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

Opinion Standards Committee of The Florida Bar
Business Law Section

and

Legal Opinions Subcommittee of The Real Property Finance and Lending Committee
of The Florida Bar
Real Property, Probate and Trust Law Section

July 24, 2021

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OVERVIEW OF THE FIRST SUPPLEMENT TO THE REPORT

On December 11, 2011, the Legal Opinion Standards Committee of The Florida Bar Business Law Section (the "**Business Section Committee**") and the Legal Opinions Committee of The Florida Bar Real Property, Probate and Trust Law Section (now operating as the Legal Opinions Subcommittee of the Real Property Finance and Lending Committee of The Florida Bar Real Property, Probate and Trust Law Section) (the "**Real Property Section Committee"**, and, together with the Business Section Committee, the "**Committees**") promulgated their "*Report on Third-Party Legal Opinion Customary Practice in Florida*" dated December 3, 2011 (the "**Report").** This First Supplement to the Report (the "**First Supplement**") updates several sections of the Report to reflect (i) the adoption in 2013 of the Florida Revised Limited Liability Company Act, (ii) the adoption in 2013 of revisions to the Florida land trust statute (Section 689.071, Florida Statutes), and (iii) the adoption in 2019 of extensive revisions to the Florida Business Corporation Act (Chapter 607, Florida Statutes). This First Supplement also adds two new sections to the Report on the topics of (a) issuances of preferred shares by a Florida corporation, and (b) issuances of membership interests by a Florida limited liability company. Finally, this First Supplement discusses several important issues of customary opinion practice that have arisen since the Report was published in 2011.

This First Supplement should be read in conjunction with the Report, and words defined in the Report are so defined in the First Supplement unless the context otherwise requires. For ease of reference, sections and subsections of the Report that are changed by this First Supplement are referenced in this First Supplement by the section and subsection name and by the page number where the modified section or subsection can be found in the Report. In all cases, this First Supplement restates in its entirety the subsections of the Report that have been modified.

This First Supplement was approved by the Executive Council of the Business Law Section of The Florida Bar on January 15, 2021 and by the Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar on July 24, 2021. Following publication of this First Supplement, a composite PDF version of the Report, including the First Supplement, will be made available for download at www.flabizlaw.org (the website of the Business Law Section) on the Business Section Committee's webpage, and www.rpptl.org (the website of the RPPTL Section), on the Real Property Section Committee's webpage.

We would like to thank RR Donnelley & Sons Company for typesetting the First Supplement, as they did with respect to the Report. Their very able assistance makes the First Supplement a cleaner, more readable document, and we very much thank them for their important contribution to the First Supplement.

The Members of the Committees who participated in the preparation of this First Supplement are listed below. This First Supplement reflects the consensus views of the members of the Committees who participated in its preparation. It does not necessarily reflect the views of the individual members of each of the Committees or their respective law firms, nor does it mean that each member of each of the Committees agrees with every position taken in this First Supplement.

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REVISIONS TO "ENTITY STATUS AND ORGANIZATION OF A FLORIDA ENTITY"

A. Modifications to Subsection B – "Corporation"

In 2019, the Florida legislature adopted an updated and modernized version of Chapter 607 of the Florida Statutes, which is called the Florida Business Corporation Act **("FBCA")**. The revised FBCA became effective on January 1, 2020. Certain pertinent clean up changes to the revised FBCA were adopted by the Florida legislature in 2020, and these clean up changes became effective on June 18, 2020.

The following section replaces in its entirety subsection B. of the Report entitled: "*Entity Status and Organization of a Florida Entity – Corporation* " that is contained on pages 38-42 of the Report. In large measure, the changes made to this subsection relate to updating the statutory references for the adoption of the revised FBCA and the adoption in 2020 of the subsequent clean up changes.

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B. Corporation

Recommended opinion:

The Client is a [corporation] organized under Florida law, and its [corporate] status is active.

1. *The Basic Meaning of the Opinion*. The opinion that "The Client is a corporation organized under Florida law," and "its corporate status" (or "its status") is active or, the equivalent opinion: "The Client is a corporation duly organized, validly existing and in good standing under the laws of the State of Florida" means that, as of the date of the opinion: (i) articles of incorporation for the corporation have been filed with the Department, (ii) the corporation has not been dissolved, (iii) the corporation's articles of incorporation have not been revoked or suspended, (iv) the corporation has not been a party to a merger in which the corporation was not the surviving corporation, (v) the corporation has not been converted into a different form of entity, (vi) in the case of a corporation whose term of duration is limited, the term of the corporation has not expired, (vii) the requisite organizational actions (as described in (2) below) have been taken with respect to the corporation, and (viii) the corporation has active status.

2. *Organized*. An opinion that the corporation is "organized" is usually part of the corporate status opinion. Sometimes the word "duly" is added before "organized." However, adding the word "duly" to the opinion does not change the meaning of this opinion or change the diligence recommended in order to render this opinion.

   "Organization" is discussed in Section 607.0205 of the Florida Business Corporation Act ("FBCA"). Organization under the FBCA requires the adoption of bylaws and the election of directors and officers. Under the Prior Florida Reports (and under the historical reports of most other state and local bar associations), an opinion regarding the "organization" of a corporation required Opining Counsel to confirm that the corporation was properly organized under the laws in effect at the time of its incorporation. However, the Committees believe that such interpretation has become anachronistic and that, except as set forth below, Florida customary practice no longer requires an Opining Counsel to determine if the proper steps were taken at the time the corporation was formed under the applicable law in effect at the time of such formation. Rather, the Committees believe that today's Florida customary practice uses the term "organization" to address whether the corporation is organized as of the date of the opinion letter. Thus, whether or not the necessary steps to "organization" were completed at the time of the formation of the corporation, Opining Counsel can render the "organization" opinion if Opining Counsel confirms that, at the time of the delivery of the opinion letter, the corporation has adopted bylaws and elected or appointed directors and officers (which are the requirements for proper organization under the FBCA).

Notwithstanding the foregoing, the current status of a corporation's "organization" cannot be relied upon if Opining Counsel knows that the failure of the corporation to have been properly organized at an earlier time will reasonably likely cause adverse consequences to the corporation (or if Opining Counsel is aware of facts (red flags) that ought to cause a reasonable Opining Counsel to conclude that the corporation's failure to have been properly organized at an earlier time will reasonably likely cause adverse consequences to the corporation). In such circumstances, Opining Counsel must consider whether the corporation was "organized" at the earlier time.

Under Section 607.0732 of the FBCA, a corporation can entirely dispense with the requirements of a board of directors in a written agreement adopted by all of the corporation's shareholders. In such a case, it will be the actions of the shareholders rather than the actions of the directors that will govern. If an agreement under Section 607.0732 of the FBCA is in place and such agreement dispenses with requirements for a board of directors, "organization" will instead require the adoption of bylaws, having an agreement in place that conforms with the requirements of Section 607.0732 of the FBCA, and the election or appointment of officers. While this provision now applies to any Florida corporation (other than a corporation that has a class of shares registered under the Securities Exchange Act of 1934), it will typically only be applicable in the context of closely held corporations.

3. *Incorporated and Existing*. In some cases, Opining Counsel will opine that a corporation is "incorporated" or is "existing" under Florida law. Under Florida customary practice, this opinion can be based solely on the provisions of Section 607.0203 of the FBCA and a certificate from the Department that the corporation's articles of incorporation have been filed by the Department.

   Section 607.0203 of the FBCA states that the Department's acceptance for filing of the articles of incorporation of a corporation is conclusive proof that the incorporator(s) satisfied all conditions precedent to incorporation, (except in a proceeding brought by the State of Florida to cancel or revoke the incorporation or to administratively dissolve the corporation). An opinion that a Florida corporation is "organized" also includes an opinion that the corporation is "incorporated" and is "existing," although the reverse is not true.

   Although some opinions state that the corporation is "duly incorporated" or "validly existing," the terms "duly" and "validly" are not used in any of the forms of opinion recommended by this Report because, in the view of the Committees, such words do not change the meaning of the opinion or change the diligence recommended in order to give the opinion. Consistent with this position, the 2019 revisions to the FBCA removed the phrase "duly incorporated" from Section 607.0128(2)(b)1. (now Section 607.0128(1)(b)) of the FBCA.

4. *De Jure Corporation*. Some commentators suggest that using the term "validly existing" may indicate that the corporation is a "de jure" as opposed to a "de facto" corporation. However, because an opinion that a corporation is "organized" and an opinion that a corporation is "incorporated" and/or is "existing" are all supported, in whole or in part, by a certificate from the Department as to the presumed proper filing of the articles of incorporation, the corporation will necessarily be a "de jure" corporation.

5. *Certificate of Status*. Section 607.0128 of the FBCA provides for the Department to issue a "certificate of status" for a corporation if the records of the Department show that the corporation has filed its articles of incorporation. The certificate of status must state: (i) the name of the corporation, (ii) that the corporation was organized under the laws of Florida, (iii) the date of organization, (iv) whether all fees due by the corporation to the Department under the FBCA have been paid, (v) whether the corporation's most recently required annual report has been filed by the Department, (vi) whether the Department has administratively dissolved the corporation or received a record notifying the Department that the corporation has been dissolved by judicial action, and (v) whether the Department has filed articles of dissolution for the corporation.

   To ensure that dissolution proceedings have not been commenced, Opining Counsel should obtain a certificate of an officer of the corporation confirming that no steps leading to the corporation's

dissolution have been taken. Alternatively, Opining Counsel may review the records of the corporation to confirm that there are no records indicating that steps leading to the corporation's dissolution have been taken.

If Opining Counsel is aware that resolutions approving the dissolution of the corporation have been adopted, but articles of dissolution have not been filed, counsel may give an active status opinion, but should disclose the adoption of the resolutions in the opinion letter and consider the effect of the adoption of resolutions regarding the dissolution of the corporation on the other opinions being rendered with respect to the Transaction.

6. *Active Status vs. Good Standing*. The recommended opinion uses the phrase "its corporate status is active" or "its status is active" because the words "active status" are used by the Department in its certificate of status. However, Opining Counsel in Florida are often asked to render (particularly in transactions in which the counsel for the Opinion Recipient is an out-of-state attorney) an opinion using the words "good standing." The Committees believe that the use of the phrase "good standing" in an opinion of Florida counsel with respect to a Florida corporation has the same meaning under Florida customary practice as the phrase "its corporate status is active" or "its status is active."

7. *General Exclusions from Active Status Opinion*. An opinion that a corporation's "status is active" or that its "corporate status is active" merely indicates that the corporation exists and has not been dissolved as of the date of the certificate of status issued by the Department. Because it would be impossible or extremely difficult for Opining Counsel to establish that there are no grounds existing under the statute for involuntary dissolution of the corporation, the active status opinion under Florida customary practice does not mean or imply that there are no grounds existing under the statute for involuntary dissolution (either judicial or administrative) of the corporation. For example, if the corporation's annual report to the Department has not yet been filed, and is not filed by its due date, the corporation may be subject to administrative dissolution at a later date.

8. *Circumstances Affecting the Certificate of Status*. As noted above, Opining Counsel may opine that the corporation exists as of the date of the opinion letter in reliance on a certificate of status from the Department, even if circumstances exist that could result in the involuntary dissolution of the corporation with the passage of time. Opining Counsel is not obligated to conduct any investigation regarding this issue. However, if Opining Counsel is aware that circumstances for dissolution exist, Opining Counsel should advise the Client to take the necessary actions to cure those circumstances promptly, since dissolution of the Client will generally constitute a violation of the Transaction Documents. For example, the Department may administratively dissolve a corporation under Section 607.1420(1)(a) and (b) of the FBCA if the corporation does not pay any fee or penalty due to the Department under the FBCA or file its required annual report by the date specified in that Section. This same provision permits administrative dissolution by the Department under Section 607.1420(1)(c) of the FBCA if the corporation fails to maintain a registered agent and a registered office.

   Opining Counsel should be aware that a resignation by a registered agent becomes effective 31 days after the registered agent files a statement of resignation with the Department. In that regard, a certificate of status issued by the Department under Section 607.0128 of the FBCA is not required to include information regarding the resignation of the corporation's registered agent.

9. *Officer's Certificate*. In rendering an opinion as to the "organization" of a Florida corporation, Opining Counsel may rely upon an officer's certificate whereby an officer of the Corporation certifies that bylaws have been adopted by the corporation (attaching a copy of the bylaws), in addition to certifying that (i) the Transaction has been approved by the corporation's board of directors (and shareholders, if applicable), attaching copies of the resolutions approving the Transaction, and (ii) naming the officers of the corporation who are authorized to execute and deliver the Transaction Documents on behalf of the corporation.

The Committees note that the "entity status and organization" opinion is generally not given in a vacuum. Rather, it is generally given with other opinions regarding entity power and authorization of the Transaction by the Client entity. As a result, the officer's certificate generally covers more matters than entity status alone. Thus, while not all of the items covered in the officer's certificate described above may technically be required to render the entity status opinion, they are still likely needed in order to render these other opinions.

Unless Opining Counsel has knowledge to the contrary (or is aware of facts (red flags) that ought to cause a reasonable Opining Counsel to conclude that such facts are unreliable), Opining Counsel may rely, under the "presumption of continuity and regularity" described in "Introductory Matters – Presumptions of Continuity and Regularity," as to the proper approval of the bylaws by the Board (or the shareholders, if applicable), the proper election of the board of directors by the corporation's shareholders and the proper appointment of the officers by the corporation's board of directors.

10. *No Need to Review Share Issuances*. It is not necessary for Opining Counsel to confirm that the corporation has issued shares of its stock in order to deliver the "organization" opinion. However, if the Transaction contemplates the issuance of securities by the corporation, Opining Counsel, in rendering opinions regarding the issuance of such securities, will need to consider the matters set forth in "Opinions with Respect to Securities."

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

Diligence Checklist – Corporation.

In order to render an organization and entity status opinion with respect to a Florida corporation, Opining Counsel should take the following actions:

- Obtain a copy of the corporation's articles of incorporation (preferably a certified copy obtained from the Department) and review the articles of incorporation to ensure that they substantially comply with the requirements of Section 607.0202 of the FBCA.
- Confirm by obtaining a certificate from the Client that at least one director of the corporation has been elected (except in circumstances where the corporation is managed directly by its shareholders pursuant to an agreement that complies with Section 607.0732 of the FBCA and dispenses with the board of directors), that one or more officers have been appointed and that the corporation has adopted bylaws.
- Obtain an "active status" certificate with respect to the corporation from the Department. If the certificate of status indicates that the Client has not yet filed its annual report or paid its annual fee for the current year, the recommended (but not mandatory) practice is to require the Client to make satisfactory arrangements for filing the report and paying the fee before Opining Counsel renders an "active status" opinion regarding the corporation.
- Confirm that no steps leading to the corporation's dissolution have been taken. The recommended practice is to obtain a certificate to this effect from the Client, and the illustrative form of certificate to counsel that accompanies this Report includes such a statement.

