for issuance in the future on the exercise of the convertible or derivative securities, but are not yet issued, (ii) the board of

directors has adopted a resolution to designate and reserve such authorized, but unissued, preferred shares for future issuance, and (iii) such resolution of the board of directors has not been revoked as of the date of the opinion letter. After confirming the number of authorized shares of the corporation from a review of the corporation's articles of incorporation as amended to date, Opining Counsel may rely upon an officer's certificate confirming the factual issues described in clauses (i), (ii) and (iii) above as the basis of this opinion.

The recommended form of opinion is as follows:

The Client has reserved ___shares of its [preferred stock] for issuance upon [describe the triggering event with specificity, such as the conversion of convertible securities or the exercise of derivative securities].

The "reserved shares" preferred stock opinion does not confirm the absence of anti-dilution provisions in any convertible securities, options or warrants issued by the corporation that in the future could cause the number of shares of preferred stock reserved to be inadequate. In addition, the "reserved shares" preferred stock opinion does not provide absolute assurance that such preferred shares will be available for issuance at the time the preferred shares are to be issued or converted, because the corporation's board of directors has the legal ability to revoke the reservation of preferred shares and authorize the issuance of those preferred shares in the future for a entirely different purpose. Accordingly, as with each of the other opinions that are being given, the "reserved shares" preferred stock opinion speaks only as of the date of the opinion letter.

To provide greater assurance to the Opinion Recipient that the preferred shares reserved will continue to be available for issuance in the future upon the designated triggering event, the Opinion Recipient should consider obtaining a contractual covenant from the corporation in a Transaction Document or in some other document that obligates the corporation to continue to reserve the appropriate number of authorized but unissued preferred shares .

D. Corporations – Issuances of Preferred Shares

The following opinions relate to the validity of the particular issuances of preferred shares that are contemplated by the Transaction Documents.

Recommended opinion:

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

A. Duly Authorized.

Under Florida customary practice, this opinion means that: (a) the issuance of the preferred shares has been authorized by all necessary corporate action in compliance with the FBCA and the articles of incorporation and bylaws of the corporation, (b) the number of preferred shares that have been issued (together with any additional preferred shares proposed to be issued) are not in excess of the number of preferred shares of the particular class or classes authorized by the articles of incorporation, as amended to date and (c) the corporation has the power under the FBCA, the articles of incorporation and the bylaws of the corporation to create the preferred shares having the rights, powers and preferences of the preferred shares in question. This opinion does not mean that any previously issued and outstanding preferred shares were properly issued and, in rendering this opinion, Opining Counsel is not expected to take any steps to confirm whether any previously issued and outstanding preferred shares were properly issued. See "Corporations – Outstanding Equity Securities" below.

In determining the number of preferred shares available for issuance, Opining Counsel may rely on the information contained in the corporation's financial statements, on a statement from the corporation's transfer agent or on a statement from the Client, unless Opining Counsel has knowledge that the information being relied upon is not correct or unless Opining Counsel is aware of other facts (red flags) that call into question the reliability of such

information. See "Common Elements of Opinions—Knowledge."

The board of directors (or the shareholders, if such power is reserved to the shareholders in the articles of incorporation) may approve the issuance of preferred shares of stock for consideration consisting of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, promises to perform services evidenced by a written contract, or other securities of the corporation. Before the corporation issues any preferred shares, the board of directors of the corporation (or the shareholders, if such power is reserved to them) must determine that the consideration received or to be received for the preferred shares to be issued is adequate.

Under Section 607.0825(1)(e) of the FBCA, although the board of directors of a Florida corporation cannot delegate authority to authorize or approve the issuance or sale or contract for the sale of preferred shares , it can give a committee (or a senior executive officer of the corporation) the power to authorize or approve the issuance or sale or contract for the sale of preferred shares so long as such issuance, sale or contract for sale is within limits specifically prescribed by the board of directors in the authorizing resolutions. However, there is doubt as to whether a committee (or a senior officer of a corporation) can be given the power to set or establish the rights, powers and preferences of a particular series of "blank check" preferred stock even if the board of directors appears to have set limits in authorizing resolutions.

Opinion recipients sometimes request that the opinion expressly confirm that the terms of the preferred shares do not violate the FBCA and the articles of incorporation of the corporation. One form of this requested opinion is set forth below:

> *"The rights, powers and preferences of the preferred stock set forth in [the articles of incorporation of the corporation] do not violate [the FBCA] or [the articles of incorporation of the corporation.]*

The Committees believe that this confirmation is already included within the duly authorized opinion and is therefore unnecessary.

An opinion that preferred shares have been "duly authorized" does not address whether the creation of such shares violates or breaches any agreement to which the corporation is a party, such as a shareholders' agreement. In addition, the "duly authorized" opinion does not address whether any fiduciary duty has been violated in connection with the creation or authorization of such preferred shares.

1. Enforceability of the Preferred Shares

The duly authorized opinion does not cover a stockholder's ability to enforce the provisions of the preferred shares. The opinion addresses only the corporation's power under the FBCA and the corporation's articles of incorporation to create the class or series of preferred shares in question. Accordingly, the duly authorized opinion does not address the question whether, assuming that the corporation has the power to create such preferred shares, the terms of the preferred shares will be given effect by the courts in a particular situation.

Opinion recipients will sometimes request that the opinion state that the provisions of the preferred shares (or certain provisions of such preferred shares) are "*enforceable in accordance with their terms*." At least two state bar reports have addressed this issue and both reports have determined that it is inappropriate for an opinion recipient to request an enforceability opinion with respect to the issuance of preferred shares.

In discussing this enforceability request, the 2008 TriBar Report noted that "the enforceability of an agreement addresses contract law concepts (and includes the standard exceptions) and preferred stock provisions are not governed by contract law but rather are governed by corporation law." Because the enforceability opinion addresses the remedies available to a contract party under a contract, the 2008 TriBar Report noted that the "concepts underlying an enforceability opinion do not easily fit" a preferred stock opinion.

In 2007, the Business Law Section of the State Bar of California adopted the TriBar position that "a duly authorized" opinion confirms that the corporation has the power to create stock with the rights, powers and preferences of the shares in question. The California VC Financing Report noted that an opinion giver is sometimes requested to provide an opinion that "*the rights, preferences and privileges of the stock being purchased in the transaction are as set forth in the Company's Articles*" and occasionally, the opinion is formulated as a request for

an enforceability opinion, such as the Company's Articles "*are enforceable against the Company in accordance with their terms*." The California Committee stated in the California VC Financing Report that both requested opinions were "technically incorrect" and "inappropriate" because (i) the attributes of the preferred shares are set forth not only in the corporation's articles of incorporation, but also in the applicable corporation statute and case law and (ii) the corporation's articles of incorporation are not, in fact, a contract as to which a remedies opinion can be given because the provisions of the articles of incorporation relating to the rights of the preferred shares are governed by the relevant corporate law.

Although both the 2008 TriBar Report and the 2007 California VC Financing Report have adopted the position that preferred shares are governed by (or at least primarily governed by) corporate law and not contract law, several more recent Delaware cases have held that the rights of preferred shareholders are "primarily contractual in nature." See Fletcher International, Ltd. v. ION Geophysical Corporation, Del. Ch. LEXIS 125 (2010) (holding that a corporation that caused its subsidiary to issue a convertible note without obtaining the required consent of a preferred shareholder of such corporation violated the terms of such preferred shares).

As noted by another Delaware court, "[a] preferred shareholder's rights are defined in either the corporation's articles of incorporation or in the certificate of designation, which acts as an amendment to a certificate of incorporation. Thus, rights of preferred shareholders are contractual in nature and the 'construction of preferred stock provisions are matters of contract interpretation for the courts.'" In re Appraisal of Metromedia International Group, Inc., 971 A.2d 893, 899 (Del.Ch. 2009). The Metromedia court noted that former Delaware "Chancellor Allen analyzed the rights conferred upon preferred shareholders by the certificate of designation because, '[t]o the extent it possesses any special rights or powers and to the extent it is restricted or limited in any way, the relation between the holder of the preferred shares and the corporation is contractual.'"

Notwithstanding the aforementioned Delaware court decisions, the Committees believe that, under Florida customary practice, it is inappropriate for recipient counsel to request that Opining Counsel opine as to the enforceability of the preferred shares or the certificate of designation for such preferred shares, regardless of the formulation of such opinion.

2. Potential Exceptions to Duly Authorized Opinion.

In certain complex issuances of preferred shares, Opining Counsel may not be able to provide an unqualified "due authorization" opinion and such opinion may need to include one or more specific exceptions addressing specific terms of the articles of incorporation of the corporation which conflict with the applicable provisions of the FBCA, the articles of incorporation or applicable case law or not be given at all. Examples of these special exceptions include, without limitation:

(i) the articles of incorporation establish a procedure for declaring dividends that conflict with the FBCA;

(ii) the articles of incorporation provide for "drag along" rights that conflict with the FBCA's appraisal rights;

(iii) the article of incorporation provide for a lower percentage vote for approval of certain matters than required by the FBCA;

(iv) the articles of incorporation give holders of a class of stock the right to designate members of a committee of the board of directors but the FBCA limits this right to the members of the board of directors; and

(v) the board of directors pursuant to its blank check authority creates a non-voting class of stock but the articles of incorporation only permit voting stock.

No exception to the "due authorization" opinion is required if the articles of incorporation require redemption of the preferred shares and the preferred shares are callable, however the Committees believe that an exception would be required if the holder of the preferred shares has a "put right" with respect to such preferred

shares. In any event, the FBCA only permits redemption when the corporation has sufficient legal funds available to effect such redemption. Although many opinions include the phrase "*to the extent funds are lawfully available therefor*", the Committees believe that including such limitation in the opinion is not necessary. However, the Committees suggest that Opining Counsel should consider informing recipient counsel of this limitation in the opinion.

Finally, the 2008 TriBar Report notes that the corporation's lack of corporate power to create a certain provision of the preferred shares "might" give rise to a question regarding the validity of the preferred shares itself. In this situation, if the offending provision in the articles of incorporation is not removed or adequately modified to cure the issue to the satisfaction of Opining Counsel, Opining Counsel may not be able to provide the duly authorized opinion without expressly addressing in the opinion the possible effect of the provision on the validity of the preferred shares in its entirety.

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Diligence Checklist – Corporation – Preferred Stock. To render the "duly authorized" portion of this opinion, Opining Counsel should take the following actions:

- Assuming that Opining Counsel is also opining on the authorized capital of the corporation and has performed the diligence necessary to render that opinion (see "Corporations-Authorized Capitalization – Preferred Stock" above), Opining Counsel should review the articles of incorporation, as amended (preferably a certified copy obtained from the Department) to determine whether the right to authorize the issuance of preferred shares is reserved to the shareholders.
- Opining Counsel should confirm that the issuance of the preferred shares has been approved by the board of directors of the corporation (or the shareholders, if the articles of incorporation reserve this power to the shareholders) in accordance with the FBCA and the corporation's articles of incorporation and bylaws.
- If any aspects of the issuance of the preferred shares was delegated to a committee of the board of directors (or to a senior executive officer), Opining Counsel should confirm that the authority delegated to the committee (or to a senior executive officer) was permitted under the FBCA, and that the committee (or such senior executive officer) properly acted within that authority. In this regard, Section 607.0825 of the FBCA provides that no committee of the board of directors of a corporation shall have the authority to authorize or approve the issuance or sale or contract for the sale of preferred shares, or determine the designation and relative rights, preferences, and limitations of a voting group, except that the board of directors may authorize a committee (or a senior executive officer) to do so within limits specifically prescribed by the board of directors. Opining Counsel should also verify that any actions taken by the committee (or such senior executive officer) with respect to the issuance of the preferred shares were taken in accordance with the FBCA and the corporation's articles of incorporation and bylaws.
- Opining Counsel should obtain a factual certificate from the Client providing Opining Counsel with copies of the resolutions (or written consents) adopted with respect to the preferred share issuance. Unless Opining Counsel has notice that such facts are inaccurate (or is aware of other facts (red flags) that reasonably call into question the reliability of such facts), Opining Counsel may assume under Florida customary practice that: (i) in authorizing the issuance of the preferred shares, the board of directors (or shareholders, committee or a senior executive officer) acted at a properly called and held meeting (or by written consent, provided that taking such action by written consent is not prohibited by the articles of incorporation or bylaws), and (ii) the authorizing resolution received the requisite votes in accordance with the FBCA, the articles of incorporation and the bylaws.
- Opining Counsel should examine the authorizing resolution(s) to confirm that the board of directors (or shareholders and/or committee and/or a senior executive officer): (a) approved the issuance of the preferred shares, (b) recited the consideration for which the preferred shares were to be issued, and (c) determined in such resolution that the consideration received or to be received for the preferred shares was adequate.
- Opining Counsel should confirm that the terms of the preferred shares do not conflict with or violate the FBCA, the articles of incorporation of the corporation or applicable case law.
- Opining Counsel should determine whether a "put right" has been granted in connection with such preferred shares and, if so, an exception should be included in the opinion.

B. **Validly Issued – Preferred Stock.**

This opinion means that the preferred shares have been issued in accordance with the FBCA, the corporation's articles of incorporation and bylaws and any resolution of the board of directors or shareholders (or committee or a senior executive officer) of the corporation which authorized such issuance. The "validly issued" opinion should not be rendered by Opining Counsel unless the preferred shares are: (i) included within the authorized capitalization of the corporation, (ii) have been duly authorized, (iii) are fully paid and are nonassessable (see below), and (iv) comply with any applicable statutory preemptive rights or any applicable preemptive rights contained in the

corporation's articles of incorporation.

