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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 COMPANIES - ISSUANCE OF MEMBERSHIP INTERESTS OF LIMITED LIABILITY COMPANIES

III. MARGIN STOCK

_____ __, 2014

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 and (iii) margin stock.

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 this Report 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 Transaction" (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;

5. [OTHER SOURCE MATERIALS TO BE ADDED]

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

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. Below are examples of those opinions, together with a discussion of the opinion language and the diligence recommended with respect to each opinion.

This Supplement to the Report only addresses opinions regarding issuances of preferred shares by Florida corporations. This Report does not address opinions regarding issuances of securities by limited partnerships, general partnerships [**or limited liability companies]**. The Committees plan on covering these opinion topics in one or more future supplements to this Report.

A. Corporations – Authorized Capitalization

Recommended opinion:

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

The authorized capitalization opinion 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.

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. To render the "authorized capitalization" opinion with respect to 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).
- 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 current number of shares authorized for each class as set forth therein.

B. Corporations – Number of Shares Outstanding

An opinion regarding the number of outstanding shares 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 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

The "reserved shares" 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" opinion is rendered, it means that: (i) sufficient additional shares 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, 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" 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" opinion does not provide absolute assurance that such shares will be available for issuance at the time the shares are to be issued or converted, because the corporation's board of directors has the legal ability to revoke the reservation of shares and authorize the issuance of those shares in the future for a entirely different purpose. Accordingly, as with each of the other opinions that are being given, the "reserved shares" opinion speaks only as of the date of the opinion letter.

To provide greater assurance to the Opinion Recipient that the 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 shares.

D. Corporations – Issuances of Preferred Shares

The following opinions relate to the validity of the particular issuances of preferred shares (the "**shares**" or the "**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 and 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 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.

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 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 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 its 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 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 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 a Delaware court, "[a] preferred shareholder's rights are defined in either the corporation's certificate 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.'" However, although the terms of preferred shares are "contractual in nature" under Delaware law, the remedies for, or consequences of, the violation or breach of such terms are typically established or informed by corporate law (and not by contract law).

[ADDITIONAL DISCUSSION REGARDING FLORIDA LAW ISSUES.]

[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 provision of the FBCA, the articles of incorporation or applicable case law. Examples of these special exceptions include, without limitation:

(i) the articles of incorporation establishe a procedure for declaring dividends that conflict with the FCBA,

(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.

[NOTE: CONSIDER INCLUDING DRAFT OF SAMPLE EXCLUSIONS FOR THE OPINION]

No exception is required in the opinion if the articles of incorporation require redemption of the preferred shares, but 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 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.

Diligence Checklist – Corporation. 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" 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 or violate with the FBCA, the articles of incorporation of the corporation or applicable case law.

B. **Validly Issued.**

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 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" 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" 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. 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.

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, shares with par value may be issued for less than their stated value. Further, under Section 607.0623(1) of the FBCA, 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. 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

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

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. Outstanding Preferred Equity Securities.

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."

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II. LIMITED LIABILITY COMPANIES: ISSUANCE OF MEMBERSHIP INTERESTS OF LIMITED LIABILITY COMPANIES

[to come]

III. MARGIN STOCK

[to come]