B. Modifications to Subsection E – "Limited Liability Company"

In 2013, the Florida legislature adopted Chapter 605 of the Florida Statutes, which is called the Florida Revised Limited Liability Company Act (**"FRLLCA"**). FRLLCA became effective for Florida limited liability companies organized after December 31, 2013 on January 1, 2014, and became effective for all Florida limited liability companies whenever organized on January 1, 2015. At the time that FRLLCA became effective with respect to all Florida limited liability companies, whenever formed, Chapter 608 of the Florida Statutes, which previously was the chapter in the Florida Statutes governing Florida limited liability companies, was repealed.

The following section replaces in its entirety subsection E. of the Report entitled: "*Entity Status and Organization of a Florida Entity – Limited Liability Company*" that is contained on pages 50-52 of the Report. In large measure, the changes made to this subsection relate to updating the statutory references for the adoption of FRLLCA. There is also a change dealing with the recommended filing of a Statement of Authority in circumstances where the transaction involves the acquisition or financing of Florida real estate. Finally, the Supplement reflects a decision by the Committees that in the context of a single-member limited liability company, the LLC does not have to have an operating agreement in order for Florida counsel to render legal opinions on an LLC if there is a record sufficient to reflect the ownership and management of the LLC. This change is a recognition of the informality often followed by Florida lawyers in the context of single member LLCs.

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E. Limited Liability Company

Recommended opinion:

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

1. *Basic Meaning of this Opinion*. A Florida limited liability company ("LLC") is governed by Chapter 605 of the Florida Statutes, which is generally referred to as FRLLCA. The opinion that a company "is a limited liability company organized under Florida law, and its limited liability company status is active" (or "its status is active") means that: (i) the company has complied in all material respects with the requirements for the formation of an LLC under FRLLCA, (ii) governmental officials have taken all steps required by law to form the company as an LLC, (iii) the company's existence began prior to the effective date and time of the opinion letter, (iv) the company is currently in existence and its status is active, and (v) the company has not been converted into a different form of entity. Under Sections 605.0201(4) and 605.0207 of FRLLCA, a Florida LLC is formed upon the later of (i) the date and time when the articles of organization are filed with the Department (or on such earlier date as specified in the articles of organization, if such date is within five business days prior to the date of filing, or at any later date (up to 90 days) specified in the articles of organization) and (ii) when at least one person has become a member. In order to file such articles of organization, the person filing is confirming that at least one person is or becomes a member of the LLC at the time the articles of organization become effective. Section 605.0211(3) of FRLLCA provides that, subject to any qualification stated in the certificate of status, a certificate of status issued by the Department is conclusive evidence that the Florida limited liability company is in existence.

2. *Organized*. An opinion that an LLC is properly organized is often part of the LLC status opinion. This opinion means that Opining Counsel has verified that: (i) the LLC has articles of organization executed by at least one member (or an authorized representative of the member), (ii) the articles of organization comply with the requirements set forth in Section 605.0201 of FRLLCA, (iii) the articles of organization have been filed with the Department, (iv) if the LLC has more than one

member, an operating agreement has been adopted by the member(s) of the LLC, (v) if the LLC has only one member, a written operating agreement has been adopted by the member of the LLC or a record exists sufficient to confirm the identity of the member, to establish whether the LLC is member-managed or manager-managed, and to establish who is authorized to act on behalf of the LLC, (vi) if the articles of organization or operating agreement provide that the LLC is a manager-managed company, then one or more managers have been appointed by the members, and (vii) the LLC has active status.

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

Generally speaking, the articles of organization for a Florida LLC rarely contain more than the minimum information required under FRLLCA, although its filing constitutes notice of all facts that are set forth in the articles of organization. The operating agreement of the LLC is generally more substantive and by definition sets forth the provisions adopted for the management and regulation of the affairs of the LLC and the relationships of the members, the managers (if the LLC is manager-managed), and the LLC. The statute provides that an operating agreement may be oral, but, as in the case of an oral partnership agreement, in the view of the Committees, Opining Counsel should generally not opine that an LLC is "organized" if the LLC has not adopted a written operating agreement. However, in the context of a single-member LLC, a written operating agreement may not be necessary if there is a record sufficient to confirm the identity of the member, to establish whether the LLC is member-managed or manager-managed, and to establish who is authorized to act on behalf of the LLC. This might be accomplished, for example, by identifying the member in the articles of organization and stating in the articles of organization that the LLC is member-managed.

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

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

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

5. Involuntary Dissolution. An opinion that an LLC's "status is active" merely indicates that the LLC exists and has not been dissolved as of the date of the certificate of status issued by the Department. Because it would be impossible or extremely difficult for Opining Counsel to establish that no grounds exist under the statute for involuntary dissolution of the LLC, this opinion does not mean or imply that no grounds exist under the statute for involuntary dissolution of the LLC. The circumstances under

which an LLC may be administratively dissolved by the Department are set forth in Section 605.0714 of FRLLCA and the grounds for judicial dissolution are specified in Section 605.0702 of FRLLCA. Opining Counsel may opine that the LLC exists on the date of the opinion in reliance on a certificate of status from the Department, even if circumstances exist that could result in involuntary dissolution with the passage of time. Opining Counsel is not obligated to conduct any investigation regarding this issue. However, if Opining Counsel knows (or ought to reasonably know based on the facts (red flags) in such counsel's possession) that such circumstances for dissolution exist, Opining Counsel should advise the Client to take the necessary actions to cure those circumstances promptly, since dissolution of the LLC will generally constitute a violation of the Transaction Documents. For example, the Department may administratively dissolve an LLC under Section 605.0714(1)(c) of FRLLCA if the company is without a registered agent as required by Section 605.0113, and, under Section 605.0115(3)(a) of FRLLCA, the resignation of a registered agent becomes effective 31 days after the registered agent files a statement of resignation with the Department.

6. Real Estate Transaction – Statement of Authority. If the transaction in question involves the transfer or financing of real estate, then, it is recommended that Opining Counsel obtain from the Department a copy of any Statement of Authority (preferably a certified copy) with respect to the LLC filed with the Department (or if one is not on file with the Department, require that a Statement of Authority be executed in accordance with Section 605.0302 of FRLLCA and have it filed with the Department). Further, if the transaction involves a purchase or financing of real property, it is recommended that a certified copy of the Statement of Authority be recorded in the public records of the County in which the real property is located for opinions on all real estate related transactions.

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

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

- Obtain a copy of the LLC's articles of organization (preferably a certified copy obtained from the Department) and review them to confirm that they substantially comply with the requirements of Section 605.0201 of FRLLCA.
- Obtain a "certificate of status" for the LLC from the Department. If the certificate of status indicates that the LLC has not filed its annual report or paid its annual fee for the current year, then the recommended (but not mandatory) practice is to require the Client to make satisfactory arrangements for filing the report and paying the fee before Opining Counsel renders an "active status" opinion regarding the LLC.
- Obtain and examine a copy of the LLC's operating agreement, certified by a manager of the LLC (if manager-managed), by a member of the LLC (if member-managed), or by an officer of the LLC (if officers have been appointed by the members or the managers, as applicable, under the LLC's operating agreement), as being a true and complete copy, including all amendments. In the view of the Committees, if the LLC has more than one member and does not have a written LLC operating agreement, Opining Counsel should generally not render an opinion with respect to the LLC and should counsel the Client to reduce its operating agreement to writing. However, in the context of a single member LLC, Opining Counsel should not generally render an opinion with respect to the LLC unless the LLC has a written operating agreement or the LLC has a record sufficient to confirm the identity of the member, to establish whether the LLC is member-managed or manager-managed, and to establish who is authorized to act for the LLC.
- Determine from reviewing the operating agreement and the articles of organization whether the LLC is a member-managed company or a manager-managed company; if the latter, confirm that a manager (or managers) has been appointed in accordance with the requirements of those documents (generally through obtaining a written certificate from the Client).
- Obtain a current factual certificate from either (i) a manager of the LLC (if manager-managed), (ii) a member of the LLC (if member-managed), or (iii) an officer (if officers have been appointed) certifying that the LLC has at least one member, that no circumstances exist which would trigger dissolution under the articles of organization or operating agreement, and that no proceedings have commenced for dissolution of the LLC.
- If the transaction in question involves the transfer or financing of real estate, then it is recommended that Opining Counsel obtain a Statement of Authority (preferably certified) from the Department (or if one is not on file with the Department, require that a Statement of Authority be executed in accordance with Section 605.0302 and have it filed with the Department). The Committees recommend that Opining Counsel require the recordation of a certified copy of the Statement of Authority in the public records of the County in which the real property is located for opinions on all real estate related transactions.

C. Modifications to Subsection F – "Trusts"

In 2013, the Florida legislature adopted a new version of the Florida Land Trust Act (the "**FLTA**"), Section 689.071, Florida Statutes. A Florida trust organized under the FLTA is referred to herein as a "**Florida Land Trust**".

The following sections replace in their entirety subsection F. of the Report entitled: "*Entity Status and Organization of a Florida Entity – Trusts*" that is contained on pages 52-57 of the Report.

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F. Trusts

(1) **In General**.

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

(2) **Trusts Other than Florida Land Trusts**.

(a) Trusts with Written Trust Agreements.

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

The Client(s) [is/are] the trustee(s) of a trust pursuant to the provisions of that certain trust agreement dated _____, 20__.

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

(b) *Trusts Without Written Trust Agreements.*

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

(c) *Trustees that are Entities.*

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

(3) **Trusts Owning Real Estate**.

(a) *Generally*

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

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

A Florida Land Trust that falls into the first category described above arises pursuant to Section 689.071, Florida Statutes.

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

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

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

If the trust satisfies the requirements of Section 689.071, Florida Statutes, Opining Counsel can render the trust status opinion even if there is no separate trust agreement governing the trust relationship. However, because the customary practice in dealing with most opinions involving trusts is not to render an opinion unless a written trust agreement exists, the exception from this general rule should be applied only in very limited circumstances. For the limited exception to apply, the following three requirements must all be satisfied:

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

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

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

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

In the case of a Florida Land Trust, if Opining Counsel is unable to confirm that there is no separate trust agreement governing the trust relationship or if Opining Counsel has knowledge that a written trust agreement exists, Opining Counsel should not render the status opinion with respect to the trust unless Opining Counsel, in addition to addressing the requirements set forth in the recorded instrument, obtains a copy of the trust agreement and performs the diligence required with respect to other trusts in Florida as set forth above in subsection (2) ("**Trusts Other than Florida Land Trusts**") above.

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

(4) **Successor Trustee.**

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

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

(a) Trusts Other than Florida Land Trusts.

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

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

(ii) In the real estate context, the parties must have taken additional actions. In particular, if the trustee has resigned, then a trustee's declaration of appointment of successor trustee reciting such trustee's name,

address and its resignation, the appointment of the successor trustee by name and address and the successor's acceptance of appointment should be signed by the successor trustee (and preferably by the prior trustee), should be witnessed and acknowledged in the manner provided for acknowledgment of deeds, and should be recorded in the office of the recorder in the county where the trust's property is located. The declaration should have attached to it each of the following: (a) the first page of the trust agreement, (b) the successor trustee page of the trust agreement, (c) the powers page(s) of the trust agreement, (d) the signature page of the trust agreement, and (e) the legal description of the trust property.

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

(b) *Florida Land Trusts.* In the case of a Florida Land Trust, where no successor trustee is named in the recorded instrument and a trust agreement exists, Section 689.071(9), Florida Statutes, should be followed as the procedure whereby one or more persons or entities having the power of direction of the land trust agreement may appoint a successor trustee or trustees of the land trust by filing a declaration of appointment of a successor trustee or trustees in the office of the recorder of deeds in the county in which the trust's property is located. The declaration must be signed by a beneficiary or beneficiaries of the trust and by each successor trustee, must be acknowledged in the manner provided for acknowledgment of deeds, and must contain: (a) the legal description of the trust property, (b) the name and address of the former trustee, (c) the name and address of the successor trustee, and (d) a statement that each successor trustee has been appointed by one or more persons or entities having the power of direction of the land trust, together with an acceptance of appointment by each successor trustee.

(5) **Diligence Concerning Beneficiaries**. Although Opining Counsel may need to consider whether the beneficiaries of the trust have approved the Transaction to render an opinion that the Transaction has been approved by all requisite formality, Opining Counsel does not need to do so to render a status opinion on the trust (see "Authorization of the Transaction by a Florida Entity"), since the status opinion relating to a Florida trust focuses solely on the status of the trustee.

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

(7) **Effect of Presumption Arising Under Section 689.07, Florida Statutes**. Section 689.07, Florida Statutes, is separate and apart from Section 689.071, Florida Statutes, and the two should not be confused. Under Section 689.07, Florida Statutes, a deed by which real property is conveyed to a person or entity simply "as trustee," without setting forth any of the powers required to avail the trustee of the benefit of the Florida land

trust presumption arising under Section 698.071, Florida Statutes, grants an absolute fee simple estate in the real property to the "trustee," individually, including both legal and equitable title, provided the other requirements of Section 689.07, Florida Statutes, are met. In such case, a Florida Land Trust is not created, the recital of trust status is disregarded as a matter of law, and Opining Counsel should not render the recommended trust opinion. Indeed, in such case, the owner of the real property is not the trustee of a trust and no special form of opinion on trust status is pertinent. In such case, the entity opinion should be an opinion concerning the direct entity status of the entity designated as the trustee.

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

Diligence Checklist—Trusts, including Florida Land Trusts

- If the trustee is a corporation, partnership, or limited liability company, Opining Counsel should confirm that the trustee is properly organized and/or exists, and has active status (or in good standing in the state of its incorporation) and, if it is a foreign entity required to obtain a certificate of authority to transact business in Florida, that it has obtained such a certificate of authority from the Department.
- If the deed or other instrument of conveyance is dated prior to July 3, 1992 and the trustee is a corporation, Opining Counsel should confirm that the corporation has trust powers. As of July 2, 1992, those portions of Section 660.41, Florida Statutes, which mandated that corporate trustees have trust powers were repealed. Thus, if the deed or other instrument of conveyance is dated after July 2, 1992 and the trustee is a corporation, Opining Counsel does not need to confirm the existence of trust powers. See Fund Title Note 31.02.06 (2001). The existence of trust powers for state chartered institutions may be confirmed by obtaining a Certificate from the Department of Financial Institutions, and the existence of such powers for federally chartered institutions may be obtained from the Comptroller of the Currency, at the following respective addresses:

  Director, Division of Financial Institutions
  Florida Office of Financial Institutions
  200 E. Gaines Street
  Tallahassee, Florida 32399

  Assistant Comptroller of the Currency
  Southeastern District
  3 Ravinia Drive, Suite 1950
  Atlanta, Georgia 30346

- To opine that the Client is the trustee of a Florida land trust that is in compliance with the provisions of Section 689.071, Florida Statutes, Opining Counsel should examine the deed or other instrument of conveyance naming the trustee as grantee or transferee and any written trust agreement for compliance with the requirements set forth in Section 689.071, Florida Statutes.
- If the trust satisfies the requirements set forth in Section 689.071, Florida Statutes, Opining Counsel should obtain a written certificate or affidavit signed by at least the trustee, and preferably also by all of the beneficiaries of the trust, confirming that no separate trust agreement or other agreement governing the trust relationship exists. If the trust satisfies the requirements set forth in Section 689.071, Florida Statutes, but Opining Counsel has knowledge that a trust agreement governing the trust relationship exists, Opining Counsel should obtain and review a copy of the written trust agreement governing the trust, in particular, to determine who is designated as the trustee(s) of the trust.
- If the trust does not satisfy the requirements of Section 689.071, Florida Statutes, Opining Counsel should obtain and review a copy of the written trust agreement governing the trust, in particular, to determine who is designated as the trustee(s) of the trust.

