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

I. CORPORATIONS - ISSUANCE OF PREFERRED SHARES

II. MARGIN STOCK – OPINION WITH RESPECT TO REGULATION U

III. ADDITIONS TO THE REPORT

_____ __, 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 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.

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 ("**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 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.'"

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.

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

II. 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.

III. 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:

> ( ) 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.

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]