The corporation may issue the number of preferred shares of each class or series authorized by its articles of incorporation pursuant to Section 607.0603 of the FBCA. A corporation may also issue fractional preferred shares pursuant to Section 607.0604 of the FBCA. Before a corporation issues preferred shares, the board of directors (or shareholders, if the power to issue preferred shares has been reserved to the shareholders in the articles of incorporation) must determine that the consideration received or to be received for the preferred shares to be issued is adequate pursuant to Section 607.0621(3) of the FBCA, which defines broadly the consideration for which shares may be issued. If the preferred shares are to be issued pursuant to a written subscription agreement approved by the board of directors in the authorizing resolutions (which subscription agreement sets forth the terms of the preferred share purchase), the preferred shares will not be deemed to have been validly issued until the consideration for the issuance of such preferred shares has been paid as required by such subscription agreement. Opining Counsel should confirm that payment was received by the corporation by obtaining an officer's certificate confirming such payment or by some other method reasonably acceptable to Opining Counsel.

Pursuant to Section 607.0625(1) of the FBCA, preferred shares may, but need not be, represented by certificates. However, if preferred shares are represented by a certificate or certificates, then, at a minimum, each preferred share certificate must state on its face the following information:

(a) the name of the corporation and that the corporation is organized under the laws of the State of Florida;

(b) the name of the person to whom the preferred shares are issued; and

(c) the number and class of preferred shares and the designation of the series, if any, the certificate represents.

In addition, as required by Section 607.0625(3) of the FBCA, if the corporation is authorized to issue different classes of preferred shares or different series within a class, the designations, relative rights, preferences, and limitations applicable to each class and the variations in rights, preferences and limitations determined for each series (and the authority of the board of directors to determine variations for future series) must be summarized on the front or back of each certificate. Alternatively, each certificate may state conspicuously on its front or back that the corporation will furnish the shareholder with a full statement of this information on request and without charge.

Finally, pursuant to Section 607.0625(4)(a) of the FBCA, each preferred share certificate must be signed (either manually or in facsimile) by an officer or officers designated in the bylaws or designated by the board of directors.

An opinion that preferred shares are validly issued subsumes within it an opinion that the certificates issued representing the preferred shares are in proper form (or if uncertificated securities (see below), that such securities have been properly issued). A separate opinion as to whether the certificates representing the preferred shares being issued are in proper form is sometimes requested and given. See "Corporations – Stock Certificates in Proper Form – Preferred Stock" below.

Pursuant to Section 607.0626 of the FBCA, unless the articles of incorporation or the bylaws provide otherwise, the board of directors of the corporation may authorize the issuance of some or all of the preferred shares without certificates. If the preferred shares are not evidenced by certificates, then, within a reasonable time after the issue or transfer of the preferred shares without certificates, the corporation shall send the shareholder a written statement of the information required by Section 607.0625(2) and (3) of the FBCA (if applicable) and Section 607.0627 of the FBCA regarding restrictions on transfer of preferred shares (if applicable). However, the failure of the corporation to deliver the written statement described in Section 607.0626 of the FBCA after the preferred shares without certificates are issued does not affect an opinion regarding whether the preferred shares were validly issued. It is recommended (but not required) that Opining Counsel obtain a certificate from the Client confirming that the Client has complied with such requirement or an undertaking from the Client that it will in the future comply with the Client's obligations under this statute.

In rendering the "valid issuance" opinion, Opining Counsel should also consider whether the contemplated issuance of preferred shares violates a preemptive right contained in the FBCA or in the corporation's articles of incorporation. See "Corporations – No Preemptive Rights – Preferred Stock" below. If such preemptive rights exist, Opining Counsel should make certain that such rights have been properly extended and addressed, or waived, before issuing an opinion that such preferred shares are validly issued.

An opinion that preferred shares have been "validly issued" does not address whether the issuance of such preferred shares violates or breaches any agreement to which the corporation is a party, such as a shareholders' agreement. In addition, the "validly issued" opinion does not address whether any fiduciary duty has been violated in connection with the issuance of such preferred shares. However, if Opining Counsel is aware that a particular issuance of preferred shares violates a shareholders' agreement, Opining Counsel should consider advising the Opinion Recipient of such fact so as to avoid a potential claim that the opinion is misleading.

Diligence Checklist – Corporation – Preferred Stock. To render the "validly issued" portion of this opinion, Opining Counsel should take the following actions:

- Confirm that the preferred shares to be issued are duly authorized (see discussion above).
- Obtain a copy of the corporation's articles of incorporation, as amended, (preferably a certified copy obtained from the Department) and review such articles to verify compliance with any specified minimum amount or form of consideration.
- Review the corporation's bylaws (a copy certified as true and correct by an officer) to verify compliance with any specified minimum amount or form of consideration.
- Obtain all subscription agreements, if any, whether pre-incorporation or post-incorporation, if applicable, referred to in the authorizing resolutions, confirming the consideration to be received by the corporation.
- Review resolutions of the board of directors, committee and/or a senior executive officer (a copy certified as true and correct by an officer) confirming the consideration to be received for the issuance of the preferred shares and the adequacy thereof under the FBCA and the articles of incorporation and bylaws.
- Confirm that the preferred share certificates are in proper form or, if the preferred shares are to be uncertificated, that the statutory requirements with respect to uncertificated securities have been (or are being) followed.

C. Fully Paid and Nonassessable – Preferred Stock.

This opinion means that the corporation has received the required consideration (except in the case of stock dividends, where no consideration is required) for the preferred shares being issued and that the corporation cannot call for any additional consideration to be paid by the holder of such shares.

1. **Fully Paid.** This opinion means that the consideration, as specified in the authorizing resolutions or in a subscription agreement, has been received in full and the requirements, if any, in the corporation's articles of incorporation and bylaws, have been satisfied. Pursuant to Section 607.0621(2) of the FBCA, such consideration may consist of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, promises to perform services evidenced by a written contract, or other securities of the corporation. Opining Counsel may rely on a certificate from the client regarding the receipt of such consideration unless Opining Counsel is aware of facts that would make such reliance unreasonable or unreliable under the circumstances.

   The determination by the corporation's board of directors (or shareholders, if such power is reserved to the shareholders) is conclusive insofar as the adequacy of consideration for the issuance of the preferred shares, and this opinion is based on an unstated assumption regarding compliance by the directors with their fiduciary obligations in determining the adequacy of consideration. Although Florida eliminated

par value in 1990 as it relates to share issuances, some companies continue to use par value in order to minimize out-of-state taxes or fees. Unless the corporation's articles of incorporation provide otherwise, preferred shares with par value may be issued for less than their stated value. Further, under Section 607.0623(1) of the FBCA, preferred shares of a corporation's stock issued as a dividend may be issued without consideration unless the articles of incorporation otherwise provide.

2. **Nonassessable.** Nonassessable means that, once the corporation has received the specified consideration, it cannot call for any additional consideration. Under Section 607.0621(4) of the FBCA, consideration in the form of a promise to pay money or perform services is deemed received by the corporation at the time of the making of the promise, unless the agreement otherwise provides.

Since this opinion is rendered under the FBCA, it does not address whether preferred shares might be assessable under another statute or under an agreement. This is important because, for example, in contrast to corporations organized under the FBCA, shares of a Florida banking corporation organized under Chapter 658 of the Florida Statutes must have a specified par value and shares cannot be issued at a price less than par value.

Similarly, this opinion does not mean that shareholders will not be subject to liability for receipt of an unlawful dividend or, as to a controlling shareholder, if the corporate veil is pierced.

Diligence Checklist – Corporation – Preferred Stock. To render the "fully paid and non-assessable" portion of this opinion, Opining Counsel should take the following actions:

- Confirm that the preferred shares are duly authorized and validly issued (see discussions above).
- Obtain an officer's certificate confirming receipt of the consideration required by the authorizing resolutions and/or confirming that no consideration for the preferred shares remains unpaid.

E. Corporations – No Preemptive Rights – Preferred Stock

Recommended opinion:

The issuance of the [preferred shares] will not give rise to any preemptive rights under the Florida Business Corporation Act or the Client's Articles of Incorporation.

This opinion means that existing shareholders of a corporation do not have a right under the FBCA or the corporation's articles of incorporation to maintain their percentage ownership of the corporation by buying a proportional number of preferred shares of any future issuance of preferred shares. Existing shareholders with preemptive rights have the right, but not the obligation, to purchase as many preferred shares of the newly issued preferred stock as are necessary to maintain their proportional ownership interest in the corporation before the corporation sells the preferred shares to persons outside of the shareholder group that holds the preemptive rights.

Prior to 1976, Florida's general business corporation statute mandated preemptive rights unless the articles of incorporation provided otherwise. For corporations formed on or after January 1, 1976, no statutory preemptive rights exist unless they are expressly provided for in the articles of incorporation. Thus, in 1976, Florida changed from a statutory "opt-out" state to a statutory "opt-in" state. The opt-in approach recognizes that preemptive rights may be inconvenient and severely impair a corporation's ability to raise capital through future equity issuances. Therefore, Florida corporations formed on or after January 1, 1976 do not have statutory preemptive rights unless specifically stated in their articles of incorporation, but Florida corporations formed prior to January 1, 1976 continue to have preemptive rights unless their articles of incorporation expressly provide that the corporation's shareholders do not have preemptive rights.

Regardless of whether a corporation grants or denies preemptive rights in its articles of incorporation, a corporation may, by contract or otherwise, grant a shareholder the equivalent of preemptive rights or some other

right to purchase preferred shares from the corporation. The recommended form of opinion regarding preemptive rights does not cover contractual preemptive rights. However, although such confirmation is discouraged, a factual confirmation that Opining Counsel is not aware of any contractual preemptive rights that have been granted to other shareholders of the corporation is sometimes requested and given. See "No Violation and No Breach or Default – No Breach of or Default under Agreements" for a discussion of opinions regarding contractual preemptive rights. Further, if Opining Counsel is aware that a particular issuance of preferred shares violates a contractual preemptive right contained in a particular agreement under circumstances where Opining Counsel is not rendering an opinion regarding "no breach of or default under agreements" with respect to that particular agreement, Opining Counsel should consider advising the Opinion Recipient of such fact so as to avoid a potential claim that the opinion is misleading.

Diligence Checklist – Corporation Incorporated On or After January 1, 1976.

- When issuing this opinion for a corporation formed on or after January 1, 1976, Opining Counsel should review the corporation's articles of incorporation, as amended (preferably a certified copy obtained from the Department), to ascertain if such articles of incorporation grant preemptive rights to shareholders.
- If the articles of incorporation grant preemptive rights to shareholders, Opining Counsel should ascertain whether the preferred share issuance in question triggers the granting of preemptive rights as described in the articles of incorporation.
- If the preferred share issuance in question triggers the grant of preemptive rights under the articles of incorporation, Opining Counsel should determine if shareholders have waived their preemptive rights or whether the shareholders holding preemptive rights have already been properly given the opportunity to exercise their preemptive rights. Pursuant to Section 607.0630(2)(b) of the FBCA, "[a] shareholder may waive his or her preemptive right," and a waiver "evidenced by a writing is irrevocable even though it is not supported by consideration." If all shareholders with preemptive rights have not waived them, or if such preemptive rights have not been provided in accordance with the FBCA, this opinion should not be rendered.

Diligence Checklist – Corporation Incorporated Prior to 1976.

- When issuing this opinion for a corporation formed prior to 1976, Opining Counsel should review the corporation's articles of incorporation to determine if they expressly deny preemptive rights to shareholders. If such articles of incorporation do not specifically provide that they deny preemptive rights, Opining Counsel should determine if shareholders have waived their preemptive rights. Because current Section 607.0630(2)(b) of the FBCA, which statutorily provides for the waiver of preemptive rights, does not apply to corporations incorporated prior to January 1, 1976, a waiver must be noted on the shareholders' stock certificates to be effective. This opinion should not be given unless all shareholders have expressly waived their preemptive rights.

F. Corporations – Stock Certificates in Proper Form – Preferred Stock

Recommended opinion:

The stock certificate(s) representing the [preferred shares] comply in all material respects with the Florida Business Corporation Act and the Client's Articles of Incorporation and bylaws.

This opinion means that, as of the date of the opinion, each preferred stock certificate: (i) includes on its face the name of the issuing corporation, a statement that the corporation is organized under the laws of the State of Florida, the name of a person designated as the person to whom the preferred shares are issued, the

number and class of preferred shares the preferred stock certificate represents and the designation of the series, if any, the stock certificate represents, and (ii) is signed, either manually or by facsimile, by an officer or officers designated in the bylaws or designated in resolutions of the board (whether or not such person is still an officer when the certificate is issued) or by a person or persons who purport to be an officer or officers of the corporation. In addition, this opinion means that, as of the date of the opinion, each stock certificate either: (i) includes on its face or back language relating to: (a) any designations, relative rights, preferences, and limitations applicable to each class, and (b) any variations in rights, preferences, and limitations for each series (and the authority of the board to determine variations for future series), or (ii) if any such designations, relative rights, preferences, and/or limitations are applicable and/or any such variations in rights, preferences and/or limitations are applicable, states conspicuously on its face or back that the corporation will furnish the shareholder with a full statement of the information required by Section 607.0625(3) of the FBCA upon request and without charge. Although a stock certificate may bear an actual or facsimile corporate seal, this opinion means that the preferred stock certificate bears a corporate seal only if the corporation's articles of incorporation and/or bylaws requires that the corporation's stock certificates bear a corporate seal.