REVISIONS TO "AUTHORITY TO TRANSACT BUSINESS IN FLORIDA"

A. Modifications to Subsection A – "Qualification of a Foreign Entity to Transact Business in Florida"

The following section replaces in its entirety subsection A of the Report entitled "***Authority to Transact Business in Florida – Qualification of a Foreign Entity to Transact Business in Florida***" that is contained on pages 58 to 65 of the Report.

* * * * * * * * * * * * * * * * * * *

A. Qualification of a Foreign Entity to Transact Business in Florida

Opining Counsel representing a foreign corporation, a foreign limited partnership, a foreign general partnership, a foreign limited liability partnership or a foreign limited liability company with respect to a Florida Transaction may be requested to render a legal opinion as to whether the foreign entity Client is required to apply for and obtain a certificate of authority from the Department to transact business in Florida. In addressing this legal issue, Opining Counsel will need to determine whether the Client's activities in Florida are substantial enough to require that such foreign entity file an application with the Department seeking to obtain a certificate of authority to transact business in Florida.

If the foreign entity Client merely owns or mortgages real property or personal property located in Florida, without more, the "safe-harbor" provisions of each of Florida's business entity statutes provide that the Client entity will not be required to obtain a certificate of authority to transact business in Florida. On the other hand, the widely held view is that if the Client foreign entity's activities in Florida are more regular, systematic or extensive than the listed "safe-harbor" activities, including the ownership of income-producing real or tangible personal property in Florida, the foreign entity will be required to obtain a certificate of authority to transact business in Florida.

Opinion Recipients sometimes request an opinion that the Client is authorized to transact business as a foreign entity in every jurisdiction in which the Client's property or activities requires qualification or where the failure to qualify would have a material adverse effect on the Client. This is an inappropriate opinion to request. See "Introductory Matters – Reasonableness; Inappropriate Subjects for Opinions." However, it is common practice in Florida for an Opinion Recipient to request an opinion from a Florida Opining Counsel as to whether Opining Counsel's foreign entity Client is authorized to transact business in Florida, either together with or separate from an opinion as to whether Opining Counsel's foreign entity Client is required to obtain such authorization. An opinion that a particular foreign entity client is authorized to transact business in Florida may be rendered based solely on the receipt of a certificate of status issued by the Department. In particular, under Florida customary practice, in rendering this opinion Opining Counsel need not review the information provided by the Client to the Department in its application to obtain a certificate of authority to transact business in Florida.

An opinion that the Client is authorized to transact business in Florida is premised on the foreign entity Client being properly organized and in good standing as an entity under the laws of its jurisdiction of organization. Accordingly, unless Opining Counsel is rendering an opinion as to the Client foreign entity's organization and status in its jurisdiction of organization, the foreign entity's status under the laws of such foreign jurisdiction will be implicitly assumed into the opinion letter under Florida customary practice, even if such assumption is not expressly stated in the opinion letter. However, since the active status or good standing of the foreign entity Client in its jurisdiction of organization will always be required in connection with the Transaction, it is strongly recommended that Opining Counsel take appropriate steps to confirm that its foreign entity Client has active status or good standing in its jurisdiction of organization.

Sometimes an opinion regarding "authority to transact business" in Florida will use the words "qualified to do business" instead of "authorized to transact business." The words "authorized to transact business" are

recommended because they are contained in the statutes governing foreign entities transacting business in Florida (the FBCA, FRLLCA, FRULPA and FRUPA). However, whichever words are used, they are deemed to have the same meaning under Florida customary practice.

In circumstances where Florida counsel is consulted concerning authorization of a foreign entity to transact business in Florida and gives advice that such authorization may be required, but such foreign entity nevertheless has not obtained a certificate of authority, Florida counsel to the foreign entity should consider advising its Client about the consequences of failing to obtain a certificate of authority to transact business in Florida. Such consequences include fees that may be due to the Department for failure to obtain a certificate of authority and the inability of the Client to prosecute litigation in Florida if the Client does not hold a certificate of authority.

However, the foreign entity Client will be permitted to defend litigation brought against the Client in Florida whether or not the Client has obtained a certificate of authority to transact business in Florida. The applicable sections of Florida's entity statutes that reflect the administrative penalties for failing to obtain a certificate of authority to transact business in Florida are contained in Section 607.1502 of the FBCA, Section 620.1907 of FRULPA, Section 620.9103 of FRUPA and Section 608.0904 of FRLLCA. At the same time, Opining Counsel should consider advising its foreign entity Client as to the ancillary consequences of obtaining a certificate of authority to transact business in Florida, such as the application of the Florida corporate income tax under Chapter 220 of the Florida Statutes to a foreign corporation that obtains a certificate of authority to transact business in Florida.

1. Foreign Corporation

Recommended opinion:

Based solely on a certificate of status from the Department dated _____, 20__, the Client is authorized to transact business as a [foreign corporation] in the State of Florida, and its [corporate] status in Florida is active.

If a foreign corporation has obtained a certificate of authority to transact business in the State of Florida, then the diligence required to render the recommended opinion is simple. In such circumstances, Opining Counsel should obtain an "active status" certificate from the Department and under customary practice in Florida, may rely on such certificate in issuing an opinion that the Client foreign corporation is authorized to transact business in Florida and has active status in Florida. Section 607.0128(3) of the FBCA provides that, "[s]ubject to any qualification stated in the certificate, a certificate of status or authority issued by the department is conclusive evidence that the domestic or foreign corporation is in existence and is of active status or that the foreign corporation is authorized to transact business in this state and is of active status in this state."

To obtain a certificate of authority, a foreign corporation must comply with the requirements of Section 607.1503 of the FBCA. Further, the name of the foreign corporation must comply with the requirements of Section 607.1506 of the FBCA.

If Opining Counsel is asked to opine as to whether or not a certificate of authority must be obtained for a foreign corporation, Opining Counsel must evaluate whether such authorization is required. In carrying out the evaluation, Opining Counsel should obtain a factual certificate from a responsible officer of the Client describing fully the scope of the foreign corporation's business activities in Florida. Opining Counsel should then review Section 607.1501(2) of the FBCA, which lists certain "safe harbor" activities in Florida that do not require a foreign corporation to obtain a certificate of authority to transact business. If the safe harbor exemptions do not expressly apply, it is the widely held view among Florida lawyers that under such circumstances, the foreign corporation will need to obtain a certificate of authority from the Department. If such qualification appears to be required, Opining Counsel should not render a legal opinion regarding the foreign corporation's authority to transact business in Florida unless a certificate of authority has been obtained and the foreign entity has active status in Florida.

The circumstances under which a foreign corporation's certificate of authority may be administratively revoked by the Department are set forth in Section 607.1530 of the FBCA, such as the foreign corporation's failure for 30 days or more to maintain a registered agent in Florida, or its failure to file the required annual report or pay the required fees or penalties. Even if circumstances exist that could result in administrative revocation of the foreign corporation's certificate of authority with the passage of time, Opining Counsel may opine that a foreign corporation Client is authorized to transact business in Florida, and the opinion is not an affirmation that no such circumstances then exist. However, if Opining Counsel has knowledge that circumstances for the future revocation of the Client's certificate of authority exist at the time the opinion is rendered (or if Opining Counsel is aware of facts (red flags) that ought to cause a reasonable Opining Counsel to know of such circumstances), the recommended (but not mandatory) practice is for Opining Counsel to require the Client to take the necessary actions to cure the violation, since revocation of the Client's certificate of authority will generally constitute a violation of the Transaction Documents and will also preclude the Client from maintaining any legal proceedings in a Florida court.

Even if a foreign corporation is not deemed to be transacting business in Florida requiring registration with the Department, a registered office and a registered agent (a so-called "RICO" agent) will need to be appointed pursuant to Section 607.0505 of the FBCA if: (a) the foreign corporation (or alien business organization) owns an interest in Florida real property, or (b) the foreign corporation (or alien business organization) owns a mortgage on Florida real property (and is not otherwise exempt from this requirement because it is a "financial institution," as that term is defined in Section 607.0505(11) of the FBCA).

2. Foreign Limited Partnership

Recommended opinion:

Based solely on a certificate of status from the Department dated _____, 20__, the Client is authorized to transact business as a [foreign limited partnership] in the State of Florida, and its [limited partnership] status in Florida is active.

FRULPA provides, in Section 620.1903(1), a "safe harbor" list of activities by a limited partnership that do not constitute transacting business in Florida, which list is similar to the safe harbor lists for foreign business entities contained in the FBCA and FRLLCA. One noteworthy distinction is that Section 620.1903(3) of FRULPA expressly provides that "the ownership in this state of income-producing real property or tangible personal property," other than property excluded under the safe harbor list in subsection (1), constitutes transacting business in the State of Florida. The widely held view among Florida lawyers is that all foreign business entities that own income-producing property in Florida are required to obtain a certificate of authority to transact business in Florida.

One notable safe harbor activity in Florida is a foreign business entity's ownership of a limited partnership interest in a limited partnership that is doing business in Florida, unless such foreign business entity limited partner manages or controls the partnership or exercises the powers and duties of a general partner. See Section 607.1501(2)(l) of the FBCA, Section 605.0905(1)(l) of FRLLCA, Section 620.1903(1)(l) of FRULPA and Section 620.9104(1)(l) of FRUPA. Conversely, FRULPA requires, as a condition to the Department filing of a Florida certificate of limited partnership or a certificate of authority for a foreign limited partnership, that any general partner that is not an individual must be organized under Florida law or otherwise authorized to transact business in Florida. See Sections 620.1201(1)(c) and 620.1902(1)(e) of FRULPA.

In order to assess whether a Florida certificate of authority is required for a foreign limited partnership, Opining Counsel should obtain a factual certificate from a general partner of the Client describing fully the scope of the foreign limited partnership's business activities in Florida. Opining Counsel should then determine whether those activities go beyond the safe harbor exemptions listed in Section 620.1903(1) of FRULPA. In virtually all cases not expressly covered by the safe harbor, it is the widely held view among Florida lawyers that it will be necessary for the foreign limited partnership to obtain a certificate of authority to transact business in Florida.

If Opining Counsel is requested to render the recommended "authorized to transact business" opinion for a foreign limited partnership, Opining Counsel should obtain a certificate of status for the limited partnership from the Department under 620.1209(2) of FRULPA. However, if the foreign limited partnership has not obtained a certificate of authority from the Department, the Department cannot issue a certificate of active status. In such circumstance, Opining Counsel will need to assist the limited partnership in obtaining a certificate of authority in accordance with the requirements of Section 620.1902 of FRULPA before Opining Counsel will be in a position to render this opinion.

To obtain a certificate of authority, a foreign limited partnership must comply with the name requirements set forth in Section 620.1108(2) of FRULPA (e.g., the name of a limited partnership that is not a limited liability limited partnership must contain the phrase "limited partnership" or "limited" or the abbreviation "L.P." or "Ltd." or the designation "LP" and may not contain the phrase "limited liability limited partnership" or the abbreviation "L.L.L.P." or the designation "LLLP") or adopt an alternate complying name under Section 620.1905 of FRULPA. Further, under Section 620.1902(1)(e) of FRULPA, the Department will not issue a certificate of authority for a foreign limited partnership unless all general partners that are business entities are either organized under Florida law or are authorized to transact business in Florida.

After a foreign limited partnership has obtained a certificate of authority to transact business in Florida, Opining Counsel can then obtain a certificate of active status for that foreign limited partnership from the Department under Section 620.1209(2) of FRULPA. Subsection (3) of that statute provides that, "[s]ubject to any qualifications stated in the certificate, a certificate of status issued by the Department may be relied upon as conclusive evidence that the … foreign limited partnership … is authorized to transact business in this state." Under customary practice in Florida, Opining Counsel may rely solely on the certificate of active status issued by the Department in rendering the recommended opinion.

The circumstances under which a foreign limited partnership's certificate of authority may be administratively revoked by the Department are set forth in Section 620.1906 of FRULPA, such as the foreign limited partnership's failure to maintain a registered agent in Florida or its failure to file the required annual report or to pay the required fees or penalties. Even if circumstances exist that could result in administrative revocation of the foreign limited partnership's certificate of authority with the passage of time, Opining Counsel may opine that a foreign limited partnership is authorized to transact business in Florida, and the opinion is not an affirmation that no such circumstances then exist. However, if Opining Counsel has knowledge that circumstances for future revocation of the Client's certificate of authority exist at the time the opinion is rendered (or if Opining Counsel is aware of fact (red flags) that ought to cause a reasonable Opining Counsel to know of such circumstances), the recommended (but not mandatory) practice is for Opining Counsel to require the Client to take the necessary actions to cure the violation, since revocation of the Client's certificate of authority will generally constitute a violation of the Transaction Documents and will also preclude the Client from maintaining any legal proceeding in a Florida court.

When dealing with foreign limited partnerships, the history of the RICO agent provisions are peculiar and a potential trap for the unwary. In 2005, when FRULPA was enacted, the RICO agent provisions previously contained in Florida's limited partnership statute were removed from Florida's limited partnership statute.

However, even if a foreign limited partnership is not deemed to be transacting business in Florida requiring that such foreign limited partnership obtain a certificate of authority from the Department, such entity may still be required to have a registered office and appoint a registered agent for service of process if it owns an interest in Florida real property or a mortgage on Florida real property (and is not otherwise exempt from this requirement because it is a "financial institution"). Although FRULPA does not contain provisions similar to those contained in Section 607.0505 of the FBCA, the broad language of Section 607.0505 of the FBCA (covering alien business organizations as well as foreign corporations) may bring other entities such as foreign limited partnerships under the requirements of that statute. See "Foreign Corporation" above.

3. Foreign General Partnership

Except to the extent that the Florida Fictitious Name Act (Section 865.09, Florida Statutes) might apply, there are no statutory requirements that a foreign general partnership obtain a certificate of authority to transact business in Florida. Thus, it is never appropriate for Opining Counsel to render an opinion that a foreign general partnership has obtained a certificate of authority from the Department and is thereby authorized to transact business as a foreign general partnership in Florida.

If Opining Counsel agrees to render an opinion that a foreign general partnership does not need to obtain a certificate of authority to transact business in Florida, the recommended opinion language is a follows:

The Client is not required to obtain a certificate of authority from the Department to transact business in Florida.

The optional partnership registration system under FRUPA is available to foreign general partnerships, and Section 620.8105(4) of FRUPA provides that a certified copy of a partnership registration statement filed in another jurisdiction may be filed in Florida in lieu of an original statement. If a foreign general partnership has filed an optional FRUPA registration statement in Florida, then the foreign general partnership is exempt from the registration requirements of the Florida Fictitious Name Act. On the other hand, a foreign general partnership that is transacting business in Florida and has not elected to register under the optional partnership registration provisions of FRUPA may be required to register its name under the Florida Fictitious Name Act. See "Entity Status and Organization of a Florida Entity – Florida General Partnership." Compliance with the Florida Fictitious Name Act or with the optional partnership registration system under FRUPA is different from a requirement to apply for and obtain a certificate of authority to transact business in Florida.

Even though a foreign general partnership is not obligated to obtain a certificate of authority from the Department to transact business in Florida, such entity may still be required to have a registered office and appoint a registered agent for service of process if it owns an interest in Florida real property or a mortgage on Florida real property (and is not otherwise exempt from this requirement because it is a "financial institution"). Although FRUPA does not contain provisions similar to those contained in Section 607.0505 of the FBCA, the broad language of Section 607.0505 of the FBCA (covering alien business organizations as well as foreign corporations) may bring entities other than foreign corporations under the requirements of that statute. See "Foreign Corporation" above.

4. Foreign Limited Liability Partnership

Recommended opinion:

Based solely on a certificate of status from the Department dated _____, 20__, the Client is authorized to transact business as a [foreign limited liability partnership] in the State of Florida, and its [limited liability partnership] status in Florida is active.

Sections 620.9101 through 620.9105 of FRUPA include a provision whereby a foreign LLP may file a "statement of foreign qualification" to transact business in Florida, and a provision (i.e., Section 620.9104(1) of FRUPA) setting forth a "safe harbor" list of activities by a foreign LLP that do not constitute transacting business in Florida (which list parallels the safe harbor list contained in FRULPA). Like Section 620.1903(3) of FRULPA, Section 620.9104(2) of FRUPA expressly provides that "the ownership in this state of income-producing real property or tangible personal property," other than property excluded under the safe harbor list in Section 620.9104(1) of FRUPA, constitutes transacting business in the State of Florida. The widely held view among Florida lawyers is that Section 620.9104(2) of FRUPA requires all foreign limited liability partnerships that own income-producing property in Florida to obtain a certificate of authority to transact business in Florida.

Because the safe harbor lists in FRULPA and FRUPA are nearly identical, the diligence required to render the "authorized to transact business" opinion for a foreign LLP is similar to that required for a foreign limited partnership. In order to assess whether a Florida statement of authority is required for a foreign LLP, Opining Counsel should obtain a factual certificate from a general partner of the Client describing fully the scope of the foreign LLP's business activities in Florida. Opining Counsel should then determine whether those activities go beyond the safe harbor exceptions listed in Section 620.9104(1) of FRUPA. However, it is the widely held view among Florida lawyers that in virtually all cases not expressly covered by the safe harbor, a foreign LLP will need to obtain a certificate of authority from the Department.

If Opining Counsel is requested to render the recommended "authorized to transact business" opinion for a foreign LLP, Opining Counsel must obtain a certificate of active status for that LLP from the Department.

However, if the foreign LLP has not obtained a certificate of authority from the Department, the Department cannot issue a certificate of active status. In such circumstances, Opining Counsel will need to assist the Client in obtaining a certificate of authority in accordance with the filing procedures set forth in Section 620.9102 of FRUPA before Opining Counsel will be in a position to render this opinion.

The statement of foreign qualification under Section 620.9102 of FRUPA requires the appointment of an agent for service of process in Florida and requires that the name of the foreign limited liability partnership must end with "Registered Limited Liability Partnership," "Limited Liability Partnership," "R.L.L.P.," "L.L.P.," "RLLP" or "LLP." An application to obtain a certificate of authority for a foreign LLP cannot be filed, however, unless the partnership also files a partnership registration statement with the Department in accordance with the requirements of Section 620.8105 of FRUPA. Under Section 620.8105(3) of FRUPA, one key requirement for a partnership registration statement is that all of the partners in the registered partnership that are business entities (as well as any agent appointed by the partnership to maintain a list of partners, in lieu of naming all the partners in the registration statement) must be organized in Florida or otherwise hold a certificate of authority from the Department to transact business in Florida.

After the foreign LLP has registered with the Department under Section 620.8105 of FRUPA and has obtained its certificate of authority under Section 620.9102 of FRUPA, Opining Counsel can then obtain a certificate of active status for the LLP from the Department. Unlike the FBCA and FRULPA, the LLP provisions of FRUPA do not contain a provision expressly stating that a certificate of status issued by the Department is "conclusive evidence" of the foreign LLP's qualification. However, as a diligence matter, a certificate of status obtained from the Department with respect to a foreign LLP is the functional equivalent of the conclusive certificates issued by the Department with respect to foreign corporations and foreign limited partnerships, and under Florida customary practice, Opining Counsel may rely solely on such certificate of status when rendering the recommended opinion.

A foreign LLP is required under Section 620.9003 of FRUPA to file an annual report and to pay an annual filing fee to the Department. Failure to file the annual report or to pay the required fee may result in administrative revocation of the partnership's status as a LLP, but revocation is generally not an event of dissolution for the LLP unless the partnership agreement so provides. The statute does not provide for revocation of LLP status if the partnership fails to maintain an agent for service of process, although the annual LLP report must identify the name and address of the current agent. Neither the opinion that the foreign LLP is "authorized to transact business" nor the opinion that "its status is active" means or implies that there are no grounds existing under the statute for administrative revocation of such foreign LLP's limited liability status. However, if Opining Counsel has knowledge that circumstances for future revocation of the Client's certificate of authority exists at the time the opinion is rendered (or if Opining Counsel is aware of facts (red flags) that ought to cause a reasonable Opining Counsel to know of such circumstances), the recommended (but not mandatory) practice is for Opining Counsel to require the Client to take the necessary actions to cure the violation, since revocation of the Client's certificate of authority will generally cause a violation of the Transaction Documents and will also preclude the Client from maintaining any legal proceeding in a Florida court.

Even if a foreign LLP is not deemed to be transacting business in Florida requiring that such entity obtain a certificate of authority from the Department, such entity may still be required to have a registered office and appoint a registered agent for service of process if it owns an interest in Florida real property or a mortgage on Florida real property (and is not otherwise exempt from this requirement because it is a "financial institution"). Although FRUPA does not contain RICO agent provisions similar to those contained in Section 607.0505 of the FBCA, the broad language of Section 607.0505 of the FBCA (covering alien business organizations as well as foreign corporations) may bring other entities such as foreign LLPs under the requirements of that statute. See "Foreign Corporation" above.

5. Foreign Limited Liability Company

Recommended opinion:

Based solely on a certificate of status from the Department dated _____, 20__, the Client is authorized to transact business as a [foreign limited liability company] in the State of Florida, and its [limited liability company] status in Florida is active.

Section 605.0902(1) of FRLLCA requires a foreign limited liability company to obtain a certificate of authority from the Department prior to transacting business in Florida. Section 605.0905(1) of FRLLCA provides a "safe harbor" list of activities in Florida by a foreign LLC that do not constitute transacting business, which list is substantially the same as the lists contained in Section 607.1501(2) of the FBCA and Section 620.1903(1) of FRULPA.

If a foreign LLC has obtained a certificate of authority to transact business in the State of Florida, Opining Counsel should obtain an "active status" certificate from the Department. Section 605.0211(3) of FRLLCA provides that, "[s]ubject to any qualification stated in the certificate of status, a certificate of status or authority issued by the department is conclusive evidence that the . . . foreign limited liability company is authorized to transact business in this state and is of active status in this state."

If Opining Counsel is asked to opine as to whether or not a foreign LLC must obtain a certificate of authority in Florida, Opining Counsel must evaluate whether such authorization is required. In carrying out that evaluation, Opining Counsel should obtain a factual certificate from a manager of the Client (if manager-managed), from a member of the Client (if member-managed), or from an officer of the Client (if officers have been appointed under the LLC's operating agreement) describing fully the scope of the foreign LLC's business activities in Florida. Opining Counsel should then determine whether those activities fall within the safe harbor provisions of Section 605.0905(1) of FRLLCA. It is the widely held view of Florida lawyers that if the safe harbor exemptions do not expressly apply, the foreign LLC will need to obtain a certificate of authority from the Department.

A foreign LLC may not obtain a certificate of authority to transact business in Florida unless its name satisfies the same requirements applicable to domestic limited liability companies under Section 605.0112 of FRLLCA (i.e., its name must contain the words "limited liability company" or the abbreviation "L.L.C." or "LLC") or must adopt an alternative name pursuant to Section 605.0906 of FRLLCA.

The circumstances under which a foreign LLC's certificate of authority may be administratively revoked by the Department are set forth in Section 605.0908 of FRLLCA, such as the foreign LLC's failure for 30 days or more to maintain a registered agent, or its failure to file the required annual report or to pay the required fees or penalties. Even if circumstances exist that could result in administrative revocation of the LLC's certificate of authority with the passage of time, Opining Counsel may opine that a foreign LLC is authorized to transact business in Florida, and the opinion is not an affirmation that no such circumstances then exist. However, if Opining Counsel has knowledge that circumstances for future revocation of the Client's certificate of authority

exist at the time the opinion is rendered (or if Opining Counsel is aware of facts (red flags) that ought to cause a reasonable Opining Counsel to know of such circumstances), the recommended (but not mandatory) practice is for Opining Counsel to require the Client to take the necessary actions to cure the violation, since revocation of the Client's certificate of authority will generally constitute a violation of the Transaction Documents and will also preclude the Client from maintaining any legal proceeding in a Florida court.

Even if a foreign LLC is not deemed to be transacting business in Florida requiring that such LLC obtain a certificate of authority from the Department, such entity may still be required to have a registered office and appoint a registered agent for service of process if it owns an interest in Florida real property or a mortgage on Florida real property (and is not otherwise exempt from this requirement because it is a "financial institution"). Although FRLLCA does not contain RICO agent provisions similar to those contained in Section 607.0505 of the FBCA, the broad language of Section 607.0505 of the FBCA (covering alien business organizations as well as foreign corporations) may bring other entities such as foreign LLCs under the requirements of that statute. See "Foreign Corporation" above.

6. Trust with a Foreign Trustee

There is no statutory requirement that an individual non-resident of Florida serving as the trustee of a trust owning Florida real property obtain a certificate of authority to transact business in Florida prior to transacting business in Florida. This is true whether or not the trustee is entitled to the benefits of Section 689.071, Florida Statutes (the Florida Land Trust Act). Additionally, there is no statutory requirement that a foreign corporation or other foreign business entity serving as the trustee of a trust owning Florida real property obtain a certificate of authority to transact business in Florida merely because of such entity's status as a trustee. Opining Counsel should be aware, however, that the Florida statutes applicable to foreign entities may cause such entity to be required to obtain a certificate of authority to transact business in Florida because of the scope of its activities in Florida, including its status as a trustee of a trust.

7. Not-For-Profit Corporation

Florida's not-for-profit statute (Chapter 617, Florida Statutes) has provisions that require a foreign not-for-profit corporation to obtain a certificate of authority to transact business in Florida if such entity conducts its affairs or holds income producing property in Florida. The requirements described in "Foreign Corporation" above should be followed in connection with rendering an opinion that a foreign not-for-profit corporation is authorized to transact business in Florida.

B. Modifications to Subsection B – "Foreign Entity Not Required to Obtain a Certificate of Authority from the Department to Make a Loan"

The following section replaces in its entirety subsection A of the Report entitled "***Authority to Transact Business in Florida – Foreign Entity Not Required to Obtain a Certificate of Authority from the Department to Make a Loan*** " that is contained on pages 65 to 66 of the Report.

* * * * * * * * * * * * * * * * * * * *

B. Foreign Lender Not Required to Obtain a Certificate of Authority from the Department to Make a Loan

When representing a Client in connection with a loan transaction, Florida Opining Counsel may be asked to opine as to whether an out-of-state lender is required to be authorized to transact business in Florida in order to make a loan to a Florida entity or to make a loan secured by Florida property. Each of the Florida business entity statutes (for corporations, limited liability companies and general and limited partnerships) includes the following activities in its safe harbor list of activities that do not require a lender to become authorized to transact

business in Florida: (i) creating or acquiring indebtedness, mortgages, or security interests in real or personal property; and (ii) securing or collecting debts or enforcing mortgages or other security interests in property securing the debts. See Sections 607.1501(2)(g) and (h) of the FBCA, Sections 605.0905(1)(g) and (h) of FRLLCA, Sections 620.1903(1)(g) and (h) of FRULPA, and Sections 620.9104(1)(g) and (h) of FRUPA. For foreign corporations, foreign limited partnerships and foreign limited liability partnerships, the following additional phrase appears at the end of Section 607.1501(2)(h) of FBCA, Section 620.1903(1)(h) of FRULPA and Section 620.9104(1)(h) of FRUPA: "and holding, protecting, or maintaining the property so acquired."

However, if a foreign lender participates in any activity not specified within the safe harbor list, the foreign lender may be required to obtain a certificate of authority from the Department to transact business in Florida.

These other activities could include having physical premises in Florida, having loan officers in Florida, and operating a business on property that has been foreclosed, and could even include making a number of loans to Florida entities or making a number of loans secured by Florida property.

Regardless of its activities in the State of Florida, an entity possessing a national or federal charter, such as a national bank, will not be subject to the requirement under Florida law for obtaining a certificate of authority to transact business because of principles of federal preemption.

If this opinion is requested by an out-of-state lender, the recommended form of opinion is as follows:

Neither the making of the [Loan], nor the securing of the [Loan] with collateral, nor the ownership of the [Notes], will, solely as the result of any such action, require the [Lender] to obtain a certificate of authority to transact business as a foreign [corporation/limited partnership/general partnership/ limited liability partnership/limited liability company] in the State of Florida.