This opinion does not address whether the preferred stock certificates contain legends that may be required by contract or may be required or advisable under applicable federal or state securities laws (such as customary private placement legends). If the Transaction Documents require the preferred stock certificates to contain legends and Opining Counsel is asked for an opinion that the preferred stock certificates also comply with the specific requirements as set forth in the Transactions Documents, Opining Counsel may give that opinion if such information is correct. However, any such coverage should be expressly set forth in the opinion letter.

G. <u>Outstanding Preferred Equity Securities</u>.

Sometimes, an Opinion Recipient will request an opinion that *all outstanding preferred equity securities that have previously been issued by the corporation* were duly authorized and that all such securities were validly issued and are fully paid and nonassessable. The Committees believe that such an opinion should be resisted because such an opinion would require Opinion Counsel to look at each historic issuance preferred shares by the corporation to determine if each such issuance was proper at the time of each such issuance. As a result, except in very limited circumstances, such as in connection with a secondary public sale of such securities, the Committees believe that the value of this opinion will almost never justify the cost of providing it. See "Introductory Matters – Reasonableness; Inappropriate Subjects for Opinions."

End of Page

OPINIONS WITH RESPECT TO MEMBERSHIP INTERESTS OF LIMITED LIABILITY COMPANIES

In Transactions in which a Florida limited liability company is issuing membership interests in a Florida limited liability company, Opining Counsel may be asked to render opinions regarding the Client's membership interests. Below are examples of those opinions, together with a discussion of the opinion language and the diligence recommended with respect to each opinion.

Limited Liability Company – Issuance of Membership Interests

The following opinions relate to the validity of the particular issuances of membership interests (the "**LLC Interests**") in a Florida limited liability company (the "**LLC**") that are contemplated by the Transaction Documents.

Recommended opinion:

The [LLC Interests] are validly issued.

1. **Validly Issued.**

This opinion means that the LLC Interests have been issued in accordance with the Florida Revised Limited Liability Company Act ("**FRLLCA**"), the LLC's articles of organization, operating agreement and any written consent or resolution of the manager(s) and/or members of the LLC that may be required by such articles of organization or operating agreement. The "validly issued" opinion should not be rendered by Opining Counsel unless the LLC Interests: (i) have been duly authorized, (ii) comply with any applicable terms of the articles of organization and operating agreement of the LLC and (iii) comply with the FRLLCA.

The LLC may issue LLC Interests to a member of the LLC as set forth in Section 605.0401 of the FRLLCA. The "validly issued" opinion also confirms that the issuance of the LLC Interests complied with any conditions to the such issuance set forth in the operating agreement or resolution authorizing such issuance, if any, including the receipt of the required kind and amount of consideration for such LLC Interests. Opining counsel may rely upon an express assumption or upon a certificate of an appropriate officer or representative of the LLC that the LLC has received the required consideration.

[If LLC Interests were not validly issued to the transferor prior to the transfer of such LLC Interests to a transferee, then, opining counsel may give the "validly issued" opinion with respect to such LLC Interests if all necessary limited liability company action has been taken by the LLC and its members to ratify the valid issuance of such LLC Interests to the transferor.][**DISCUSS**]

In addition, a person may be a member of the LLC without making a financial contribution to the LLC. Section 605.0401(4) of the FRLLCA states that "[a] person may become a member without acquiring a transferable interest and without making or being obligated to make a contribution to the limited liability company. "

Pursuant to Section 605.0502(4) of the FRLLCA, a LLC Interest may, but need not be, evidenced by a certificate and, subject to such section, the LLC Interest that is evidenced by a certificate may be transferred by the transfer of such certificate. An opinion that LLC Interests are validly issued subsumes within it an opinion that the certificates issued representing the LLC Interests are in proper form (or if uncertificated securities (see below), that such securities have been properly issued.

An opinion that LLC Interests have been "validly issued" does not address (i) whether the issuance of such LLC Interests violates or breaches any agreement to which the LLC is a party (other than the operating agreement), (ii) the enforceability of the terms of the operating agreement of the issuing LLC, (iii) compliance with securities or antitrust laws or (iv) the status of the LLC Interests as general intangibles or securities under the Uniform Commercial Code even if the operating agreement of the LLC states that the LLC Interests are securities under

Article 8 of the Uniform Commercial Code. In addition, the "validly issued" opinion does not address whether any fiduciary duty has been violated in connection with the issuance of such LLC Interests. However, if Opining Counsel is aware that a particular issuance of LLC Interests violates any agreement (other than the operating agreement) in which any member is a party, Opining Counsel should consider advising the Opinion Recipient of such fact so as to avoid a potential claim that the opinion is misleading.

a. **Duly Authorized Opinion - Not Necessary**. It is customary for opinions given in connection with the issuance of corporate stock to state that the shares have been "duly authorized." Opinions regarding the issuance of LLC Interests sometimes state that the LLC Interests have been "duly authorized." However, the FRLLCA does not provide for authorized capital or specify any requirement for authorized capital for the LLC. In addition, unlike the articles of incorporation of a corporation, operating agreements do not typically create a "pool of authorized LLC Interests" from which the LLC Interests may be issued from time to time in the future. Since the issues that are required to be addressed in providing the "validly issued" opinion are the same issues which would need to be addressed in providing a "duly authorized" opinion, it is the opinion of the Committees that the "duly authorized" opinion does not add anything of value if the validly issued opinion is given with the respect to the LLC Interests.

Diligence Checklist – Limited Liability Company. To render the "validly issued" portion of this opinion, Opining Counsel should take the following actions:

- Confirm that the LLC Interests to be issued are duly authorized (see discussion above).
- Obtain a copy of the LLC's articles of organization, as amended, (preferably a certified copy obtained from the Department) and review such articles to verify compliance with any specified minimum amount or form of consideration.
- Review the LLC's operating agreement (a copy certified as true and correct by a manager, member or an officer) to verify compliance with any specified minimum amount or form of consideration.
- Review Section 605.0401-605.0402 of the FRLLCA.
- Obtain all subscription agreements, if any, whether pre-formation or post-formation, if applicable, referred to in the authorizing resolutions, confirming the consideration to be received by the LLC.
- Review resolutions of the manager(s) or member(s) (a copy certified as true and correct by a manager, member or officer) confirming the consideration to be received for the issuance of the LLC Interests and the adequacy thereof under the FRLLCA and the articles of organization and the operating agreement.
- Include an express assumption in the Opinion or obtain a certificate from an appropriate officer or representative of the LLC that any required consideration for the issuance of the LLC Interests has been received by the LLC.

2. **Admission of Purchasers of LLC Interests as Members of the LLC**.

Recommended opinion:

Each of the Members has been duly admitted to the LLC as a member of the LLC.

Unless otherwise permitted by the articles of organization or the operating agreement of the LLC, only members are permitted to exercise membership rights in the LLC. Pursuant to Section 605.0401(3)(a) of the FRLLCA provides that, after formation of the LLC, a person becomes a member of the LLC as provided in the operating agreement or as otherwise provided in such section. Section 605.0502(1(c) of the FRLLCA provides that a transfer of a LLC Interest does not entitle the transferee to participate in the management or conduct of the LLC's activities or affairs. Accordingly, any purchaser of a LLC Interest is required to comply with the operating agreement in order for such purchaser to become a "member" of the LLC and have the right to participate in the management and conduct of the LLC's activities and affairs.

Section 605.0102(40) of the FRLLCA defines a "member" as a person who: (i) is a member of a LLC under Section 605.401 of the FRLLCA or was a member in a LLC when the LLC became subject to this chapter and (ii) has not dissociated from the LLC under Section 605.602 of the FRLLCA.

An opinion that the purchaser of an LLC Interest has been "duly admitted" as a member of the LLC means that the purchaser (A) has been admitted as a "member" of the LLC in compliance with the requirements, if any, in (i) the FRLLCA, (ii) the operating agreement of the LLC, (iii) the articles of organization of the LLC, and (iv) any subscription agreement applicable to the issuance of such LLC Interest, if any and (B) has not dissociated from the LLC under or pursuant to the terms of: (i) Section 605.602 of the FRLLCA, (ii) the operating agreement of the LLC or (iii) the articles of organization of the LLC.

Opining counsel may rely upon an express assumption or upon a certificate of an appropriate officer or representative of the LLC that the transferee of an LLC Interest has satisfied each condition to admission as a "member" of the LLC which is set forth in (i) the FRLLCA, (ii) the operating agreement of the LLC, (iii) the articles of organization of the LLC, and (iv) any subscription agreement applicable to the issuance of such LLC Interest, if any.

[An opinion that the purchaser of an LLC Interest has been duly admitted as a member of the LLC subsumes the opinion that such LLC Interests have been validly issued to such transferee or that all necessary limited liability company action has been taken by the LLC and its members to ratify the valid issuance of such LLC Interests.] We note that Section 605.0502(6) of the FRLLCA provides that a transfer of a LLC Interest in violation of a restriction on transfer contained in the operating agreement is ineffective as to a person who has knowledge or notice of the restriction at the time of transfer. [**DISCUSS**]

An opinion that a purchaser or transferee of an LLC Interest is a member of the LLC does not address (i) whether the LLC or its members can enforce the member's obligations under the operating agreement of the LLC or (ii) if the member is a legal entity rather than an individual, that the member has the power to be a member under the law which it was formed.

Diligence Checklist – Limited Liability Company. To render the "duly admitted to the LLC as a member" portion of this opinion, Opining Counsel should take the following actions:

- Confirm that the LLC Interests to be issued are validly issued (see discussion above).
- Obtain a copy of the LLC's articles of organization, as amended, (preferably a certified copy obtained from the Department) and review such articles to verify compliance with any specified conditions to admission as a member of the LLC, if any.
- Review the LLC's operating agreement (a copy certified as true and correct by a manager, member or an officer) to verify compliance with any specified conditions to admission as a member of the LLC, if any.
- Review Section 605.0401 of the FRLLCA to verify that such new transferee has complied with such statute.
- Review Section 605.0602 of the FRLLCA to verify that such new transferee has not dissociated from the LLC.
- Obtain all subscription agreements, if any, whether pre-formation or post-formation, if applicable, referred to in the authorizing resolutions, to verify compliance with any specified conditions to admission as a member of the LLC, if any.
- Review resolutions of the manager(s) or member(s) (a copy certified as true and correct by a manager, member or officer) to verify compliance with any specified conditions to admission as a member of the LLC, if any.
- Include an express assumption in the Opinion or obtain a certificate from an appropriate officer or representative of the LLC that any conditions set forth in the subscription agreement, if any and the operating agreement which are required for admission as a member into the LLC have been satisfied.

3. **Obligations of Purchaser of LLC Interest for Payments and Contributions**.

Recommended opinion:

Under the Florida Revised Limited Liability Company Act, as amended (the "FRLLCA"), purchasers of LLC Interests have no obligation to make further payments for their purchase of LLC Interests or contributions to the LLC solely by reason of their ownership of LLC Interests or their status as members of the LLC, except as provided in [their Subscription Agreement or the Operating Agreement and except for their obligation to repay any funds wrongfully distributed to them as set forth in Section 605.0406 of the FRLLCA].

When LLC Interests are initially issued, purchasers often request an opinion with respect to their obligation to make payments and contributions to the LLC in connection with their purchase and ownership of the LLC Interests. Some purchasers request that the opinion use the "fully paid and nonassessable" terminology which is customarily used in connection with the issuance of capital stock by a corporation.

Often the subscription agreement which is executed in connection with the issuance of the LLC Interest or the operating agreement of the LLC provide for an obligation of the members of the LLC to make additional capital contributions and to make additional payments to the LLC under certain circumstances. Including the reference to these two agreements as exceptions to this opinion is based upon the understanding that an opinion giver should not be required to provide an opinion regarding factual matters that can be readily determined by the review of such agreements by the opinion recipient or their counsel. Accordingly, this opinion requires opining counsel to determine whether under the law covered by the opinion (and apart from the operating agreement and subscription agreement related to such LLC Interests), purchasers of LLC Interests are subject to any requirements following the closing to make payments for their LLC Interests or make contributions solely by reason of their ownership of LLC Interests. The purchaser remains responsible to understand its obligations to make payments and contributions under the operating agreement and their subscription agreement, if any. Numerous exceptions and assumptions to the opinion would typically be required by the opinion giver if this opinion did not exclude the operating agreement and the subscription agreement.

Opinion recipients sometimes ask the opinion giver to identify the particular sections of the operating agreement and the subscription agreement which require any payments or contributions after the closing of the purchase of the LLC Interests. To address this request, the opinion giver may delete the exception to the two agreements from the opinion and substitute a reference to such sections of such operating agreement and subscription agreement that impose obligations to make further payments or contributions (i.e., **"except as provided in Sections ____ of the Operating Agreement and in Section ____ of the Subscription Agreement").**

Opinion givers may address the possibility that a member may have agreed, apart from the subscription agreement and the operating agreement, to be personally liable to make certain payments and contributions to or for the benefit of the LLC by an express assumption in the opinion or by relying upon a certificate from an appropriate representative of the LLC.

The Committees suggest that the form of opinion set forth above be used rather than an opinion worded like an opinion given with respect to corporate stock, that the LLC Interests are "**fully paid and nonassessable**." Since these terms are not defined in the FRLLCA and the meaning of these terms are not generally understood in the context of the issuance of LLC Interests, the Committees believe that the use of these terms are not appropriate with respect to the issuance of LLC Interests.