The following language may be added to the opinion by Opining Counsel if Opining Counsel wishes to state explicitly that no other activities are contemplated by this opinion:

However, we express no opinion with respect to the effect upon the [Lender] of engaging in any other activities in the State of Florida (including the making of additional loans in the State of Florida) or the effect upon the [Lender] of having a physical presence, if any, in the State of Florida.

This opinion does not mean (among other things) that: (i) the lender is not subject to personal jurisdiction in Florida, (ii) the lender may not be served with process in Florida, or (iii) the lender will not be subject to Florida taxes in connection with the loan.

If the Opinion Recipient requires a broader opinion which extends to otherwise requiring qualification or registration of the lender in the State of Florida, or which extends to the act of seeking to enforce the Transaction Documents in the State of Florida, and Opining Counsel agrees to give such an expanded opinion, Opining Counsel should consider the possible applicability of the registration requirements of Section 607.0505, Florida Statutes, and the requirements governing mortgage lenders at Part III, Chapter 494, Florida Statutes. In such

circumstances where an expanded opinion is given, unless the applicability or non-applicability of the requirements is clear, the Opinion Recipient should be prepared to accept a qualification to the opinion such as the following:

> **... except that (i) if [Lender] is not a "financial institution" as defined in Section 607.0505, Florida Statutes (which definition includes, but is not limited to, state and national banks and state and federal savings associations, insurance companies licensed or regulated by the United States or a state, and licensed Florida mortgage lenders), [Lender] may be required to maintain a registered office and a registered agent in the State of Florida and file a notice thereof with the Department of State under Section 607.0505, Florida Statutes, (ii) upon [Lender's] taking of title to any of the collateral or the operation of the facilities thereon located within the State of Florida, [Lender] may be subject to doing business and registration requirements under Sections 607.0505 and 607.1501, Florida Statutes, (iii) [Lender] may be required to be licensed as a Florida mortgage lender unless [Lender] makes only nonresidential mortgage loans and sells loans only to institutional investors within the meaning of Chapter 494, Florida Statutes, or unless [Lender] is a state or federally chartered bank, trust company, savings and loan association, savings bank or credit union, bank holding company regulated under the laws of any state or the United States, or insurance company if the insurance company is duly licensed in Florida, or is a wholly owned bank holding company subsidiary or a wholly owned savings and loan association holding company subsidiary that is formed and regulated under the laws of any state or the United States and that is approved or certified by the Department of Housing and Urban Development, the Veterans Administration, the Federal National Mortgage Association, or the Federal Home Loan Mortgage Corporation, or is otherwise exempt.**

In some cases, the Opinion Recipient may ask that Opining Counsel describe the repercussions of the failure of an out-of-state lender to become authorized to transact business under Section 607.1501, Florida Statutes, or to register under Section 607.0505, Florida Statutes. In such cases, the following may be included in the opinion:

> **Failure to become authorized to transact business under Section 607.1501, Florida Statutes, if required, will result in the inability of the entity to prosecute or maintain an action or proceeding in the State of Florida (until qualified), but will not prevent the entity from defending itself in a lawsuit in Florida, and will entitle the Department (under Section 607.1502, Florida Statutes) to impose the fees and taxes that would have been charged if the entity had been qualified together with, to the extent ordered by a court of competent jurisdiction, a civil money penalty of not less than $500 or more than $1,000 for each year or part thereof during which the entity transacted business without qualifying. Failure to register under Section 607.0505, Florida Statutes, if required, will not result in the inability of the entity to either bring suit or defend itself in a suit in the State of Florida, but will entitle the Department (under Section 607.0505(1)(b), Florida Statutes) to impose a civil money penalty in the amount of $500 for each year or part thereof during which the entity should have been registered. Such liability will be forgiven in full upon the compliance by the entity with the registration requirements. Additional penalties and consequences, including the filing of a lis pendens, could result from any proceedings brought by the Florida Department of Legal Affairs to enforce the registration provisions of Section 607.1501, Florida Statutes. However, the failure of an entity to become authorized to transact business under Section 607.1501, Florida Statutes, or the entity's failure to register under Section 607.0505, Florida Statutes, if required, does not adversely affect the creation or perfection of liens in favor of the entity.**

REVISIONS TO "ENTITY POWER OF A FLORIDA ENTITY"

A. Modifications to Subsection A – "Corporation "

The following section replaces in its entirety subsection A of the Report entitled "***Entity Power of a Florida Entity – Corporation*** " that is contained on page 70 of the Report.

* * * * * * * * * * * * * * * * * * *

A. Corporation

> ***Recommended opinion:***
>
> **The Client has the corporate power to execute and deliver the [Transaction Documents] and to perform its obligations thereunder.**

Corporate power of a Florida corporation is derived from the FBCA and the corporation's articles of incorporation. To render a corporate power opinion, Opining Counsel should review the FBCA. Under Section 607.0301 of the FBCA, a corporation may be organized for any lawful business. Section 607.0302 of the FBCA then gives the corporation powers to act as if it were an individual, except to the extent of any limitations set forth in the corporation's articles of incorporation. Accordingly, Opining Counsel should examine the powers (and limits, if any) stated in the corporation's articles of incorporation to confirm that the corporation has the corporate power to execute and deliver the Transaction Documents and perform its obligations thereunder.

Under Section 607.0302 of the FBCA, only a corporation's articles of incorporation define its corporate power. Notwithstanding the foregoing, the Committees recommend that Opining Counsel also review the corporation's bylaws to determine whether the bylaws limit the powers of the corporation in any manner.

Under Section 607.1405 of the FBCA, a corporation that is dissolved only has the power to wind up its affairs. As a result, before rendering a power opinion with respect to the corporation, Opining Counsel should determine whether the corporation has filed Articles of Dissolution with the Department or has been administratively dissolved; and if Articles of Dissolution have been filed or the corporation has been administratively dissolved, Opining Counsel should confirm that the Transaction is engaged in for the purpose of winding up the affairs of the corporation or, alternatively, but only in cases where the corporation has been administratively dissolved, should arrange for the corporation to be reinstated before completing the Transaction.[1]

In most situations, the corporation's articles of incorporation will authorize the corporation to engage in any legal activity. However, there are exceptions to this general rule and Opining Counsel should be aware that the articles of incorporation of some corporations may expressly limit the freedom and power of the corporation to engage in certain transactions or may include SPE provisions that limit the power of the corporation in certain circumstances or in a certain manner. See "Limitations on Power and Special Purpose Entities" below. In any such case, Opining Counsel should carefully review the Organizational Documents of the corporation to determine whether any such provisions preclude or otherwise limit the corporation from having the power to enter into the Transaction and perform its obligations under the Transaction Documents.

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[1] The discussion in this paragraph regarding matters to be considered if a Florida entity has filed Articles of Dissolution or if a Florida entity has been administratively dissolved applies equally to opinions regarding Florida corporations, Florida limited liability companies, Florida limited partnerships, and other types of Florida entities. Future versions of this Report will include this same analysis with respect to opinions on "entity power" for other types of Florida entities.

B. Modifications to Subsection E – "Limited Liability Company"

The following section replaces in its entirety subsection E of the Report entitled "***Entity Power of a Florida Entity – Limited Liability Company***" that is contained on page 71 of the Report. The principal changes made to this section relate to updating statutory references to address the enactment of Chapter 605, Florida Statutes (FRLLCA).

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E. Limited Liability Company

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

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

In the context of an LLC with more than one member, if the Client does not have a written operating agreement, the Committees believe that Opining Counsel should not render an entity power opinion with respect to the Client. In the context of an LLC with only one member, Opining Counsel should not render an entity power opinion with respect to the Client unless the Client has either (i) a written operating agreement, or (ii) a record sufficient to confirm the identity of the member, to establish whether the LLC is member-managed or manager-managed, and to establish who is authorized to act on behalf of the LLC.

Unless the Client's articles of organization or operating agreement provide otherwise, each Florida limited liability company has the requisite entity power to engage in any lawful activity, and Section 605.0109 of FRLLCA provides that an LLC has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including a non-exclusive list of permitted actions enumerated in that section.

Under Section 605.0709 of FRLLCA, an LLC that is dissolved only has the power to wind up its affairs. As a result, before rendering a power opinion with respect to the LLC, Opining Counsel should determine whether the LLC has filed Articles of Dissolution with the Department or has been administratively dissolved; and if Articles of Dissolution have been filed or the LLC has been administratively dissolved, Opining Counsel should confirm that the Transaction is engaged in for the purpose of winding up the affairs of the LLC or, alternatively, but only in cases where the LLC has been administratively dissolved, should arrange for the LLC to be reinstated before completing the Transaction[2].

[2] The discussion in this paragraph regarding matters to be considered if a Florida entity has filed Articles of Dissolution or if a Florida entity has been administratively dissolved applies equally to opinions regarding Florida limited liability companies, Florida corporations, Florida limited partnerships, and other types of Florida entities. Future versions of this Report will include this same analysis with respect to opinions on "entity power" for other types of Florida entities

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

C. Modifications to Subsection F – "Trusts"

The following section replaces in its entirety subsection F. of the Report entitled: "***Entity Power of a Florida Entity – Trusts***" that is contained on pages 72-75 of the Report.

* *

F. Trusts

Recommended opinion:

The Client(s), as trustee(s) of the trust, has/have the trust power to execute and deliver the [Transaction Documents] and to perform the Client(s)' obligations thereunder.

(1) General

Because a trust is not a separate statutory entity under Florida law (see "Entity Status and Organization of a Florida Entity – Trusts"), the trust power is not derived from the trust itself. Rather, the trust power is derived from the power of the trustee(s) to act on behalf of the trust. Accordingly, in addressing trust power, Opining Counsel must make two key inquiries: (i) first, whether a trustee that is an entity rather than an individual has the power to engage in the Transaction based on the trustee's Organizational Documents and the Florida law governing such entity's organization and existence, and (ii) second, whether the trustee has the power to engage in the Transaction under the trust agreement, and for a Florida Land Trust without a written trust agreement, whether the trustee has the power to engage in the Transaction pursuant to a recorded instrument that qualifies the arrangement as a Florida Land Trust under Section 689.071, Florida Statutes.

(a) Trustee as Business Entity. If the trustee is a Florida corporation, partnership or LLC, Opining Counsel should first inquire as to the entity power of that particular entity. Generally, this inquiry will be the same as the inquiry set forth above relative to the steps to be taken to determine whether that business entity, in its own capacity, has the power to engage in the Transaction and deal with trust property, and therefore has the power to execute and deliver the Transaction Documents and perform its obligations under such documents on behalf of the trust beneficiaries.

(b) Trustee Power. The extent of the second inquiry is dependent upon: (i) whether the trust relationship satisfies the requirements of Section 689.071, Florida Statutes and therefore qualifies as a Florida Land Trust, (ii) whether, in the context of a Transaction involving real property, the provisions of Section 689.07, Florida Statutes, are applicable because the real property has been conveyed to a person or entity simply "as trustee," without setting forth any of the powers required to avail the trustee of the benefit of the presumption arising under Section 689.071, Florida Statutes, (iii) whether a separate written trust document or other agreement governing the trust relationship exists, and (iv) whether the beneficiaries of the trust need to consent to the execution, delivery and performance of the Transaction Documents for the trustee to have the power to take the required actions. If a written trust document or other agreement governing the trust relationship exists, then, even if the trust relationship is a Florida Land Trust created pursuant to Section 689.071, Florida Statutes, or the real property has been conveyed to a person or entity simply "as trustee," a review of the trust document or other agreement governing the trust relationship must be made by Opining Counsel to render the opinion.

(2) Florida Trusts Other than Florida Land Trusts

(a) *Trusts with Written Trust Agreements*.

In most cases, each trustee of a Florida trust derives the power to own and deal with trust property and to transact business, and thus to execute and deliver the Transaction Documents and to perform his, her or its obligations under such documents, from the terms of the trust agreement or other agreement governing the trust. Except in the limited situations described below, Opining Counsel should not render an opinion regarding the trust unless Opining Counsel obtains a copy of the trust agreement or other agreement governing the trust relationship and performs the following further diligence. In this regard, Opining Counsel should: (i) review the trust agreement or other agreement governing the trust relationship to determine whether any trust beneficiaries and/or other parties hold the power of direction over the actions of the trustee and, if so, to determine which trust beneficiaries and/or other parties hold such power of direction; (ii) review any other agreement that may have been made among the trust beneficiaries regarding their direction of the trustee to determine compliance with any approval requirements in any such other agreement; and (iii) determine that the appropriate trust beneficiaries and/or other parties (or any required majority, if not required to be unanimous) have executed a written direction to the trustee with respect to the action to be taken.

(b) *Trusts without Written Trust Agreements*

If the Transaction is large enough or important enough to require a third-party legal opinion, then the trust's affairs are sufficiently complex to require a written trust agreement. Accordingly, in this context, Opining Counsel should not opine with respect to any trust (other than possibly with respect to a Florida Land Trust) unless the trust is subject to or has a written trust agreement.

(c) *Passive Trusts – Powers of Beneficiaries*

If Opining Counsel determines that the trust is "passive," that is, that the trustee has no active managerial or decision-making authority, then the beneficiaries, as well as the trustee, should execute all necessary Transaction Documents. The beneficiaries also need to execute all necessary Transaction Documents or provide a written consent or similar written instrument in circumstances where the trust agreement requires such execution or fails to extend clear express power to the trustee(s).

(d) *Trusts Where Title to Real Property is Held by Trustee*

This analysis is particularly true in the case of a trust in which title to real property is held by a trustee, whether or not the trustee has the benefit of any statutory presumption concerning the organization of the trust and his, her or its authority to deal with the real property. See Fund Title Note 31.03.03 (2001). Furthermore, in the case of a trust in which title to real property is held by a trustee, Opining Counsel should cause to be recorded in the public real estate records either: (i) the unrecorded trust instrument (to which the Client may object), or (ii) an affidavit, certificate, or other instrument by the trustee or the trustee's counsel establishing the identity of the trustee, the execution of the trust instrument, the power of the trustee to act under the trust instrument and confirming that the trustee's power has not been revoked and remains in full force and effect.

(e) *Consents from Trustee and Beneficiaries*

Additionally, to render the foregoing opinion, Opining Counsel must obtain properly executed certificates of consent or similar written instruments from the trustee and each beneficiary of the trust who has a power to direct the activities of the trust under the trust agreement, confirming the trust's power to enter into and perform the Transaction Documents and the trustee's power to execute and deliver the Transaction Documents on behalf of the trust. In such certificates: (i) all such beneficiaries, as well as the holders of any security interests in their beneficial interests, should be identified and (ii) the trustee should be directed to consummate the Transaction and execute and deliver the Transaction Documents. If any holders of security interests are identified, Opining Counsel should confirm that all such holders have consented to the Transaction.