[However, if the opinion recipient request that the opinion giver use the "**fully paid and nonassessable**" terminology in providing this opinion regarding the obligation of purchasers to make additional payments or contributions, the Committees believe that "**fully paid and nonassessable**" in this context should be understood to mean that **"purchasers of LLC Interests have no obligation to make further payments**

for their purchase of LLC Interests or contributions to the LLC solely by reason of their ownership of LLC Interests or their status as members of the LLC, except for their obligation to repay any funds wrongfully distributed to them as set forth in Section 605.0406 of the FRLLCA." [DISCUSS]

If additional payments or contributions are required of a purchaser of an LLC Interest after the closing of such purchase pursuant to the terms of the operating agreement or subscription agreement with respect to such LLC Interest, then, such "**fully paid and nonassessable**" terminology should be limited by expressly excluding the terms of the operating agreement and subscription agreement, if any, from such opinion (i.e. **" and except as may be required by the Subscription Agreement and the Operating Agreement"**).][**DISCUSS]**

Diligence Checklist – Limited Liability Company. To render the "no obligation to make payments or contributions" portion of this opinion, Opining Counsel should take the following actions:

- Exclude from the opinion the subscription agreement, if any, and the operating agreement of the LLC.
- Include an express assumption in the Opinion or obtain a certificate from an appropriate officer or representative of the LLC that the purchaser has not agreed to make additional payments or contributions to or for the benefit of the LLC, except as forth in the subscription agreement, if any, and the operating agreement of the LLC.

4. **Liability of Purchaser of LLC Interest to Third Parties**.

Recommended opinion:

Under the Florida Revised Limited Liability Company Act, as amended (the "**FRLLCA**"), purchasers of LLC Interests have no obligation to make further payments for their purchase of LLC Interests or contributions to the LLC solely by reason of their ownership of LLC Interests or their status as members of the LLC **and have no personal liability for the debts, obligations and liabilities of the LLC, whether arising in contract, tort or otherwise, solely by reason of being or acting as a member or manager of the LLC**, except as provided in [their Subscription Agreement or the Operating Agreement and except for their obligation to repay any funds wrongfully distributed to them as set forth in Section 605.0406 of the FRLLCA and [**provided that such member does not engage in conduct which may impose personal liability upon such member as set forth in Section 605.04093 of the FRLLCA**].[**DISCUSS**]

When LLC Interests are initially issued, purchasers often request a supplement to the opinion described in Section __ above with respect to their obligation to make payments and contributions to the LLC in connection with their purchase and ownership of the LLC Interests that, as members of the LLC, they will have no personal liability to third parties for debts, obligations and liabilities of the LLC.

This opinion addresses an area which is typically not given in connection with the issuance of capital stock by corporations. The Committees are hopeful that this supplemental opinion will not be requested in the future as practitioners become more familiar with the FRLLCA and the LLC.

Section 605.0304 of the FRLLCA provides that a member or manager of a LLC is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation or other liability of the LLC solely by reason of being or acting as members or managers, except as set forth in Section 605.04043 of the FRLLCA which provides for certain exceptions to the limitation of liability for managers (in a manager-managed LLC) and members (in a member- managed LLC) in the event that they engage in certain egregious conduct.

An opinion which addresses the purchaser of a LLC Interest's personal liability for the debts, obligations and liabilities of the LLC that is limited to liability "solely by reason of being or acting as a member or manager" does not address: (i) a purchaser's status as a controlling person under the securities laws, the environmental laws or other applicable laws, (ii) a purchaser's execution of any guaranty agreement, indemnity agreement or other agreement in his, her or its personal capacity and not on behalf of the LLC, such as a financial guaranty and/or an environmental indemnification agreement in connection with a loan provided to the LLC, (iii) a purchaser's service in another capacity for the LLC, for example, as a manager of a manager-managed LLC or as a member of a member-managed LLC or as an officer of the LLC, (iv) a purchaser's own tortious or wrongful conduct or (v) application of "piercing the veil legal theory", alter ego, or similar equitable doctrines with respect to the purchaser and the LLC.

The Committees believe that the foregoing opinion that is limited to "solely by reason of being or acting as a member or manager" automatically incorporates and includes each of the exclusions listed in the prior paragraph. However, opinion givers may wish to include such exceptions in their opinion as follows:

***Alternate Exception**:*

"The phrase "solely by reason of being or acting as a member or manager" in opinion paragraph ____ is taken from Section 605.0304(1) of the FRLLCA and, together with the reference in the opinion the FRLLCA, has been included to make clear that such opinion does not cover personal liability that a purchaser may have that is not attributable solely to the purchaser's status as a member or manager, such as the personal liability a purchaser may incur as a result of: (i) a purchaser's status as a controlling person under the securities laws, the environmental laws or other applicable laws, (ii) a purchaser's execution of any guaranty agreement, indemnity agreement or other agreement in his, her or its personal capacity and not on behalf of the LLC, such as a financial guaranty and/or an environmental indemnification agreement in connection with a loan provided to the LLC, (iii) a purchaser's service in another capacity for the LLC, for example, as a manager of a manager-managed LLC or as a member of a member-managed LLC or as an officer of the LLC, (iv) a purchaser's own tortious or wrongful conduct or (v) application of "piercing the veil legal theory" , alter ego, or similar equitable doctrines with respect to the purchaser and the LLC."

Diligence Checklist – Limited Liability Company. To render the "no personal liability of member, solely by reason of being or acting as a member or manager" portion of this opinion, Opining Counsel should take the following actions:

- Exclude from the opinion the subscription agreement, if any, and the operating agreement of the LLC.
- Include the recommended exception set forth above in the Opinion.
- Include an express assumption in the Opinion that, if the purchaser is acting as a manager in a manager-managed LLC or a member in a member-managed LLC, the purchaser does not engage

[The 2011 TriBar Report addresses opinions regarding the issuance of LLC membership interests. Although these reports of the TriBar Opinion Committee do not necessarily reflect customary practice in Florida, the guidance contained in these reports may also be helpful to Florida lawyers who are called upon to deliver opinions regarding the issuance of preferred LLC Interests or regarding the issuance of LLC membership interests, respectively.]

III. MARGIN STOCK - OPINION WITH RESPECT TO REGULATION U

In a Transaction involving a loan or credit facility, Opining Counsel may be asked to render an opinion regarding compliance with the Federal Reserve Board margin regulations, particularly if stock or other equity securities are being given as collateral. Below is an example of a margin regulation opinion, a broad overview of the margin regulations generally, and the diligence recommended with respect to giving the opinion.

A. Opinion Form

Opinion language to address the margin regulations could be as follows:

Recommended opinion:

The making of loans or advances to the Borrower pursuant to the Loan Agreement and the application of the proceeds of the loans or advances thereunder, assuming that the Borrower complies with the provisions therein relating to the use of proceeds, do not violate Regulation U of the Board of Governors of the Federal Reserve System.

A. Overview of Federal Margin Regulations

The Board of Governors of the Federal Reserve System (the "**Federal Reserve Board**") has promulgated margin regulations at Regulations T, U, and X, codified at 12 C.F.R. 220, 221, and 224, respectively, pursuant to authority granted under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq*). Regulation U (the "**Regulation**") imposes requirements upon banks and other persons (but not including brokers or dealers) who extend credit secured directly or indirectly by margin stock, including a margin requirement (a restriction on the amount of such credit) if the credit is secured directly or indirectly by margin stock and is extended for the purpose of buying or carrying margin stock . Regulation T regulates extensions of credit by brokers and dealers and related transactions, and among other things imposes initial margin requirements and payment rules for certain securities transactions. Regulation X requires that credit obtained by either (a) United States persons or (b) foreign persons controlled by or acting on behalf of or in conjunction with United States persons within or outside the United States under the circumstances described therein must comply with the limitations of Regulations T and U. This Supplement discusses only the Regulation, because opinions are requested more frequently for the Regulation than the other margin regulations. If a legal opinion is requested for a bank lender under Regulations T and X as well, the recommended opinion can generally be extended to cover such regulations without significant additional work. In each case Opining Counsel should consult the texts of the relevant Regulations in giving the respective opinions.

B. Regulation U Scope and Concepts

In general, the Regulation imposes certain requirements upon banks and other persons (other than brokers or dealers) that extend credit directly or indirectly secured by margin stock. Among other things, the Regulation (a) restricts the amount of credit extended for the purpose of buying or carrying margin stock if the credit is directly or indirectly secured by margin stock and (b) establishes a documentary requirement that must be complied with if the credit is directly or indirectly secured by margin stock regardless of whether the purpose is to buy or carry margin stock. Concepts discussed in greater depth in this section include the types of lenders subject to the Regulation, the types of borrowers subject to the Regulation, what constitutes margin stock, what constitutes the buying or carrying of margin stock, what constitutes purpose credit, and what constitutes being indirectly secured by margin stock.

Regulation U applies to banks (as defined in the Regulation, and herein each referred to as a "**bank**") and to other persons that are required to register with the Federal Reserve Board under Section 221.3(b) of the Regulation (each a "**non-bank lender,**" and together with any bank, each a "**lender**"). The registration

requirements of Section 221.3(b) require any person, other than a bank or a broker or dealer, who in the ordinary course of business extends or maintains credit directly or indirectly secured by margin stock, to register with the Federal Reserve Bank at the end of any calendar quarter during which the amount of credit extended equals $200,000 or more or the amount of credit outstanding at any time during that quarter equals $500,000. Savings and loan associations do not come within the definition of "bank" for the purposes of Regulation U, but may likely come within the registration requirement and accordingly may be a "lender" for the purposes of the Regulation.

A borrower is within the scope of the Regulation unless it is an "**exempted borrower**," which is defined in Section 221.2 of the Regulation to be a member of a national securities exchange or a registered broker or dealer, "a substantial portion of whose business" consists of transactions with persons other than brokers or dealers. That section also includes examples of what "a substantial portion of business" means.

Generally speaking, "**margin stock**" includes securities that are registered on a national securities exchange and over-the-counter securities designated for trading in the National Market System, debt securities (bonds) that are convertible into margin stock, and shares of most mutual funds. The actual definition of "**margin stock**" specifies (i) any equity security registered or having unlisted trading privileges on a national securities exchange; (ii) any OTC security designated as qualified for trading in the National Market System under a designation plan approved by the Securities and Exchange Commission; (iii) any debt security convertible into a margin stock or carrying a warrant or right to subscribe to or purchase a margin stock; (iv) any warrant or right to subscribe to or purchase a margin stock; or (v) any security issued by an investment company registered under Section 8 of the Investment Company Act of 1940, with certain exceptions. Section 221.2 of the Regulation.

Certain triggers of the Regulation relate to the buying/purchasing or carrying of margin stock. While the meaning of "**buying**" and "**purchasing**" is apparent, the meaning of "**carrying**" can be deduced from the definition of "carrying credit" at Section 221.2 of the Regulation. A "**carrying credit**" is defined to be credit that enables a customer to maintain, reduce, or retire indebtedness originally incurred to purchase a security that is currently margin stock.

If a loan or other extension of credit is made by a lender for the purpose (whether immediate, incidental, or ultimate) of buying or carrying margin stock, it is referred to as a "**purpose credit.**"

The Regulation applies to credits that are directly or indirectly secured by margin stock. The concept of being directly or indirectly secured by margin stock is somewhat vague, and is often uncertain in application. The definition of "**indirectly secured**" at Section 221.2 of the Regulation includes any arrangement with the customer under which (i) the customer's right or ability to sell, pledge, or otherwise dispose of margin stock owned by the customer is in any way restricted while the credit remains outstanding; or (ii) the exercise of such right is or may be cause for accelerating the maturity of the credit. Under this definition, a situation where the credit agreement contains a no lien covenant that restricts liens upon the assets of the borrower and the borrower owns margin stock would constitute the indirect securing of the credit by the margin stock, giving rise to potential applicability of the Regulation. There are exceptions to the definition which include, among other things, an arrangement where after applying the proceeds of the credit not more than 25% of the value of the assets subject to the arrangement (presumably the lien covenant) is represented by the margin stock, or where the lender in good faith has not relied upon the margin stock as collateral in extending or maintaining the particular credit. The exception regarding margin stock not constituting more than 25% of the assets of the company subject to the restriction, is particularly helpful in determining that the credit is not indirectly secured by margin stock.

C. Purpose Statement

If a bank extends credit secured directly or indirectly by margin stock in an amount exceeding $100,000, or if a nonbank lender extends credit secured directly or indirectly by margin stock, the lender is required to obtain a purpose statement from its borrower, which is also executed by the lender. Section 221.3(c) of the Regulation. In the case of a bank the purpose statement form is Form FR U-1 and in the case of a non-bank lender the purpose statement form is Form FR G-1. Part 1 of the purpose statement asks the borrower to certify the amount of the credit being extended, to state whether the credit is being used to purchase or carry margin stock, and, if not, to describe the purpose of the credit. Part 2 is completed by the lender if the purpose of the credit is to purchase or carry margin stock. In that case, the lender describes and values the margin stock and other collateral that secures

the extension of credit. In Part 3, the lender executes the purpose statement (whether or not Part 2 is required to be completed) and makes certain certifications. A new purpose statement is required for each extension of credit, except that in the case of revolving credit or multiple draw transactions, a purpose statement is generally required only at the beginning of the transaction and then amended if collateral is added. Agents in syndicated transactions will often require a purpose statement for each lender in the syndicate.