(3) Effect of Presumption Arising Under Section 689.071, Florida Statutes

(a) *Generally*

For trusts created prior to July 1, 2013, a trust is a Florida Land Trust under Section 689.071, Florida Statutes, if: (1) a deed or other recorded instrument naming the trustee as grantee or transferee sets forth the trustee's powers, and (2) the recorded instrument or trust agreement expresses the intention to create a land trust (see Section 689.071(12), Florida Statutes).

For land trusts created on or after July 1, 2013, a trust is a land trust under Section 689.071 if: (1) a deed or other recorded instrument naming the trustee as grantee of transferee sets forth the trustee's powers, and (2) the trustee has limited duties that do not exceed the duties set forth in Section 689.071(2)(c), Florida Statutes.

The trustee of a Florida Land Trust derives his, her, or its power or capacity to transact business on behalf of the trustee from Section 689.071, Florida Statutes, and the deed or other instrument of conveyance naming the trustee as grantee or transferee. In such case, third parties dealing with the trustee who do not have actual or constructive notice of the terms of a trust agreement may be entitled to the benefit of Section 689.073, Florida Statutes, if the conveyance into the trust qualifies under such statute. In that case, trust powers exist to the extent specified in the deed or other instrument of conveyance into the trustee.

(b) *Florida Land Trusts Without Written Trust Agreements*

If the trust satisfies the requirements of Section 689.071, Florida Statutes, Opining Counsel can render the trust power opinion even if there is no separate written trust agreement governing the trust relationship. However, because the customary practice in dealing with most opinions involving trusts is not to render an opinion unless a written trust agreement exists, the exception from this rule should only be applied in limited circumstances. For the exception to apply, the three requirements set forth in "Entity Status and Organization of a Florida Entity – Trusts – Trusts Owning Real Estate – Florida Land Trust without Written Trust Agreements" must all be satisfied.

If all three requirements are satisfied, then Opining Counsel must review the recorded instrument and determine whether the express language in the recorded instrument confers on the trustee the power to execute, deliver and perform the Transaction Documents without any power of direction by the trust beneficiaries or any other parties.

In the case of a Florida Land Trust, if there is no trust agreement or other agreement governing the trust relationship, but the express language in the recorded instrument creating the Florida Land Trust establishes that there are trust beneficiaries or other parties who hold a power of direction over the actions of the trustee, then Opining Counsel must also: (i) review any documents that may have been executed by the designated trust beneficiaries or other parties regarding their direction of the trustee, (ii) confirm compliance with any approval requirements in any such recorded instrument, and (iii) confirm that such trust beneficiaries or other parties (or any required majority, if not required to be unanimous) have executed a written direction to the trustee with respect to the action to be taken.

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

In the case of a Florida Land Trust, if a separate written trust agreement or other agreement governing the trust relationship also exists, Opining Counsel should not render the opinion unless Opining Counsel, in addition to addressing the requirements in the recorded instrument, performs the following further diligence: (i) Opining Counsel should review whatever documents are available that govern the trust relationship to determine whether any trust beneficiaries and/or other parties hold the power of direction over the actions of the trustee and, if so, which trust beneficiaries and/or other parties hold such power of direction; (ii) Opining Counsel should review

any other agreement that may have been made among the trust beneficiaries regarding their direction of the trustee to determine compliance with any approval requirements in any such other agreement; and (iii) Opining Counsel should determine that the appropriate trust beneficiaries and/or other parties (or any required majority, if not required to be unanimous) have executed a written direction to the trustee with respect to the action to be taken. Moreover, if the terms of the trust agreement or other agreement governing the trust relationship are inconsistent with the powers set forth in the recorded instrument, the terms in the trust agreement or other agreement governing the trust relationship will generally prevail over the powers set forth in the recorded instrument.

Notwithstanding the requirement set forth herein that Opining Counsel review any underlying trust agreement that may exist, such requirement is not intended to modify or affect the protection of third parties set forth in Section 689.073, Florida Statutes.

(4) Effect of Presumption Arising Under Section 689.07, Florida Statutes.

Under Section 689.07, Florida Statutes, a deed by which real property is conveyed to a person or entity simply "as trustee," without setting forth any of the powers required to avail the trustee of the benefit of the presumption arising under Section 689.071, Florida Statutes, grants an absolute fee simple estate in the real property to the "trustee," individually, including both legal and equitable title, provided the other requirements of Section 689.07, Florida Statutes, are met. In such case, a Florida land trust is not created, the recital of trust status is disregarded as a matter of law, and Opining Counsel should ensure that the "trustee" executes the Transaction Documents in his, her or its individual capacity. In such case, the owner of the real property is not the trustee of a trust and no special form of opinion is necessary. In addition, if the "trustee" is an entity, Opining Counsel must determine whether such entity has the entity power, in its own right, to own and deal with such property and to execute and deliver the Transaction Documents and perform its obligations thereunder.

Nevertheless, because the deed indicated that the putative "trustee" was acquiring title in a trust capacity, Opining Counsel should obtain a certificate from the "trustee" regarding whether he, she or it has made a declaration of trust and, if so, whether any written trust instrument or instruments exist. If a trust instrument exists, then Opining Counsel should obtain a copy and perform the diligence described above in "Florida Trusts Other than Florida Land Trusts."

REVISIONS TO "AUTHORIZATION OF THE TRANSACTION BY A FLORIDA ENTITY"

A. Modifications to Subsection D – "Limited Liability Company"

The following section replaces in its entirety subsection D. of the Report entitled "*Authorization of the Transaction by a Florida Entity – Limited Liability Company*" that is contained on pages 82-85 of the Report. The principal changes made to this section relate to updating statutory references to address the enactment of FRLLCA.

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D. Limited Liability Company

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

To render an authorization opinion, Opining Counsel must determine whether its LLC Client has authorized the Transaction in accordance with Chapter 605, Florida Revised Limited Liability Company Act (effective January 1, 2015) (FRLLCA), the LLC's articles of organization and the LLC's operating agreement, and whether the member, manager or officer authorized to execute and deliver the Transaction Documents on behalf of the LLC has been authorized to bind the LLC to the Transaction Documents.

The Committees believe that a third-party legal opinion with respect to the authorization of a transaction by a Florida LLC should not be rendered with respect to an LLC unless (i) if the LLC that has more than one member, the LLC has a written operating agreement, or (ii) if the LLC has only one member, the LLC has a written operating agreement or the LLC has a record sufficient to confirm the identity of the member, to establish whether the LLC is member-managed or manager-managed, and to establish who is authorized to act on behalf of the LLC.

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

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

Section 605.0201(3)(a) of FRLLCA permits the articles of organization to include an optional statement that the LLC is to be a manager-managed company, and Section 605.0201(3)(d) of FRLLCA permits the articles of organization to include a notice of any limitations on the authority of a manager or member. If either of these provisions are added or changed by an amendment or restatement of the articles of organization, Section 605.0103(4)(b)5. of FRLLCA provides that the amended and restated articles of organization do not constitute notice of the addition or change until 90 days after the effective date of the amendment or restatement. Further, Section 605.0103(4)(b)5. of FRLLCA provides that a provision in an LLC's articles of organization

limiting the authority of a manager or a member to transfer real property held in the name of the LLC is not notice of the limitation to any person (except to a member or manager) unless such limitation appears in an affidavit, certificate or other instrument that bears the name of the LLC and is recorded in the public records in the county where the real property is located.

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

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

Under Section 605.0302 of FRLLCA, an LLC may file a Statement of Authority (SOA) with the Department (or in the case of transferring real property, recording a certified copy of the SOA in the proper recording office) to put third parties on notice of specific individuals who have the power and authority to bind the LLC. The individuals named in the SOA do not have to be members or managers of the LLC. A certified copy of a SOA recorded in the public records of a particular county applies to all real property owned by the LLC in that county and can be relied upon by bona fide purchasers and mortgagees. The SOA permits reliance on behalf of third parties for those named individuals of the LLC to execute documents on behalf of the LLC or to limit the authority of certain managers or members. Where a proper SOA is recorded, the deed or mortgage must come from the individual(s) authorized under the SOA. A recorded SOA is valid for 5 years after the statement is effective unless a statement of cancellation, limitation, or denial is recorded. The recorded SOA does not eliminate the need to confirm the active status of the LLC; if an LLC has been dissolved, no reliance can be placed on any SOA recorded prior to the dissolution. A dissolved LLC may file a post-dissolution SOA that identifies individuals who can execute documents on behalf of the dissolved LLC. The SOA can be cancelled, limited, or denied, so it is important to check the public records of the county in which the real property is located in order to confirm that a statement of cancellation, limitation, or denial has not been recorded.

In considering authorization of a transaction by an LLC, it is important to keep in mind that under Section 605.0709 of FRLLCA, an LLC that is dissolved only has the power to wind up its affairs. As a result, before rendering an authorization opinion with respect to an LLC, Opining Counsel should determine whether the LLC has filed Articles of Dissolution with the Department or has been administratively dissolved, and if Articles of Dissolution have been filed or the LLC has been administratively dissolved, Opining Counsel should confirm that the transaction as to which the opinion is being rendered is solely for the purpose of winding up the affairs of the LLC, or, if the LLC has been administratively dissolved, should arrange for the LLC to be reinstated before completing the transaction.[3]

If neither a Statement of Authority has been filed nor a grant of authority has been provided for in the articles of organization (or with respect to a transfer of real estate, neither a certified copy of a Statement of Authority nor an affidavit, certificate or other instrument indicating such authority, has been recorded), under Section 605.0474(3*)* of FRLLCA a third party can rely upon a deed, mortgage, or other instrument executed by

[3] The discussion in this paragraph regarding matters to be considered if a Florida entity has filed Articles of Dissolution or if a Florida entity has been administratively dissolved applies equally to opinions regarding Florida corporations, Florida limited liability companies, Florida limited partnerships, and other types of Florida entities. Future versions of this Report will include this same analysis with respect to opinions on the "authorization of the transaction" for other types of Florida entities.

any member of a member-managed LLC or any manager of a manager-managed LLC listed on the Florida Division of Corporation's website, without reviewing the operating agreement of the LLC. Under Florida Statutes Section 605.0201 of FRLLCA, the articles of organization may, but are not required to, contain the names and addresses of the members or managers of the LLC. Accordingly, if the articles of organization of a newly formed LLC filed with the Department do not identify the members or managers of the LLC, or the member or manager who is executing the documents is not listed in the filed articles of organization of the LLC as a member or manager, Opining Counsel should obtain and review a copy of the operating agreement of the LLC (or in the context of a single member LLC, an operating agreement or a record sufficient to confirm the identity of the member, to establish whether the LLC is member-managed or manager-managed, and to establish who is authorized to act on behalf of the LLC) to confirm the authority of the executing member or manager.

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

The following sections discuss matters for Opining Counsel to consider in determining whether an LLC has properly authorized a Transaction.

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

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

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

With respect to the agency authority of members of an LLC, Section 605.04074 of FRLLCA provides, unless properly limited, that, in a member-managed LLC, each member is an agent of the LLC for the purpose of its business, and an act of a member, including the signing of an instrument in the LLC's name, for apparently carrying on in the ordinary course the LLC's business or business of the kind carried on by the LLC, binds the

LLC unless the member had no authority to act for the LLC in the particular matter and the person with whom the member was dealing knew or had notice that the member lacked authority. An act of a member that is not apparently for carrying on in the ordinary course the LLC's business or business of the kind carried on by the LLC binds the LLC only if the act was authorized by appropriate vote of the other members of the LLC. As noted in (3) below, however, the real estate rule set forth in Section 605.04074(3) of FRLLCA overrides these agency and authority rules for member-managed companies.

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

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

With respect to the agency authority of members in a manager-managed LLC, Section 605.04074(2) of FRLLCA provides that in a manager-managed LLC, a member is not an agent of the LLC for the purpose of its business solely by reason of being a member. In a manager-managed LLC, each manager is an agent of the LLC for the purpose of its business, and an act of a manager, including the signing of an instrument in the LLC's name, for apparently carrying on in the ordinary course the LLC's business or business of the kind carried on by the LLC binds the LLC, unless the manager had no authority to act for the LLC in the particular matter and the person with whom the manager was dealing knew or had notice that the manager lacked authority. An act of a manager that is not apparently for carrying on in the ordinary course the LLC's business or business of the kind carried on by the LLC binds the LLC only if the act was authorized under Section 605.04074(2)(c) of FRLLCA. As noted in (3) below, however, the real estate rule set forth in Section 605.04074(3) of FRLLCA overrides these agency and authority rules.

To render an opinion that a manager-managed LLC has approved a Transaction, Opining Counsel should review the articles of organization and the operating agreement of the LLC, determine the requisite vote of managers (and, if applicable, the requisite vote of members) to approve the Transaction and then obtain evidence as to the approval by such requisite vote of managers (and, if applicable, members). Each requisite vote should be documented in writing. Additionally, Opining Counsel should review FRLLCA to determine whether the action to be taken by the manager-managed LLC nevertheless requires the LLC to obtain member approval for

the particular Transaction even if not otherwise required by the operating agreement. Alternatively, if a SOA has been filed with the Department (or, in the case of a transfer of real estate, a certified copy of the SOA has been recorded in the public records of the county of the transaction), Opining Counsel can rely on the acts of the named individuals of the LLC to execute documents on behalf of the LLC.

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

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

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

Opining Counsel should recognize that Opining Counsel has the responsibility to become comfortable, based on the particular facts and circumstances, that the requisite approval of the other entities that are members and/or or managers of the LLC entering into the Transaction and the Transaction Documents has been obtained. If Opining Counsel cannot satisfy itself in that regard, Opining Counsel should expressly set forth in the opinion letter any limitations on the scope of Opining Counsel's opinion (or make assumptions on those topics) as a result of not having been able to satisfy itself regarding necessary approvals by other entities that are members and/or managers of the LLC.

Fiduciary Duties. The authorization opinion does not mean that the LLC's managers or the managing members who are managing the LLC, as applicable, complied with their fiduciary duties in approving the Transaction and the Transaction Documents.

REVISIONS TO "OPINIONS WITH RESPECT TO ISSUANCES OF COMMON STOCK BY A FLORIDA CORPORATION"

A. Modifications to Entire Section

The following replaces in its entirety the section of the Report entitled "***Opinions with Respect to Securities***" that is contained on pages 123 to 131 of the Report.

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In Transactions in which a Florida corporation is issuing equity securities, Opining Counsel may be asked to render opinions regarding the Client's 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 Report Section addresses opinions regarding issuances of common stock by Florida corporations. Opinions regarding issuances of preferred stock by Florida corporations are addressed in the separate new section of the Report entitled "***Opinions with Respect to Issuances of Preferred Stock by a Florida Corporation***" and opinions regarding issuances of membership interests by Florida limited liability companies are addressed in the separate new section of the Report entitled "***Opinions with Respect to Issuances of Membership Interests of a Florida Limited Liability Company***." This Report does not address opinions regarding issuances of securities by limited partnerships or general partnerships. The Committees may cover 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 common stock, $____ par value per share[4].

The authorized capitalization opinion means that, as of the date of the opinion, the Client is authorized to issue the number of shares of capital 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. If the capitalization of the corporation includes both common stock and preferred stock and the opinion is to cover both, Opining Counsel also should be guided by the discussion in the subsection of the Report entitled "***Opinions with Respect to Issuances of Preferred Stock by a Florida Corporation – Corporations – Authorized Capitalization – Preferred Stock.***"

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 series of shares within a class and the number of shares of each class and series of shares that it is authorized to issue. If more than one class or series of shares is authorized, the articles of incorporation must set forth a distinguishing designation for each class and series and, prior to the issuance of shares of a class or series, the preferences, limitations and relative rights of that class or series.

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[4] If the corporation also has preferred shares authorized in the Articles of Incorporation, the preferred shares should be reflected in the "authorized capitalization" opinion even if the issuance of shares that is the subject of the opinion letter only relates to common shares.

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 the most recent restated articles of incorporation) to determine the classes and series of shares and the number of shares authorized for each class and series 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 and certificates to determine the current classes and series of shares and the current number of shares authorized for each class and series 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 [common] 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 common stock). This opinion means that the corporation has taken the necessary corporate actions to reserve a portion of its authorized shares 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 [common 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 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 an 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 Shares

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

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

1. Duly Authorized.

Under Florida customary practice, this opinion means that: (a) the issuance of the shares has been authorized by all necessary corporate action in compliance with the FBCA and the articles of incorporation and bylaws of the corporation, and (b) the number of shares that have been issued (together with any additional shares proposed to be issued) are not in excess of the number of shares of the particular class or classes authorized by the articles of incorporation, as amended to date. This opinion does not mean that any previously issued and outstanding 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 shares were properly issued. See "Corporations – Outstanding Equity Securities" below.

In determining the number of 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 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 shares to be issued is adequate.

Prior to January 1, 2020, under Section 607.0825(1)(e) of the FBCA, the board of directors of a Florida corporation could not delegate authority to authorize or approve the issuance or sale or contract for the sale of shares; however, the board of directors was able to 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 the shares so long as such issuance, sale or contract for sale was within limits specifically prescribed by the board of directors in the authorizing resolutions.

As of January 1, 2020, Section 607.0825 of the FBCA, by no longer expressly prohibiting such delegation, allows the board of directors of a Florida corporation to delegate authority to a board committee (but only to a board committee and not to a senior executive officer of the corporation) to authorize or approve the issuance or sale or contract for the sale of shares without any need to prescribe limits in authorizing resolutions. Accordingly, if such power is delegated to a board committee and no limits are specified by the board of directors in the authorizing resolutions, the board committee will not be subject to any limits (other than carrying out such authorization or approval subject to the same fiduciary obligations that the board of directors would have in taking such action).

In addition, as of January 1, 2020, Section 607.0624(3) of the FBCA allows the board of directors of a Florida corporation to delegate authority to a board committee or to one or more officers (not just executive officers), or a board committee so authorized by the board of directors to delegate authority to one or more officers (not just executive officers) to authorize or approve the issuance of rights, options, warrants or other equity compensation without any need to prescribed limits in authorizing resolutions. Accordingly, if such power is delegated and no limits are specified in the delegation, the board committee or officer(s), as the case may be, will not be subject to any limits (other than carrying out such authorization or approval subject to applicable fiduciary obligations).

Notwithstanding and although not legally required, good corporation governance practices may suggest that the board of directors should set parameters or limitations for any such delegation.

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.

Diligence Checklist – Corporation. To render the "duly authorized" portion of this opinion, Opining Counsel should take the following actions[5]:

- 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 shares of stock is reserved to the shareholders.
- Opining Counsel should confirm that the issuance of the 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.
- Shares issued prior to January 1, 2020 - If any aspects of the issuance of the 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, prior to January 1, 2020, Section 607.0825 of the FBCA provided that no committee of the board of directors of a corporation could have the authority to authorize or approve the issuance or sale or contract for the sale of shares, except that the board of directors could have authorized a committee (or a senior executive officer) to do so within limits specifically prescribed by the board of directors. In connection with an issuance of shares prior to January 1, 2020, Opining Counsel should also verify that any actions taken by the committee (or such senior executive officer) with respect to the issuance of the shares were taken in accordance with the FBCA and the corporation's articles of incorporation and bylaws.
- Shares issued on or after January 1, 2020 - If any aspects of the issuance of the shares was delegated to a committee of the board of directors shares, Opining Counsel should confirm that the authority was delegated to the committee in accordance with the FBCA and that the committee properly acted within that authority. Opining Counsel should also verify that any actions taken by the committee with respect to the issuance of the 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 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 shares, the board of directors (or shareholders, committee or appropriate 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.

[5] A number of the actions to be taken that are recommended in this diligence checklist on the duly authorized portion of this opinion technically relate to the "valid issuance" of the shares rather than the "authorization of the shares." However, because these two concepts are most often considered together by Opining Counsel, the recommended diligence steps described in this "authorization" diligence checklist also include those items that relate to the "valid issuance" opinion.

- Opining Counsel should examine the authorizing resolution(s) to confirm that the board of directors (or shareholders and/or committee and/or an appropriate officer): (a) approved the issuance of the shares, (b) recited the consideration for which the shares were to be issued, and (c) determined in such resolution that the consideration received or to be received for the shares was adequate.

2. Validly Issued.

This opinion means that the 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 an appropriate officer) of the corporation which authorized such issuance. The "validly issued" opinion should not be rendered by Opining Counsel unless the 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 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 shares pursuant to Section 607.0604 of the FBCA. Before a corporation issues shares, the board of directors (or shareholders, if the power to issue shares has been reserved to the shareholders in the articles of incorporation) must determine that the consideration received or to be received for the 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 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 shares will not be deemed to have been validly issued until the consideration for the issuance of such 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, shares may, but need not be, represented by certificates. However, if shares are represented by a certificate or certificates, then, at a minimum, each 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 shares are issued; and

(c) the number and class of 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 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 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 shares are validly issued subsumes within it an opinion that the certificates issued representing the 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 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 shares without certificates. If the shares are not evidenced by certificates, then, within a reasonable time after the issue or transfer of the 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 shares (if applicable). However, the failure of the corporation to deliver the written statement described in Section 607.0626 of the FBCA after the shares without certificates are issued does not affect an opinion regarding whether the 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 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 shares are validly issued.

An opinion that shares have been "validly issued" does not address whether the issuance of such 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 shares. However, if Opining Counsel is aware that a particular issuance of 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 shares to be issued are duly authorized (by following the steps recommended above regarding opinions on authorization).
- Obtain a copy of the corporation's articles of incorporation, as amended, (preferably a certified copy obtained from the Department), and review such articles and bylaws 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 an appropriate officer (a copy certified as true and correct by an officer) confirming the consideration to be received for the issuance of the shares and the adequacy thereof under the FBCA and the articles of incorporation and bylaws.
- Confirm that the share certificates are in proper form or, if the shares are to be uncertificated, that the statutory requirements with respect to uncertificated securities have been (or are being) followed.

3. 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 shares being issued and that the corporation cannot call for any additional consideration to be paid by the holder of such shares.

(a) 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 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.

(b) 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 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 shares are duly authorized and validly issued (by following the steps recommended above regarding opinions on authorization and opinions on valid issuance).
- Obtain an officer's certificate confirming receipt of the consideration required by the authorizing resolutions and/or confirming that no consideration for the shares remains unpaid.

E. Corporations – No Preemptive Rights

Recommended opinion:

The issuance of the [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 shares of any future issuance of shares. Existing shareholders with preemptive rights have the right, but not the obligation, to purchase as many shares of the newly issued stock as are necessary to maintain their proportional ownership interest in the corporation before the corporation sells the 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 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 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 share issuance in question triggers the granting of preemptive rights as described in the articles of incorporation.
- If the 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 rendered unless all shareholders have expressly waived their preemptive rights.

F. Corporations – Stock Certificates in Proper Form

Recommended opinion:

The stock certificate(s) representing the [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 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 shares are issued, the number and class of shares the 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 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 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 stock certificates to contain legends and Opining Counsel is asked for an opinion that the stock certificates also comply with the specific requirements as set forth in the Transaction 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 Equity Securities.

Sometimes, an Opinion Recipient will request an opinion that all outstanding 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 of 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."

NEW SECTION OF THE REPORT – "OPINIONS WITH RESPECT TO ISSUANCES OF PREFERRED STOCK BY A FLORIDA CORPORATION"

This First Supplement addresses opinions regarding issuances of preferred shares by Florida corporations. It is largely based on the guidance contained in the 2008 report by the TriBar Opinion Committee ("**TriBar**") on the topic of "Duly Authorized Opinions on Preferred Stock" (the "**TriBar Preferred Stock Report"**). The TriBar Preferred Stock Report is available at 63 *The Business Lawyer* 921. Additionally, this First Supplement discusses principles contained in the report of the Legal Opinions Committee of the Business Law Section of the State Bar of California (the "**California Committee**") in their 2009 report entitled: "Report on Selected Legal Opinion Issues in Venture Capital Financing Transactions" (the "**California VC Report").** The California VC Report is available at 65 *The Business Lawyer* 161.

While these reports do not necessarily reflect customary practice in Florida, the guidance contained in these reports may be helpful to Florida lawyers who are called upon to deliver opinions regarding issuances of preferred stock covered by this section.

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OPINIONS WITH RESPECT TO ISSUANCES OF PREFERRED STOCK BY A FLORIDA CORPORATION

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.

A. Corporations – Authorized Capitalization – Preferred Stock

Recommended opinion:

The Client's authorized capitalization consists of _____ shares of common stock, $____ par value per share, and ____ shares of preferred stock, $____ par value per share.[6]

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(68) 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 series of shares within a class and the number of shares of each class and series of shares that it is authorized to issue. If more than one class or series of shares is authorized, the articles of incorporation must set forth a distinguishing designation for each class and series and, prior to the issuance of shares of a class or series, the preferences, limitations and relative rights of that class or series.

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 and restatements of the corporation's articles of incorporation in order to determine the current authorized capitalization.

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[6] The full "authorized capital" of the corporation should be reflected in this opinion even if the issuance of shares that is the subject of the opinion letter only relates to the issuance of preferred shares.

Under Section 607.0602 of the FBCA, the articles of incorporation may provide for "blank check" authority allowing the board of directors, without further shareholder action, to create the preferences, rights and limitations of a particular class or series of shares. In such circumstances, Opining Counsel should (i) review the articles of incorporation to confirm that "blank check" shares have been created, and (ii) review the amendment to the articles filed with the Department that establishes the rights, preferences and limitations of the particular class or series of preferred shares.

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 on 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 any certificate of designation, rights, preferences and limitations related to the preferred stock.
- Review the articles of incorporation (or the most recent restated articles of incorporation) and, if applicable, any certificates of designation, rights, preferences, and limitations to determine the classes and series of shares and the number of shares authorized for each class and series as set forth therein.
- If the articles of incorporation have been amended and/or any certificates of designation, rights, preferences, and limitations have been filed 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 and certificates to determine the current classes and series of shares and the current number of shares authorized for each class and series as set forth therein.

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 above 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 rendered was 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 for 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 an entirely different purpose. Accordingly, as with each of the other opinions that are being rendered, 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.

1. 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 "Outstanding Preferred 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 its 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 satisfies statutory requirements (which, under the FBCA, is a determination that the consideration being paid for the shares is adequate).

Prior to January 1, 2020, under Section 607.0825(1)(e) of the FBCA, the board of directors of a Florida corporation could not delegate authority to authorize or approve the issuance or sale or contract for the sale of preferred shares; however, the board of directors was able to 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 the preferred shares so long as such issuance, sale or contract for sale was within limits specifically prescribed by the board of directors in the authorizing resolutions. However, prior to January 1, 2020, Florida law was unclear on whether a committee (or a senior officer of a corporation) could 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.

As of January 1, 2020, Section 607.0825 of the FBCA, by no longer expressly prohibiting such delegation, allows the board of directors of a Florida corporation to delegate authority to a board committee (but not to a senior executive officer of the corporation) to authorize or approve the issuance or sale or contract for the sale of preferred shares without any need to prescribed limits in authorizing resolutions. Accordingly, if such power is delegated to a board committee and no limits are specified by the board of directors in the authorizing resolutions, the board committee will not be subject to any limits (other than carrying out such authorization or approval subject to the same fiduciary obligations that the board of directors would have in taking such action). As a result, from and after January 1, 2020, a board committee can be given the power by the board of directors to set or establish the rights, powers and preferences of a particular series of "blank check" preferred stock.

In addition, as of January 1 2020, Section 607.0624(3) of the FBCA allows the board of directors of a Florida corporation to delegate authority to a board committee or to one or more officers (not just executive officers), or a board committee so authorized by the board of directors to delegate authority to one or more officers (not just executive officers) to authorize or approve the issuance of rights, options, warrants or other equity compensation without any need to prescribed limits in authorizing resolutions. Accordingly, if such power is delegated and no limits are specified in the delegation, the board committee or officer(s), as the case may be, will not be subject to any limits (other than carrying out such authorization or approval subject to applicable fiduciary obligations).

Opinion Recipients sometimes request that the opinion state that the terms of the preferred shares do not violate the FBCA or 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 statement of opinion is implicit in 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.

2. Enforceability of Outstanding Preferred Stock

The duly authorized opinion does not cover a shareholder'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 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 bar reports have addressed this issue, and both reports state 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 TriBar Preferred Stock 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 party to a contract, the TriBar Preferred Stock Report noted that the "concepts underlying an enforceability opinion do not easily fit" a preferred stock opinion.

In 2009, the California Committee adopted the position of the TriBar Preferred Stock Report 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 Report noted that an opinion giver is sometimes asked 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 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 TriBar Preferred Stock Report and the California VC 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 these 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.

3. Potential Exceptions to Duly Authorized Opinion.

In some complex issuances of preferred shares, Opining Counsel may not be able to provide an unqualified "due authorization" opinion. Instead, Opining Counsel, if able to render any opinion, may need to include one or more exceptions addressing specific terms of the articles of incorporation of the corporation that conflict with the applicable provisions of the FBCA, the articles of incorporation or applicable case law. 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 arguably conflict with the FBCA's appraisal rights;

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

(iv) the articles of incorporation render holders of a class of stock the right to designate members of a committee of the board of directors but the FBCA limits that 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 that phrase in the opinion is unnecessary. However, the Committees suggest that Opining Counsel consider informing recipient's counsel of this limitation.