D. Margin Limitations

If a lender (other than a plan-lender, as defined in the Regulation) extends any purpose credit that is secured directly or indirectly by margin stock, the amount of the credit must not exceed the maximum loan value of the collateral securing the credit. Section 221.3(a) of the Regulation. "**Maximum loan value**" means the percentage of current market value assigned by the Federal Reserve Board to specified types of collateral as follows: (a) margin stock - 50% of its current market value; (b) nonmargin stock and all other collateral except puts, calls, or combinations thereof - their good faith loan value (100%); and (c) puts, call, and combinations thereof, other than options that qualify as margin stock - no loan value (0%). "**Good faith**" means, with respect to loan value for the collateral described in (b) above, that amount (not exceeding 100 per cent of the current market value of the collateral) which a lender, exercising sound credit judgment, would lend, without regard to the customer's other assets held as collateral in connection with unrelated transactions. The Regulation provides methodology for determination of "**current market value**" for securities under various circumstances, and permits valuation by any reasonable method for any other type of collateral. Sections 221.2 and 221.7 of the Regulation.

The Regulation contains provisions addressing the ability of a lender to maintain credit that was initially extended in compliance with the Regulation in the event of certain subsequent changes that would otherwise affect compliance. It also addresses a combination of credits if more than one credit is extended to the borrower. Exemptions for certain types of certain types of transactions are provided.

E. Diligence

The diligence to support a Regulation U opinion is relatively straightforward unless the loan or credit facility is both a purpose credit (i.e. the proceeds of the loan or advance are used to purchase or carry margin securities) and the loan or credit facility is directly or indirectly secured by margin stock. This is not the usual case. In that case the margin limitations described in Section D above will apply and Opining Counsel should closely review the requirements of the Regulation, including those regarding aggregation of credits, and perhaps conduct further diligence.

For a loan or credit facility that is not both a purpose credit and directly or indirectly secured by margin stock, the following sets out typical diligence.

Assuming that both the lender and the borrower are within the purview of the Regulation, in order to give a clean opinion Opining Counsel will need to determine whether any loans or advances will be made for the purpose of buying or carrying margin stock and whether the loans and advances are secured directly or indirectly by margin stock.

Diligence Checklist – Regulation U

- Evaluate the identity of the borrower and lender to determine whether they come within the scope of Regulation U. If they do, proceed with the next steps.
- Determine whether the loan or advances are "purpose credit." Review the transaction structure and the loan documents, particularly the sections governing margin requirements and use of proceeds. Often one or both of those sections will prohibit the proceeds from being used for the purpose of buying or carrying margin stock. Such a prohibition is often referred to in the actual opinion, as in the example above, to help address the factual support that underlies the margin opinion. In addition, include in the borrower's factual support certificate a statement to the effect that the proceeds of the loan or advances are not being

used for the purpose of buying or carrying margin stock.

- If it appears that the loan or advances do constitute "purpose credit," a purpose statement on either Form FR U-1 or G-1, as applicable, must be executed and delivered by the borrower and the lender (perhaps one for each lender in a syndicated transaction). Review the purpose statement for completeness.
- Review the transaction structure and the loan documents for indications that margin stock is being directly pledged. If margin stock is not directly pledged, review the loan documents for evidence of an indirect pledge of margin stock - any restriction on transfer or pledge of assets that could include margin stock. If the loan documents contain a restriction on transfer or pledge of assets that could include margin stock, which they likely will, obtain evidence, through a factual certificate or otherwise, of whether margin stock comprises over 25% of the assets subject to the restriction. If margin stock comprises over 25% of the assets subject to the restriction, check the Regulation's definition of "indirectly secured" to see if there are any other applicable exemptions.
- If it appears from the foregoing steps that the loan or advances are directly or indirectly secured by margin stock, a purpose statement on either Form FR U-1 or G-1, as applicable, must be executed and delivered by the borrower and the lender. (If the loan or advances also constitute "purpose credit" the same purpose statement would be used.) Review the purpose statement for completeness.
- However, if the loans or advances are both purpose credit and are secured directly or indirectly by margin stock, additional diligence outside the scope of this Report will be required to insure compliance with the requirements of the Regulation.

A certificate from the borrower can be helpful in providing the factual input required in connection with an opinion under Regulation U. The following is sample language for a support certificate:

Certificate Statements – Regulation U

1. No part of the loans or advances made pursuant to the Loan Agreement will be used for the purpose, whether immediate, incidental, or ultimate, of buying or carrying Margin Stock. For the purposes hereof, a "carrying" credit is a credit that enables a customer to maintain, reduce, or retire indebtedness originally incurred to purchase a security that is currently a Margin Stock.

2. None of the collateral being pledged is Margin Stock**.**

3. No more than twenty-five percent (25%) of the assets of the Borrower [and its subsidiaries – match to the asset restrictions in the Loan Agreement] (the value of such assets to be determined by any reasonable method, except that the value of Margin Stock shall consist of the greater of the then current market value of the purchase price of such Margin Stock (including related transactions)) consist, and after the application of the proceeds of the financing, will consist, of Margin Stock.

For the purposes of the forgoing, "Margin Stock" means (i) any equity security registered or having unlisted trading privileges on a national securities exchange; (ii) any OTC security designated as qualified for trading in the National Market System under a designation plan approved by the Securities and Exchange Commission; (iii) any debt security convertible into a margin stock or carrying a warrant or right to subscribe to or purchase a margin stock; (iv) any warrant or right to subscribe to or purchase a margin stock; or (v) any security issued by an investment company registered under Section 8 of the Investment Company Act of 1940.

SELECTED REVISIONS TO EXISTING SECTIONS OF THE REPORT

D. Limited Liability Company

Recommended opinion:

The Client has authorized the execution, delivery and performance of the [Transaction Documents] by all necessary limited liability company action.

To render an authorization opinion, Opining Counsel must determine whether its LLC Client has authorized the Transaction in accordance with Chapter 605, Florida Revised Limited Liability Company Act (effective January 1, 2015) (the FRLLCA), the LLC's articles of organization and the LLC's operating agreement, and whether the member, manager or officer executing the Transaction Documents on behalf of the LLC is authorized to bind the LLC to the Transaction Documents. The Committees believe that no third-party legal opinion with respect to the authorization of a transaction by a Florida LLC should be rendered unless the LLC has a written operating agreement.

In most cases, the operating agreement of the LLC provides that the LLC is empowered to engage in any lawful activity. Sometimes, however, the operating agreement will include provisions that expressly limit the power and capacity of the LLC to authorize a particular transaction or a particular type of transaction or will include SPE provisions. See "Limitations on Power and Special Purpose Entities" below.

The threshold question for Opining Counsel in determining which persons have authority to bind the LLC is whether the LLC is a member-managed company or a manager-managed company. Section 605.0407 of the FRLLCA provides that a Florida LLC is a member-managed company by default unless the articles of organization or the operating agreement provide that it is a manager-managed company. The distinction between the two management models with respect to the authority of members and managers of an LLC is discussed below. However, in both cases, Opining Counsel must review the articles of organization and operating agreement of the LLC in order to opine with respect to the authorization of actions to be taken by the LLC.

Section 605.0201(3)(a)) of the FRLLCA permits the articles of organization to include an optional statement that the LLC is to be a manager-managed company, and Section 605.0201(3)(d) of the FRLLCA permits the articles of organization to include a notice of any limitations on the authority of a manager or member. If either of these provisions are added or changed by an amendment or restatement of the articles of organization, then, Section 605.0103(4)(b)5 of the FRLLCCA provides that the amended and restated articles of organization do not constitute notice of the addition or change until 90 days after the effective date of the amendment or restatement. Further, Section 605.0103(4)(b)5 of the FRLLCA provides that a provision in an LLC's articles of organization limiting the authority of a manager or a member to transfer real property held in the name of the LLC is not notice of the limitation to any person (except to a member or manager) unless such limitation appears in an affidavit, certificate or other instrument that bears the name of the LLC and is recorded in the public records of the county where the real property is located.

Section 605.04074 of the FRLLCA provides that any LLC that is member-managed, grants all members apparent authority to bind the LCC, and any LLC that is manager-managed, grants all managers apparent authority to bind the LLC, and members have no authority to bind the company. Section 605.0212 provides that the LLC must identify the name, title or capacity and address of at least one person who has the authority to manage the LLC on the Annual Report that the LLC files with the Department.

Under Section 605.0301 of the FRLLCA, a person has the power to bind an LLC: (1) as an agent by virtue of Section 605.0407; (2) by grant of authority under the articles of organization or operating agreement of the LLC; (3) by authority pursuant to a filed Statement of Authority under Section 605.0302; or (4) by having status as an agent of the LLC, authority or power to bind the LLC under laws other than Chapter 605.

Under Section 605.0302 of the FRLLCA, an LLC may file a Statement of Authority (SOA), with the Department (or in the case of transferring real property, recording a certified copy of the SOA in the proper

recording office) to put third parties on notice of specific individuals who have the power and authority to bind the LLC. The individuals named in the SOA do not have to be members or managers of the LLC. A certified copy of a SOA recorded in the public records of a particular county applies to all real property owned by the LLC in that county and can be relied upon by bona fide purchasers and mortgagees. The SOA permits reliance on behalf of third parties for those named individuals of the LLC to execute documents on behalf of the LLC or to limit the authority of certain managers or members. Where a proper SOA is recorded, the deed or mortgage must come from the individual(s) authorized under the SOA. A recorded SOA is valid for 5 years after the statement is effective unless a statement of cancellation, limitation, or denial is recorded. The recorded SOA does not avoid the need to confirm the active status of the LLC; if an LLC has been dissolved, no reliance can be place on any SOA recorded prior to the dissolution. A dissolved LLC may file a post-dissolution SOA that identifies individuals who can execute documents on behalf of the dissolved LLC. The SOA can be cancelled, limited, or denied, so it is important to check the public records of the county in which the real property is located in order to confirm that a statement of cancellation, limitation, or denial has not been recorded.

If neither a Statement of Authority has been filed nor a grant of authority provided for in the articles of organization (or with respect to a transfer of real estate, neither a certified copy of a Statement of Authority nor an affidavit, certificate or other instrument indicating such authority, has been recorded), under Florida Statutes Section 605.0474(3*)*, a third party can rely upon a deed, mortgage, or other instrument executed by any member of a member-managed LLC or any manager of a manager-managed LLC listed on the Florida Division of Corporation website, without reviewing the operating agreement of the LLC. Under Florida Statutes Section 605.0201, the articles of organization may, but are not required to, contain the names and addresses of the members or managers of the LLC. Accordingly, if the articles of organization filed with the Department of a newly formed LLC do not identify the members or managers of the LLC, or the member or manager who is executing the documents is not listed in the filed articles of organization of the LLC as a member or manager, a copy of the operating agreement of the LLC must be obtained and reviewed to confirm the authority of the executing member or manager and should be obtained and reviewed in any event.

Nevertheless, in rendering an opinion regarding approval of the Transaction and the Transaction Documents, Opining Counsel should rely on an affirmative act of the LLC, its members and/or managers, as applicable, as the basis for the opinion and not on principles of estoppel, apparent authority, waiver and the like. In particular, although certificates and affidavits of authority are estoppel devices upon which third parties without contrary knowledge may rely, they are generally not sufficient support (standing alone) under Florida customary practice for an opinion regarding authorization of a Transaction or Transaction Documents.

The following sections reflect certain matters to consider in determining whether an LLC has properly authorized a Transaction.

1. Member-Managed. Under Sections 605.0407(2) and 605.04073(1)(b) of the FRLLCA, unless otherwise provided in the articles of organization or operating agreement, the management of a member-managed LLC is vested in its members in proportion to the then-current percentage or other interest of members in the profits of the LLC owned by all of the members. Except as otherwise provided in the articles of organization or operating agreement or the FRLLCA, in a member-managed LLC the decision of a majority-in-interest of the members is controlling.

   Because there is no prohibition in the FRLLCA, the articles of organization or operating agreement may provide for classes or groups of members having such relative rights, powers, and duties as the articles of organization or operating agreement may provide. The articles of organization or operating agreement may also provide for the taking of an action, including the amendment of the articles of organization or operating agreement, without the vote or approval of any member or class or group of members. Further, the articles of organization or operating agreement may provide that any member or class or group of members shall have no voting rights, may grant to all or certain identified members or a specified class or group of the members the right to vote separately or with all or any class or group of the members or manager on any matter. Similarly, the articles of organization or operating agreement of the LLC may provide that voting by members will be on a per capita, number, financial interest, class, group, or any other basis.

Section 605.04073(4) of the FRLLCA states that unless otherwise provided in the articles of organization or operating agreement, on any matter that is to be voted on by members, the members may take such action without a meeting, without prior notice, and without a vote if a consent or consents in writing, setting forth the action so taken, are signed by the members having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting, but in no event by a vote of less than a majority-in-interest of the members that would be necessary to authorize or take such action at a meeting. However, within 10 days after obtaining such authorization by written consent, notice must be given to those members who have not consented in writing or who are not entitled to vote on the action.

With respect to the agency authority of members of an LLC, Section 605.04074 of the FRLLCA provides, unless properly limited, that, in a member-managed LLC, each member is an agent of the LLC for the purpose of its business, and an act of a member, including the signing of an instrument in the LLC's name, for apparently carrying on in the ordinary course the LLC's business or business of the kind carried on by the LLC, binds the LLC unless the member had no authority to act for the LLC in the particular matter and the person with whom the member was dealing knew or had notice that the member lacks authority. An act of a member which is not apparently for carrying on in the ordinary course the LLC's business or business of the kind carried on by the LLC binds the LLC only if the act was authorized by appropriate vote of the other members of the LLC. As noted in (3) below, however, the real estate rule set forth in Section 608.4235(3) of the FRLLCA overrides these agency and authority rules for member-managed companies.

To render an opinion that a member-managed LLC has approved a Transaction and the Transaction Documents by all necessary action, Opining Counsel should review the articles of organization and operating agreement of the LLC (which documents should be certified to the Opining Counsel as being a true and correct copy by a member or an officer (if officers have been appointed) of the LLC). Opining Counsel should then obtain evidence as to the approval by the requisite members required to approve the Transaction and the Transaction Documents (which approval should be documented in writing). Opining Counsel should also review the FRLLCA to determine whether authorization of the members is required with respect to the particular Transaction even if not otherwise required in the LLC's articles of organization or operating agreement. Alternatively, if a SOA has been filed with the Department (or, in the case of a transfer of real estate, a certified copy of the SOA has been recorded in the public records of the County of the transaction), Opining Counsel can rely on the acts of those named individuals of the LLC to execute documents on behalf of the LLC.

2. Manager-Managed. Under Sections 605.0407(3) and 605.04074(2) of the FRLLCA, in a manager-managed LLC, the management of the company is vested in a manager or managers, and each manager has equal rights in the management and conduct of the LLC's business. Except as otherwise provided in FRLLCA, in a manager-managed LLC, any matter relating to the business of the LLC may be exclusively decided by the manager or, if there is more than one manager, by a majority of the managers. Similarly, Section 605.04073(2)(b) of the FRLLCA provides that, except as otherwise provided in the articles of organization or the operating agreement of the LLC, if the members have appointed more than one manager to manage the business of the LLC, then decisions of the managers shall be made by majority vote of the managers at a meeting or by unanimous written consent. Section 605.04072(2) of the FRLLCA provides that, in a manager-managed LLC, a manager: (i) must be designated, appointed, elected, removed, or replaced by a vote, approval, or consent of a majority-in-interest of the members; and (ii) holds office until a successor has been elected and qualified, unless the manager sooner resigns or is removed. The manager or managers may also hold the offices and have such other responsibilities accorded to them by the members and set out in the articles of organization or the operating agreement of the LLC.

With respect to the agency authority of members in a manager-managed LLC, Section 605.04074(2) of the FRLLCA provides that in a manager-managed LLC, a member is not an agent of the LLC for the purpose of its business solely by reason of being a member. In a manager-managed LLC, each manager is an agent of the LLC for the purpose of its business, and an act of a manager, including the signing of an instrument in the LLC's name, for apparently carrying on in the ordinary course the LLC's business or business of the kind carried on by the LLC binds the LLC, unless the manager had no authority to act for the LLC in the particular matter and the person with whom the manager was dealing knew or had notice that the manager lacks authority. An act of a manager which is not apparently for carrying on in the ordinary course the

LLC's business or business of the kind carried on by the LLC binds the LLC only if the act was authorized under Section 605.074(2)(c) of the FRLLCA. As noted in (3) below, however, the real estate rule set forth in Section 605.04074(3) of the FRLLCA overrides these agency and authority rules.

To render an opinion that a manager-managed LLC has approved a Transaction, Opining Counsel should review the articles of organization and the operating agreement of the LLC, determine the requisite vote of managers (and, if applicable, the requisite vote of members) to approve the Transaction and then obtain evidence as to the approval by such requisite vote of managers (and, if applicable, members). Each requisite vote should be documented in writing. Additionally, Opining Counsel should review the FRLLCA to determine whether the action to be taken by the manager-managed LLC nevertheless requires the LLC to obtain member approval for the particular Transaction even if not otherwise required by the operating agreement. Alternatively, if a SOA has been filed with the Department (or, in the case of a transfer of real estate, a certified copy of the SOA has been recorded in the public records of the county of the transaction), Opining Counsel can rely on the acts of those named individuals of the LLC to execute documents on behalf of the LLC.

3. General Real Estate Rule. As an overriding rule applicable to real property held by an LLC, Section 605.04074(3) of the FRLLCA provides that, unless a certified statement of authority recorded in the applicable real estate records limits the authority of a member or manager, any member of a member-managed LLC or manager of a manager-managed LLC may sign and deliver any instrument transferring or affecting the LLC's interest in its real property. The transfer instrument is conclusive in favor of a person who gives value without knowledge of the lack of the authority of the person signing and delivering the instrument. Nevertheless, the Committees recommend that, for opinion purposes, Opining Counsel should obtain and review the documents set forth in (1) above (for a member-managed LLC) or in (2) above (for a manager-managed LLC) before issuing an opinion regarding authorization of the Transaction by an LLC.

4. Authority. An opinion with respect to the authorization of a Transaction by an LLC reflects Opining Counsel's judgment that the persons or entities signing for the LLC have authority to execute the Transaction Documents. Although apparent authority may protect third parties who rely on the signature of a member or manager of the LLC, the Committees believe that it should not be the sole support relied upon by Opining Counsel in rendering an opinion on the authorization of a Transaction. The Committees recommend that Opining Counsel require the execution and recordation of a certified copy of the SOA in the public records of the County in which the real property is located for opinions on all real estate related transactions.

5. Other Entities. An opinion given with respect to an LLC may require Opining Counsel to look at the authorization of the Transaction by entities other than the LLC that is a party to the Transaction and the Transaction Documents. Opining Counsel should examine the structure of the LLC to determine what members or managers who have to approve the Transaction are entities. In reviewing authorization by the LLC, Opining Counsel should also review the authorization by these other entities to a level where such Opining Counsel is comfortable, based on the particular facts and circumstances, that the requisite approval of the LLC entering into the Transaction and the Transaction Documents has, in fact, been obtained.

   Opining Counsel should recognize that it is Opining Counsel's responsibility to become comfortable, based on the particular facts and circumstances, that the requisite approval of the other entities that are members and/or or managers of the LLC entering into the Transaction and the Transaction Documents has been obtained. If Opining Counsel cannot satisfy themselves in that regard, 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 necessary approvals by other entities that are members and/or managers of the LLC.

6. Fiduciary Duties. The authorization opinion does not mean that the managers or the managing members, as applicable, of the LLC are in compliance with their fiduciary duties with respect to the Transaction and the Transaction Documents.

E. Limited Liability Company

Recommended opinion:

The Client is a [limited liability company] organized under Florida law, and its [limited liability company] status is active.

1. Basic Meaning of this Opinion. A Florida limited liability company ("LLC") is governed by Chapter 605 of the Florida Statutes, which is called the Florida Revised Limited Liability Company Act ("FRLLCA"). The opinion that a company "is a limited liability company organized under Florida law, and its limited liability company status is active" (or "its status is active") means that: (i) the company has complied in all material respects with the requirements for the formation of an LLC under the FRLLCA, (ii) governmental officials have taken all steps required by law to form the company as an LLC, (iii) the company's existence began prior to the effective date and time of the opinion letter, (iv) the company is currently in existence and its status is active, and (v) the company has not been converted into a different form of entity. Under Sections 605.0201(4) and 605.0207 of the FRLLCA, a Florida LLC is formed at the date and time when the articles of organization are filed with the Department (or on such earlier date as specified in the articles of organization, if such date is within five business days prior to the date of filing, or at any later date specified in the articles of organization) and when at least one person becomes a member at the time the articles of organization become effective. Section 605.0211(3) of the FRLLCA provides that subject to any qualification stated in the certificate of status, a certificate of status issued by the Department is conclusive evidence that the Florida limited liability company is in existence.

2. Organized. An opinion that an LLC is properly organized is usually part of the LLC status opinion. This opinion means that Opining Counsel has verified that: (i) the LLC has articles of organization executed by at least one member (or an authorized representative of the member), (ii) the articles of organization comply with the requirements set forth in Section 605.0201 of the FRLLCA, (iii) the articles of organization have been filed with the Department, (iv) the Client has at least one member, (v) a written operating agreement has been adopted by the member(s) of the LLC, (vi) if the articles of organization or operating agreement provide that the LLC is a manager-managed company, then one or more managers have been appointed by the members, and (vii) the LLC has active status.

Sometimes the word "duly" is added before the word "organized." However, the addition of the word "duly" to the opinion does not change the meaning of this opinion or change the diligence recommended in order to render this opinion.

Generally speaking, the articles of organization for a Florida LLC rarely contain more than the minimum information required under the FRLLCA, although its filing constitutes notice of all facts that are set forth in the articles of organization. The operating agreement of the LLC is generally more substantive and by definition sets forth the provisions adopted for the management and regulation of the affairs of the LLC and sets forth the relationships of the members, managers (if the LLC is manager-managed) and the LLC. The statute provides that an operating agreement may be oral, but, as in the case of an oral partnership agreement, in the view of the Committees. Opining Counsel should not opine that an LLC is "organized" if the LLC has not adopted a written operating agreement. The Committees recommend that Opining Counsel require the execution and recordation of a certified copy of the SOA in the public records of the County in which the real property is located for opinions on all real estate related transactions.

3. Active Status vs. Good Standing. The opinion that an LLC's status is "active" means that as of the date of the opinion letter the company is a limited liability company and is current with all filings and fees then due to the State of Florida. This opinion should be based on a certificate of status issued by the Department. In addition to the provisions of Section 605.0211 of the FRLLCA, Section 605.0215 of the FRLLCA provides that "all certificates issued by the department in accordance with this chapter shall be taken and received in all courts, public offices, and official bodies as prima facie evidence of the facts stated. A certificate from the department delivered with a copy of a document filed by the department is conclusive evidence that the original document is on file with the department."
This opinion uses the term "its status is active" or "its limited liability company status is active" since the "active

status" language is used in the certificate provided by the Department. However, Opining Counsel in Florida are often asked to render an opinion that an LLC is in "good standing," particularly if the Opinion Recipient is represented by out-of-state counsel. Under customary practice in Florida, the use of the phrase "good standing" in an opinion as to the active status of an LLC has the same meaning as "its limited liability company status is active" or "its status is active."

4. General Exclusions for Opinion. Unless otherwise expressly stated in the opinion letter, an opinion that an LLC's status is "active" does not mean that: (i) the LLC has established any tax, accounting or other records required to commence operating its business, (ii) the LLC maintains at its registered office any of the information required to be maintained under Section 605.0410 of the FRLLCA, (iii) the members of the LLC will not have personal liability, or (iv) the LLC will be treated as a partnership for tax purposes.

5. Involuntary Dissolution. An opinion that an LLC's "status is active" merely indicates that the LLC exists and has not been dissolved as of the date of the certificate of status issued by the Department. Because it would be impossible or extremely difficult for Opining Counsel to establish that there are no grounds existing under the statute for involuntary dissolution of the LLC, this opinion does not mean or imply that there are no grounds existing under the statute for involuntary dissolution of the LLC. The circumstances under which an LLC may be administratively dissolved by the Department are set forth in Section 605.0714 of the FRLLCA and the grounds for judicial dissolution are specified in Section 605.0702 of the FRLLCA. Opining Counsel may opine that the LLC exists on the date of the opinion in reliance on a certificate of status from the Department, even if circumstances exist that could result in involuntary dissolution with the passage of time. Opining Counsel is not obligated to conduct any investigation regarding this issue. However, if Opining Counsel knows (or ought to reasonably know based on the facts (red flags) in such counsel's possession) that such circumstances for dissolution exist, Opining Counsel should advise the Client to take the necessary actions to cure those circumstances promptly, since dissolution of the LLC will generally constitute a violation of the Transaction Documents. For example, the Department may administratively dissolve an LLC under Section 605.0714(1)(c) of the FRLLCA if the company is without a registered agent as required by Section 605.0113, and, under Section 605.0115(3)(a) of the FRLLCA, the resignation of a registered agent becomes effective 31 days after the registered agent files a statement of resignation with the Department.

6. Foreign Entity. If Opining Counsel determines that Opining Counsel is competent to deliver an opinion regarding the organization, existence and status of an LLC organized under the laws of a jurisdiction other than Florida, and agrees to render such opinion, then with respect to the subject opinion such Opining Counsel will likely be held to the standard of care of a competent lawyer in the jurisdiction of organization of the entity that is the subject of the opinion. See "Common Elements of Opinions – Opinions Under Florida or Federal Law; Opinions Under the Laws of Another Jurisdiction." The diligence involved in giving an opinion regarding the organization, existence and status of a foreign limited liability company, and the form of such opinion, are beyond the scope of this Report.

Diligence Checklist – Limited Liability Company. In order to render an entity status and organization opinion with respect to a Florida LLC, Opining Counsel should take the following actions:

- Obtain a copy of the LLC's articles of organization (preferably a certified copy obtained from the Department) and review the articles of organization to ensure that they substantially comply with the requirements of Section 605.0201 of the FRLLCA.

- Obtain a "certificate of status" for the LLC from the Department. If the certificate of status indicates that the LLC has not filed its annual report or paid its annual fee for the current year, then the recommended (but not mandatory) practice is to require the Client to make satisfactory arrangements for filing the report and paying the fee before Opining Counsel renders an "active status" opinion regarding the LLC.

- Obtain and examine a copy of the LLC's operating agreement, certified by a manager of the LLC (if manager-managed), by a member of the LLC (if member-managed), or by an officer of the LLC (if officers have been appointed by the members or the managers, as applicable, under the LLC's operating agreement), as being a true and complete copy, including all amendments. In the view of the Committees, if there is no written LLC operating agreement, Opining Counsel should not render an opinion with respect to the LLC and should counsel the

Client to reduce its operating agreement to writing.

• Determine from reviewing the operating agreement and the articles of organization whether the LLC is a member-managed company or a manager-managed company; if the latter, determine whether a manager or managers have been appointed in accordance with the requirements of those documents (generally through obtaining a written certificate from the Client).

• Obtain a current factual certificate from a manager of the LLC (if manager-managed), from a member of the LLC (if member-managed), or from an officer (if officers have been appointed) certifying that there is at least one member, that no circumstances exist which would trigger dissolution under the articles of organization or operating agreement, and that no proceedings have commenced for dissolution of the LLC.

• If the transaction in question involves the transfer of real estate, then, obtain a Statement of Authority from the Department, or if one is not on file with the Department, require that a Statement of Authority be executed in accordance with Section 605.0302 and have it filed with the Department and in the county in which the real estate to be transferred is located.

F. Trusts

1. In General.

Opining Counsel may be asked to render an opinion concerning the status of a Florida trust. Unlike Florida corporations, partnerships or LLCs, a Florida trust is not a separate statutory entity under Florida law. Rather, a Florida trust is a fiduciary relationship with respect to property (whether real property, personal property or both) subjecting the person or persons by whom the title to the property is held (known as the "trustee" or "trustees") to equitable duties to deal with the property for the benefit of another person or persons (known as the beneficiary or beneficiaries), all of which arises as a result of a manifestation of an intention to create a trust arrangement. Thus, for purposes of rendering an opinion regarding a Florida trust, the Client is really not the trust itself, but rather the person or persons serving as the trustee or trustees of the trust for the benefit of the beneficiaries. As such, the proper status inquiry in the context of a trust should be based on whether the trustee or trustees is or are properly organized and existing and has or have active status. Thus, if Florida counsel is asked to render an opinion concerning the status of a Florida trust, the Opinion Recipient should want to know whether the Client(s) is or are the trustee(s) of the trust. For this reason, the recommended forms of opinion state that the Client(s) is or are the trustee(s) of the trust and go on to specify the legal basis for such designation.

2. Trusts Other than Florida Land Trusts.

(a) *Trusts with Written Trust Agreements.*

In the context of most Florida trusts, with the possible exception of Florida land trusts arising strictly by operation of Section 689.071, Florida Statutes (referred to as a "**Florida Land Trust**"), the designation of the trustee occurs pursuant to the provisions of a written trust agreement. In this context, the recommended opinion is as follows:

Recommended Opinion:

The Client(s) [is/are] the trustee(s) of a trust pursuant to the provisions of that certain trust agreement dated.

When the foregoing recommended form of opinion is to be rendered, Opining Counsel should obtain a copy of the current trust agreement governing the trust. The trust agreement needs to be reviewed by Opining Counsel in order for Opining Counsel to render any opinions with respect to the trust and, in particular, in order to determine who is designated as the trustee(s) of the trust.

(b) *Trusts Without Written Trust Agreements.*

If the Transaction is large enough or important enough to require a third-party legal opinion, then the trust's affairs are sufficiently complex to require a written trust agreement. Accordingly, in this context, the Committees believe that Opining Counsel should not opine with respect to a trust if there is no written trust agreement, other than in the limited circumstances described below with respect to a Florida Land Trust.

(c) *Trustees that are Entities.*

If the trustee or one of the trustees is an entity, then in connection with rendering this opinion Opining Counsel should obtain a certificate of status from the Department with respect to such entity and complete the diligence required with respect to the organization and entity status of such entity (see discussions above with respect to Florida corporations, Florida partnerships and Florida LLCs).

3. Trusts Owning Real Estate.

(a) *Generally*

In Florida, trusts whose trustee(s) hold title to Florida real estate under the trust arrangement generally fall into one of two general categories. The first category are trustees of Florida Land Trusts. These trusts must satisfy the statutory requirements of Section 689.071, Florida Statutes, to qualify as a Florida Land Trust. The second category are trustees who hold title to Florida real estate under a trust arrangement that does not qualify as a Florida Land Trust. Opinions concerning this second category of trusts are governed by the same customary practice that is applicable with respect to other trusts in Florida.

(b) *Florida Land Trusts Without a Written Trust Agreement.*

A Florida Land Trust that falls into the first category described above arises pursuant to Section 689.071, Florida Statutes. For Land Trusts created prior to July 1, 2013, a trust is a land trust under Section 689.071 if a deed or other recorded instrument naming the trustee as grantee or transferee sets forth the trustee's powers and the recorded instrument or trust agreement expresses the intent to create a land trust (see Section 689.071 (12) (b). For Land Trusts created on or after July 1, 2013, a trust is a land trust under Section 689.071 if (1) a deed or other recorded instrument naming the trustee as grantee or transferee sets forth the trustee's powers, and (2) the trustee has limited duties that do not exceed the duties set forth in Section 689.071 (2) (c).

The recommended form of opinion with respect to a Florida Land Trust that meets the requirements of Section 689.071, Florida Statutes, is as follows:

Recommended opinion:

The Client(s) [is/are] the trustee(s) of a Florida land trust pursuant to Section 689.071, Florida Statutes.

If the trust satisfies the requirements of Section 689.071, Florida Statutes, it is possible for Opining Counsel to render the trust status opinion even if there is no separate trust agreement governing the trust relationship. However, because the customary practice in dealing with most opinions involving trusts is to refrain from rendering an opinion unless a written trust agreement exists, the exception from this general rule should be applied only in very limited circumstances. For the limited exception to apply, the following three requirements must all be satisfied:

(i) The property that is the subject of the Transaction Documents must be limited to an interest in real property;

(ii) The trust must satisfy the requirements of Section 689.071, Florida Statutes, and particularly, the trustee must be designated as trustee in the recorded instrument and the recorded instrument must expressly confer on the trustee any one or more of the following powers: the power and authority to protect, to conserve, to sell, to lease, to encumber, or otherwise to manage and dispose of the real property or interest in real property described in the recorded instrument; and

(iii) Opining Counsel must be satisfied that no separate trust agreement or other agreement governing the trust relationship exists. To be satisfied in this regard, Opining Counsel should secure a written certificate or affidavit signed by at least the trustee, and preferably also by all of the beneficiaries of the trust, confirming that no separate trust agreement or other agreement governing the trust relationship exists. This certificate or affidavit should not be recorded in the public records if the benefits of Section 689.071, Florida Statutes, are to be retained because any such recordation might be deemed to constitute an addendum to the declaration of trust for purposes of the Florida Land Trust statute.

(c) *Florida Land Trusts with Written Trust Agreements.*

In the case of a Florida Land Trust, if Opining Counsel is unable to confirm that there is no separate trust agreement governing the trust relationship or if Opining Counsel has knowledge that a written trust agreement exists, Opining Counsel should not render the status opinion with respect to the trust unless Opining Counsel, in addition to addressing the requirements set forth in the recorded instrument, is provided with a copy of the trust agreement and engages in the diligence that is required with respect to other trusts in Florida as set forth above in "Trusts Other than Florida Land Trusts."

Notwithstanding the recommendations set forth herein that Opining Counsel review any underlying trust agreement that may exist, such recommendation is not intended to modify or affect the protections afforded to third parties by Section 689.073, Florida Statutes.

4. Successor Trustee.

In rendering an opinion concerning a Florida trust, because such opinion focuses on the trustee, and in particular may address the entity status of the trustee, the power of the trustee, and whether the trustee has properly authorized the Transaction, Opining Counsel first needs to determine that the party purporting to be the trustee of the trust is the current trustee. This determination can be complicated where the party purporting to be the trustee is a successor trustee and can be further complicated where the Transaction involves the ownership of and/or a mortgage against real estate (and particularly where the real estate is held in a Florida Land Trust).

If the named trustee of the trust is no longer serving because of death, incapacity, termination, or resignation, then Opining Counsel's diligence must focus on the entity status of the successor trustee, the power of the successor trustee, and whether the successor trustee properly authorized the Transaction. In the real estate context, it is not uncommon for the real estate records to continue to reflect the original trustee as the named owner or the named mortgagor, as the case may be. Thus, where real estate is involved, Opining Counsel's diligence must first extend to establishing that the real estate records have been properly updated to reflect the change in the designated trustee.

(a) Trusts Other than Florida Land Trusts.

In the context of trusts other than Florida Land Trusts and presumably where a written trust agreement is in existence, the trust agreement hopefully names either the successor trustee, or if not, then sets forth a method for determining the successor trustee (in which case the trust agreement will be determinative of the procedure for establishing a successor trustee). Opining Counsel should review the trust agreement from this perspective, addressing the appropriate situation, as follows:

(i) If the trustee has resigned, or has become incapable of serving due to death or incapacity, then in circumstances where real estate is not involved, Opining Counsel should, at a minimum, secure a certificate from the successor trustee certifying that the prior trustee resigned or is incapable of serving due to death or incapacity, as the case may be, and that such successor trustee is the then current trustee of the trust.

(ii) In the real estate context, the parties must have taken additional actions. In particular, if the trustee has resigned, then a trustee's declaration of appointment of successor trustee reciting such trustee's name, address and its resignation, the appointment of the successor trustee by name and address and the successor's acceptance of appointment should be signed by both the prior trustee and the successor trustee, should be witnessed and acknowledged in the manner as provided for acknowledgment of deeds and should be recorded in the office of the recorder in the county where the trust property is located. The declaration should have attached to it each of the following: (a) the first page of the trust agreement, (b) the successor trustee page of the trust agreement, (c) the powers page(s) of the trust agreement, (d) the signature page of the trust agreement, and (e) the legal description of the trust property.

(iii) In the real estate context, if the trustee has become incapable of serving due to death or incapacity, then a declaration of appointment of successor trustee reciting such trustee's name, address and the reason for the failure to serve (attach a death certificate if due to death), the appointment of the successor trustee by name and address and the successor's acceptance of appointment should be signed by the successor trustee, should be witnessed and acknowledged in the manner as provided for acknowledgment of deeds and should be recorded in the office of the recorder in the county where the trust property is located. The declaration should have attached to it each of the following: (a) the first page of the trust agreement, (b) the successor trustee page of the trust agreement, (c) the powers page(s) of the trust agreement, (d) the signature page of the trust agreement, and (e) the legal description of the trust property.

(b) Florida Land Trusts. In the case of a Florida Land Trust, where no successor trustee is named in the

recorded instrument and a trust agreement exists, Section 689.071(9), Florida Statutes, shall be followed as the procedure whereby one or more persons or entities having the power of direction of the land trust agreement may appoint a successor trustee or trustees of the land trust by filing a declaration of appointment of a successor trustee or trustees in the office of the recorder of deeds in the county in which the trust property is located. The declaration must be signed by a beneficiary or beneficiaries of the trust and by each successor trustee, must be acknowledged in the manner provided for acknowledgment of deeds, and must contain: (a) the legal description of the trust property, (b) the name and address of the former trustee, (c) the name and address of the successor trustee, and (d) a statement that each successor trustee has been appointed by one or more persons or entities having the power of direction of the land trust, together with an acceptance of appointment by each successor trustee.

5. Diligence Concerning Beneficiaries. Although Opining Counsel may need to consider whether the beneficiaries of the trust have approved the Transaction in connection with rendering an opinion that the Transaction has been approved by all requisite formality, such inquiry concerning actions of the beneficiaries is not necessary in addressing the status opinion relating to a trust (see "Authorization of the Transaction by a Florida Entity"), since the status opinion relating to a Florida trust focuses solely on the status of the trustee.

6. Use of Different Language. Notwithstanding the lack of statutory entity status for the trust itself and the need to focus on the proper designation of the trustee(s) in rendering the opinion, the Committees recognize that some Florida practitioners include language in their opinions that appears to assume that the Florida trust to which the opinion relates is a separate statutory entity under Florida law. Thus, it is not uncommon for Florida practitioners to render a status opinion involving a trust to the effect that "The Client is a trust formed under Florida law," that "The Client is a trust duly formed under Florida law," or words to similar effect. Under customary practice in Florida, an Opining Counsel who renders the opinion in one of these alternative forms is effectively giving an opinion that has the same meaning (and is subject to the same recommended diligence) as the recommended opinion, and is confirming that a trustee or trustees has/have been designated for the trust either pursuant to the provisions of a trust agreement or, in the case of a statutory Florida Land Trust, pursuant to Section 689.071, Florida Statutes.

7. Effect of Presumption Arising Under Section 689.07, Florida Statutes. Section 689.07, Florida Statutes is separate and apart from Section 689.071, Florida Statutes, and the two should not be confused.

Under Section 689.07, Florida Statutes, a deed by which real property is conveyed to a person or entity simply "as trustee," without setting forth any of the powers required to avail the trustee of the benefit of the Florida land trust presumption arising under Section 698.071, Florida Statutes, grants an absolute fee simple estate in the real property to the "trustee," individually, including both legal and equitable title, provided the other requirements of Section 689.07, Florida Statutes, are met. In such case, a Florida Land Trust is not created, the recital of trust status is disregarded as a matter of law, and it would not be appropriate for Opining Counsel to render the recommended trust opinion. Indeed, in such case, the owner of the real property is not the trustee of a trust and no special form of opinion on trust status is pertinent. In such case, the entity opinion should be an opinion concerning the direct entity status of the entity designated as the trustee.

Nevertheless, before proceeding in this fashion, because the subject deed indicated that the putative "trustee" was acquiring title in a trust capacity, Opining Counsel should ask for and require a certificate from the "trustee" regarding whether the "trustee" has made a declaration of trust and, if so, whether any written trust instrument or instruments relating to such declaration exists. If a trust agreement actually exists, then Opining Counsel should review the trust agreement and determine whether further inquiries need to be made and/or whether any corrective instruments are required before any entity opinions can be rendered.

Diligence Checklist - Trusts, including Florida Land Trusts

• If the trustee is a corporation, partnership, or limited liability company, confirm that the trustee that is an entity is properly organized and/or exists, and has active status (or in good standing in the state of its incorporation) and, if it is a foreign entity required to obtain a certificate of authority to transact business in Florida, it has obtained such a certificate of authority from the Department.

• If the deed or other instrument of conveyance is dated prior to July 3, 1992, and the trustee is a corporation,

confirm that the corporation has trust powers. As of July 2, 1992, those portions of Section 660.41, Florida Statutes, which mandated that corporate trustees have trust powers were repealed. Thus, if the deed or other instrument of conveyance is dated after July 2, 1992, and the trustee is a corporation, it is unnecessary to confirm the existence of trust powers. See Fund Title Note 31.02.06 (2001). The existence of trust powers for state chartered institutions may be confirmed by obtaining a Certificate from the Department of Banking and Finance, and the existence of such powers for federally chartered institutions may be obtained from the Comptroller of the Currency, at the following respective addresses:

Director, Division of Banking
Department of Banking and Finance
The Capitol Building
Tallahassee, Florida 32399-0350

Comptroller of the Currency
Southeastern District
Peachtree-Cain Tower, Suite 2700
229 Peachtree Street, N.E.
Atlanta, Georgia 30303.

• In order to opine that the Client is the trustee of a Florida land trust that is in compliance with the provisions of Section 689.071, Florida Statutes, Opining Counsel should examine the deed or other instrument of conveyance naming the trustee as grantee or transferee and any written trust agreement for compliance with the requirements set forth in Section 689.071, Florida Statutes.

• If the trust satisfies the requirements set forth in Section 689.071, Florida Statutes, secure a written certificate or affidavit signed by at least the trustee, and preferably also by all of the beneficiaries of the trust, confirming that no separate trust agreement or other agreement governing the trust relationship exists. If the trust satisfies the requirements set forth in Section 689.071, Florida Statutes, but Opining Counsel has knowledge that a trust agreement governing the trust relationship exists, Opining Counsel should secure a copy of the written trust agreement governing the trust and such trust agreement needs to be reviewed by Opining Counsel in order for Opining Counsel to render opinions with respect to the trust and, in particular, in order to determine who is designated as the trustee(s) of the trust.

• If the trust does not satisfy the requirements set forth in Section 689.071, Florida Statutes, Opining Counsel should secure a copy of the written trust agreement governing the trust and such trust agreement needs to be reviewed by Opining Counsel in order for Opining Counsel to render opinions with respect to the trust and, in particular, in order to determine who is designated as the trustee(s) of the trust.

ENTITY POWER OF A FLORIDA ENTITY

An opinion regarding "entity power" addresses the capacity of the Client entity under the Florida law governing such entity's organization and existence and under such entity's Organizational Documents to execute and deliver the Transaction Documents and to perform its obligations thereunder. The "entity power" opinion expresses Opining Counsel's judgment that the Transaction will not be enjoined or challenged as being beyond the Client's statutory powers and beyond the powers granted to the Client by the Client's Organizational Documents.

Although the words "power and authority" were both historically used in this opinion, the use of the term "authority" is believed by the Committees to be superfluous. Additionally, the Committees believe that the use of the word "authority" in this opinion is often misunderstood to relate to opinions regarding authorization of a Transaction. See "Authorization of the Transaction by a Florida Entity." Accordingly, the term "authority" has been omitted from the form of entity power opinion recommended by this Report. However, in the view of the Committees, if the term "authority" is used in the entity power opinion (along with the word "power"), it does not change the scope or meaning of the opinion. Further, it is unnecessary to state in the entity power opinion that an entity has "full," "all" or "all necessary" entity power. Use of these terms do not add to the opinion and do not change the scope or meaning of the opinion in any manner.

In the context of this opinion, an entity's power to "perform" its obligations under the Transaction Documents means that the entity has the power under the governing law in the jurisdiction where the entity was organized and under the Organizational Documents, as of the date of the opinion and under the circumstances then presented, to fulfill its obligations under the Transaction Documents. It does not mean that the entity's performance of its obligations under the Transaction Documents will withstand all challenges from all parties, but rather, only challenges under the entity's governing law and the entity's Organizational Documents on the grounds that the entity's actions are *ultra vires* or in breach of the entity's Organizational Documents. This opinion is different from an opinion that the entity's entering into the Transaction will not violate laws or agreements applicable to the entity or a remedies opinion regarding the enforceability against the entity of the Transaction Documents. See "No Violation and No Breach or Default" and "The Remedies Opinion." Further, an entity power opinion does not address the effect on an entity's powers under laws other than the law under which the entity was organized. In particular, this opinion does not address: (i) laws of any jurisdiction in which the entity is or should be qualified to do business as a foreign entity, (ii) laws that govern the activities of an entity that is in a regulated business, or (iii) laws that could create or restrict the exercise of entity power or purpose, such as the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.

In rendering an entity power opinion, some Opining Counsel refer to the entity's "entering into" or "consummating" the Transaction or the Transaction Documents (or the main agreement among the Transaction Documents) rather than to the entity's "performance" under the Transaction Documents. There is a difference between these two concepts: (i) "consummation" refers to the acts up until the closing of the Transaction; and (ii) "performance" relates to the entity's post-closing performance of its obligations under the Transaction Documents). With respect to an entity power opinion of a Florida Opining Counsel, the Committees believe that under Florida customary practice the scope of the entity power opinion covers both the "consummation" (or words to that effect) of the Transaction and the "performance" (or words to that effect) of the Florida entity of its obligations under the Transaction Documents, even if the words used in the entity power opinion are expressly limited to the "consummation" of the Transaction.

In certain situations, an entity's power may be limited by the entity's Organizational Documents to a particular project or business. Further in some instances, an entity's Organizational Documents may include "special purpose entity" ("**SPE**") provisions. See "Limitations on Power and Special Purpose Entities" below for a description of such provisions. In connection with the entity power opinion, Opining Counsel should carefully review the Organizational Documents of the entity to determine if any such limiting provisions or SPE provisions are contained in the entity's Organizational Documents and, if so, whether such provisions affect the entity's power to engage in the Transaction or perform its obligations under the Transaction Documents.

The entity power opinion is premised on the Client entity being in existence. If an opinion on the entity status of the Client is not being rendered by Opining Counsel, then in order to give an entity power opinion the

Client's entity status should be expressly assumed in the opinion letter. Further, just as in the case of an opinion regarding entity status and organization, an Opining Counsel rendering an entity power opinion should determine whether the entity has taken steps to dissolve. See "Entity Status and Organization of a Florida Entity." If the entity has taken steps to dissolve, the actions proposed to be taken in the Transaction and pursuant to the Transaction Documents may exceed the powers of a dissolved entity to wind up its affairs.

The entity power opinion does not mean that the persons acting on behalf of the entity with respect to the Transaction or the Transaction Documents are in compliance with their respective fiduciary duties with respect to the Transaction. See "Authorization of the Transaction by a Florida Entity."

An entity power opinion is not an opinion that the Client's business is being operated in a lawful manner and does not mean that Opining Counsel has evaluated how the Client entity is conducting its business. Further, such opinion does not address whether the Client has good title to its properties, possesses all required governmental licenses or has all required approvals from those governmental bodies that regulate the Client entity. Additionally, no diligence as to the manner in which the Client entity is actually operating its business is required in order to render the entity power opinion.

In that regard, it is implicitly assumed in an opinion of Florida counsel on entity power that the Client entity is being operated in a lawful manner unless Opining Counsel has knowledge to the contrary (or is aware of facts (red flags) that ought to cause a reasonable Opining Counsel to have such contrary knowledge). If Opining Counsel knows or should know that the Client entity is being operated in an unlawful manner, Opining Counsel should consider Opining Counsel's ethical obligations under the circumstances. See "Introductory Matters- Ethical and Professional Issues."

Often, a request for an entity power opinion will include a request for an opinion that the entity has the power to conduct its business as it is currently being conducted and to own its properties. This opinion was often historically rendered as part of the entity power opinion, and continues to this day to be rendered from time to time by Florida counsel. However, in the view of the Committees, the giving or requiring of this opinion is discouraged because of the expansive interpretation which might be given to this opinion and because of the extensive diligence that would be required to render this opinion if it were to be interpreted expansively.

In that regard, the Committees believe that under Florida customary practice, if an opinion is rendered that an entity has the power to own its properties and conduct its business as it is currently being conducted, the scope of such opinion should be interpreted as being limited to the laws under which the entity was organized and to no other laws. For example, unless this interpretation is followed, if the entity were to be engaged in a regulated business (such as the banking business), reference might be necessary to other governing laws in order to determine whether the entity is in compliance with such laws. The Committees believe that an expansion of the entity power opinion beyond the governing law of the entity in question is inappropriate based on a cost-benefit analysis of this opinion.

D. **Limited Liability Company**

Recommended opinion:

The Client has the limited liability company power to execute and deliver the [Transaction Documents] and to perform its obligations thereunder.

A Florida limited liability company derives its entity power from the Florida Revised Limited Liability Company Act, Florida Statutes Chapter 605 (effective January 1, 2015) (FRLLCA), from its articles of organization, and from the operating agreement adopted by the members of the LLC. Opining Counsel should obtain copies of the LLC's Organizational Documents together with a certificate pursuant to which such documents are certified as true and correct by a manager of the LLC (if the LLC has elected to be manager-managed), by a member of the LLC (if member-managed), or by an officer of the LLC (if officers have been appointed by the LLC pursuant to the LLC's operating agreement). Section 605.0107 of the FRLLCA provides that any company that is member-managed, grants all members apparent authority to bind the company, and any company that is manager-managed, grants all managers apparent authority to bind the company, and members have no authority to bind the company. Section 605.0212 provides that the company must identify the name, title or capacity and address of at least one person who has the authority to manage the company on the Annual Report that the company files with the Department.

If the Client does not have a written operating agreement, the Committees believe that Opining Counsel should not issue an entity power opinion with respect to the Client. Unless the Client's articles of organization or operating agreement provide otherwise, each Florida limited liability company has the requisite entity power to engage in any lawful activity, and Section 605.0109 of the FRLLCA provides than an LLC has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including a non-exclusive list of permitted actions enumerated in such section.

In most cases, an LLC's operating agreement (and sometimes the LLC's articles of organization) empowers the LLC to engage in any legal activity. However, Opining Counsel should carefully examine the LLC's Organizational Documents to determine whether they contain provisions limiting the power of the LLC to engage in certain types of transactions or include any SPE provisions. If any such limitations are included in the LLC's Organizational Documents, Opining Counsel will need to determine whether any such provisions preclude or otherwise limit the LLC from having the power to enter into the Transaction or perform its obligations under the Transaction Documents. See "Limitations on Power and Special Purpose Entities" below.

V. ADDITIONS TO THE REPORT

A. COMMON ELEMENTS OF OPINIONS

1. Excluded Laws List. In Section M of the Report (pages 30-33), a list of "**Excluded Laws**" is provided. Add the following additional items to the list of Excluded Laws:

Dodd-Frank

( ) any law, rule, or regulation relating to the Dodd-Frank Wall Street Reform and Consumer Protection Act, as amended (including all requests, guidelines, or directives thereunder or issued in connection therewith);

OR

(__) rules and regulations promulgated by the U.S. Commodity Futures Trading Commission; and (__) Federal and state laws, rules and regulations concerning financial accountability and transparency including, but not limited to, the Dodd-Frank Wall Street Reform and Consumer Protection Act and any rules and regulations promulgated thereunder.

AND

Article 55 – Write Down Action

(__) any write down action, conversion powers action or other similar action taken by the applicable European Economic Area resolution authority having jurisdiction over any credit institution or investment firm established in any member state of the European Union, Iceland, Liechtenstein or Norway under, or with respect to, Article 55 of Directive 2014/59/EU of the European Parliament and of the Council of the European Union, as such directive may be supplemented and/or amended from time to time;

B. REFERENCES TO THE LIMITED LIABILITY ACT IN THE REPORT

The Florida Revised Limited Liability Company Act – Sections 605.0101-605.1108 was enacted by the Florida Legislature effective on January 1, 2014 (the "**FRLLCA**").

Attached to this Supplement as Exhibit A is a list of the provisions of the FRLLCA which correspond to the provisions of the Florida Limited Liability Company Act which were referenced in the Report.

C. OPINIONS WITH RESPECT TO COLLATERAL UNDER THE UNIFORM COMMERCIAL CODE

1. Perfection Opinions – Location of Debtor for Limited Liability Partnership**.** In Section 7 entitled "Location of Debtor" (pages 140-141), add the following paragraph as the last paragraph of such Section:

> "A partnership may become a limited liability partnership pursuant to Section 620.9001 of the Revised Uniform Partnership Act. Because a limited liability partnership is not "formed or organized" by the filing of a "public organic record" as defined in Section 679.1021(1)(ooo) of the Florida UCC, a limited liability partnership is not a "registered organization" under Section 679.1021(1)(qqq) of the Florida UCC. The location of a limited liability partnership under the Florida UCC would be determined in the same manner as the location of a general partnership is determined under the Florida UCC. Accordingly, the Opinion Recipient should be willing to accept the opinion regarding the location of the limited liability partnership based solely on Opining Counsel's reliance upon a certificate from the debtor as to the sole place of business or chief executive office, as the case may be."

EXHIBIT A

TO FIRST SUPPLEMENT TO THE REPORT

Corresponding Reference Table for FLLCA vs. FRLLCA

Report Page No.	FLLCA Section	FRLLCA Section
50	**608.409**	**_____**
50	**608.409(3)**	**_____**
50	**608.407**	**_____**

[to be completed]