Finally, the TriBar Preferred Stock 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 render 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[7]:

- 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.
- Preferred shares issued prior to January 1, 2020 - 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, prior to January 1, 2020, Section 607.0825 of the FBCA provided that no committee of the board of directors of a corporation could 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 could have authorized a committee (or a senior executive officer) to do so within limits specifically prescribed by the board of directors. In connection with an issuance of preferred shares prior to January 1, 2020, 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.
- Preferred shares issued on or after January 1, 2020 - If any aspects of the issuance of the preferred shares was delegated to a committee of the board of directors shares (including without limitation delegated to determine the designation and relative rights, preferences, and limitations of a voting group), Opining Counsel should confirm that the authority was delegated to the committee in accordance with the FBCA and that the committee properly acted within that authority. Opining Counsel should also verify that any

[7] A number of the actions to be taken that are recommended in this diligence checklist on the duly authorized portion of this opinion technically relate to the "valid issuance" of the shares rather than the "authorization of the shares." However, because these two concepts are most often considered together by Opining Counsel, the recommended diligence steps described in this "authorization" diligence checklist also include those items that relate to the "valid issuance" opinion.

actions taken by the committee 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, certified by an appropriate officer of the Client. 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 an appropriate 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): (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 satisfied statutory requirements (which includes, under the FBCA, a determination that the consideration being paid for the shares is 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, whether an exception should be included in the opinion.
- Opining Counsel should examine the authorizing resolution(s) to confirm that the board of directors (or shareholders and/or committee and/or an appropriate officer): (a) approved the issuance of the shares, (b) recited the consideration for which the shares were to be issued, and (c) determined in such resolution that the consideration received or to be received for the shares satisfied statutory requirements (which includes, under the FBCA, a determination that the consideration being paid for the shares is adequate).

4. 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 an appropriate 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 one or more classes of preferred shares or one or more series within a class of preferred shares, 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 the 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 (by following the steps recommended above regarding opinions on authorization).
- Obtain a copy of the corporation's articles of incorporation, as amended, (preferably a certified copy obtained from the Department), and review such articles and bylaws 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 an appropriate 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.

5. 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.

(a) 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.

(b) 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 (by following the steps recommended above regarding opinions on authorization and opinions on valid issuance).
- 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 shares of any future issuance of preferred shares. Existing shareholders with preemptive rights have the right, but not the obligation, to purchase as many 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 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 rendered 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 Transaction 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 (and, in some cases, all outstanding common 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 Opining Counsel to look at each historic issuance of preferred shares (and possibly common 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 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."

NEW SECTION OF THE REPORT – "OPINIONS WITH RESPECT TO ISSUANCES OF MEMBERSHIP INTERESTS OF A FLORIDA LIMITED LIABILITY COMPANY"

In Transactions in which a Florida limited liability company is issuing membership interests in a Florida limited liability company, Opining Counsel may be asked for opinions regarding the Client's membership interests and/or the enforceability of the company's operating agreement. This First Supplement addresses opinions regarding issuances of membership interests by Florida limited liability companies and opinions as to the enforceability of a Florida limited liability company's operating agreement. It is largely based on the guidance contained in two TriBar Reports: (i) the "Supplemental TriBar LLC Opinion Report: Opinions on LLC Membership Interests" issued in 2011 (the "**TriBar LLC Membership Interest Report**"), which is available at 66 *The Business Lawyer* 1065, and (ii) the report entitled: "Third Party Closing Opinions: Limited Liability Companies" (the "**2006 Tribar LLC Report**"), which was issued in 2006 and is available at 61 *The Business Lawyer* 679.

The TriBar Membership Interest Report and the 2006 TriBar LLC Report address opinions regarding the issuance of LLC membership interests by Delaware LLCs, including the enforceability of LLC operating agreements. Although these reports do not necessarily reflect customary practice in Florida, they may provide helpful guidance to Florida lawyers who are called upon to deliver opinions regarding the matters covered by this section.

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OPINIONS WITH RESPECT TO ISSUANCES OF MEMBERSHIP INTERESTS OF A FLORIDA LIMITED LIABILITY COMPANY

A. Limited Liability Company – Issuance of Membership Interests

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

Recommended opinion:
The [LLC Interests] are validly issued.

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

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

Unlike corporations, typically an LLC operating agreement (or an amendment) does not create "authorized" LLC Interests for future issuance, but rather creates the particular LLC Interests that are to be issued in the Transaction. As such, if LLC Interests were not validly issued to a transferor prior to the transfer of such LLC Interests to a transferee, then Opining Counsel may render the "validly issued" opinion with respect to such LLC Interests if all necessary limited liability company action has been taken by the LLC and its members to ratify the valid issuance of such LLC Interests to the transferor or the managers are given the right in the operating agreement to create and approve the issuance of additional LLC interests without consent of the members.

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

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

An opinion that LLC Interests have been "validly issued" does not address (i) whether their issuance violates or breaches any agreement to which the LLC is a party (other than the operating agreement), (ii) the enforceability of the terms of the operating agreement of the issuing LLC or the enforceability of the terms of the LLC Interests, (iii) compliance with securities or antitrust laws, or (iv) the status of the LLC Interests as general intangibles or securities under the Uniform Commercial Code, even if the operating agreement of the LLC states that the LLC Interests are securities under Article 8 of the Uniform Commercial Code. In addition, the "validly issued" opinion does not address whether any fiduciary duty has been violated in connection with the issuance of the LLC Interests. However, if Opining Counsel is aware that a particular issuance of LLC Interests violates any agreement (other than the operating agreement) in which a member is a party, Opining Counsel should consider advising the Opinion Recipient of such fact so as to avoid a potential claim that the opinion is misleading.

Since Series LLCs are not authorized under FRLLCA, no opinion should be rendered on a Florida LLC that contemplates the creation of one or more series of LLCs under the umbrella of a single LLC.

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

- Confirm that the LLC Interests to be issued are duly authorized (see discussion above).
- Obtain a copy of the LLC's articles of organization, as amended, (preferably a certified copy obtained from the Department) and review them to confirm compliance with any specified minimum amount or form of consideration.
- Review the LLC's operating agreement (a copy certified as true and correct by a manager, member or an officer) to confirm compliance with any specified minimum amount or form of consideration.
- Review compliance with Sections 605.0401-605.0402 of FRLLCA.
- Obtain all subscription agreements, if any, whether pre-formation or post-formation, if applicable, referred to in the authorizing resolutions, confirming the consideration to be received by the LLC.
- Review resolutions of the manager(s) or member(s) (a copy of same certified as true and correct by a manager, member or officer) confirming that they have taken the action(s) required by FRLLCA, the LLC's articles of organization and the LLC's operating agreement, and that the consideration to be received for the issuance of the LLC Interests satisfies the requirements of FRLLCA and the articles of organization and the operating agreement.

- Include an express assumption in the opinion letter or obtain a certificate from an appropriate officer or representative of the LLC that any required consideration for the issuance of the LLC Interests has been received by the LLC.

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

C. Admission of Purchasers of LLC Interests as Members of the LLC.

Recommended opinion:

Each of the [Purchasers] has been duly admitted to the LLC as a member of the LLC.

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

Section 605.0102(40) of FRLLCA defines a "member" as a person who: (i) is a member of an LLC under Section 605.401 of FRLLCA or was a member in an LLC when the LLC became subject to FRLLCA and (ii) has not dissociated from the LLC under Section 605.602 of FRLLCA. Person is defined very broadly under Section 605.0102(48) of FRLLCA, and care should be taken to review the operating agreement to determine whether it contains any limitations on who may become a member of the LLC under the operating agreement.

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

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

An opinion that the purchaser of an LLC Interest has been duly admitted as a member of the LLC subsumes the opinion that such LLC Interests have been validly issued to such transferee or that all necessary limited liability company action has been taken by the LLC and its members to ratify the valid issuance of the LLC

Interest to the transferee. We note that Section 605.0502(6) of FRLLCA provides that a transfer of an LLC Interest in violation of a restriction on transfer contained in the operating agreement is ineffective as to a person who has knowledge or notice of the restriction at the time of transfer.

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

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

- Confirm that the LLC Interests to be issued are validly issued (see discussion above).
- Obtain a copy of the LLC's articles of organization, as amended, (preferably a certified copy obtained from the Department) and review them to confirm compliance with any specified conditions to admission as a member of the LLC, if any.
- Review the LLC's operating agreement (a copy certified as true and correct by a manager, member or an officer) to confirm compliance with any specified conditions on admission as a member of the LLC.
- If the Purchaser is a transferee of an LLC Interest, review Section 605.0401 of FRLLCA to confirm that such new transferee has complied with such statute.
- Review Section 605.0602 of FRLLCA to confirm that such Purchaser has not dissociated from the LLC and, if the Purchaser is a transferee of an LLC interest that the Transferor has not dissociated from the LLC.
- Obtain all subscription agreements, if any, whether pre-formation or post-formation, if applicable, referred to in the authorizing resolutions, to confirm compliance with any specified conditions on admission as a member of the LLC.
- Review resolutions of the manager(s) or member(s) (a copy certified as true and correct by a manager, member or officer) to confirm compliance with any specified conditions to the issuance or transfer, as the case may be, of an LLC Interest and admission as a member of the LLC.
- Include an express assumption that the Purchaser does not have knowledge or notice of a restriction at the time of purchase or transfer, as the case may be, that limits the Purchaser's ability to become a member (if Opining Counsel has not confirmed that all specified conditions to the purchase or transfer, as the case may be, of an LLC Interest and admission as a member of the LLC have been satisfied).
- Include an express assumption in the opinion or obtain a certificate from an appropriate officer or representative of the LLC that any conditions set forth any subscription agreement and the operating agreement that are required for admission as a member of the LLC have been satisfied.

D. Obligations of Purchaser of LLC Interest for Payments and Contributions.

Recommended opinion:

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

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

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

Opinion Recipients sometimes ask Opining Counsel to identify any sections of the operating agreement and the subscription agreement that require payments or contributions after the closing. If willing to address this request, Opining Counsel would delete the exception for the two agreements from the opinion and substitute references to the sections of the operating agreement and the subscription agreement that impose obligations to make further payments or contributions (such as, **"except as provided in Section _____ of the Operating Agreement and in Section _____ of the Subscription Agreement").**

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

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

However, if the Opinion Recipient inappropriately insists that Opining Counsel use the "**fully paid and nonassessable**" terminology, the Committees believe that "**fully paid and nonassessable**" should be understood to mean that **"purchasers of LLC Interests have no obligation to make further payments for their purchase of LLC Interests or contributions to the LLC solely by reason of their ownership of LLC Interests or their status as members of the LLC, except for their obligation to repay any funds wrongfully distributed to them as set forth in Section 605.0406 of FRLLCA."**

If the operating agreement or the subscription agreement require additional payments or contributions by a purchaser of an LLC Interest after the closing, or if those documents are not being reviewed by Opining Counsel, then such "**fully paid and nonassessable**" terminology should be limited by expressly excluding the terms of the operating agreement and subscription agreement, if any, from the opinion (i.e. **"and except as may be required by the Subscription Agreement and the Operating Agreement"**).

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

- Confirm that under FRLLCA, the purchaser has no obligation to make additional payments or contributions to or for the benefit of the LLC.

- Consider excluding from the opinion the subscription agreement or the operating agreement of the LLC.
- Consider including an express assumption in the opinion letter or obtain a certificate from an appropriate officer or representative of the LLC that the purchaser has not agreed to make additional payments or contributions to or for the benefit of the LLC, except as forth in the subscription agreement or the operating agreement of the LLC.

E. Liability of Purchaser of LLC Interest to Third Parties.

Recommended opinion:

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

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

This opinion addresses a subject that is not typically addressed in opinions rendered in connection with the issuance of capital stock by corporations. The Committees are hopeful that this supplemental opinion will not be requested in the future as practitioners become more familiar with FRLLCA and the appropriate nomenclature for dealing with opinions on LLC Interests.

Section 605.0304 of FRLLCA provides that a member or manager of a LLC is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation or other liability of the LLC solely by reason of being or acting as a member or a manager, except as set forth in Section 605.04093 of FRLLCA which provides certain exceptions to the limitation of liability for managers (in a manager-managed LLC) and members (in a member-managed LLC) in the event that they engage in certain egregious conduct.

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

The Committees believe that the foregoing opinion, by being limited to "solely by reason of being or acting as a member or manager," automatically incorporates and includes each of the exclusions listed in the prior paragraph. However, Opining Counsel may wish to include those exceptions in Opining Counsel's opinion letter using the following paragraph:

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

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

- Consider excluding from the opinion the subscription agreement, if any, and the LLC's operating agreement.
- Consider including the recommended exception set forth above in the opinion letter.
- Consider including an express assumption in the opinion letter that, if the purchaser is acting as a manager in a manager-managed LLC or a member in a member-managed LLC, the purchaser does not engage in any conduct that may impose personal liability upon a manager or member as described in Section 605.04093 of FRLLCA.
- Include an express assumption in the opinion letter or obtain a certificate from an appropriate officer or representative of the LLC that the purchaser has not agreed to be personally liable for any debts, obligations or liabilities of the LLC, except as forth in the subscription agreement, if any, and the operating agreement of the LLC.

F. Enforceability of an Operating Agreement

An opinion that an operating agreement is valid, binding and enforceable may be requested when the Opinion Recipient is acquiring a membership interest in a Florida LLC or when investment banking firms, lenders or rating agencies in structured finance transactions are concerned about the enforceability of covenants, restrictions and internal governance provisions in an operating agreement. This opinion is often more difficult to render than the entity status, entity power, and authorization of the transaction opinions because it requires Opining Counsel to consider issues of state contract law that are not necessarily straightforward and because it covers all the provisions in the operating agreement rather than simply those applicable to status, power and approval. Whenever Opining Counsel renders such a remedies opinion, Opining Counsel must satisfy itself that the Client has taken the steps required to enter into the agreement or Opining Counsel must assume expressly in the opinion that it took those steps. Often, these opinions are provided along with this opinion.

"*The Remedies Opinion*" section of the Report discusses generally the delivery of a "remedies" opinion, and the discussion in that section also apply to opinions on the enforceability of an operating agreement. As indicated in that section, the opinion addresses the legal effect of the contractual undertakings of Opining Counsel's Client, subject to various assumptions and qualifications, express and implied.

When giving a remedies opinion on an LLC's operating agreement, Opining Counsel will need to review an executed copy of that agreement (and this particular opinion should not be rendered, even in the context of a single-member LLC, unless the LLC has a written operating agreement). Further, it is best practice for Opining Counsel to require that all of the LLC's members have executed the operating agreement.

Additionally, if the LLC is manager-managed, it is best practice to have all of the managers execute the operating agreement, even though under Section 605.0106(4) of FRLLCA, the managers of an LLC are bound to the operating agreement even if they don't sign the agreement. When a member or manager is a legal entity and not a natural person, Opining Counsel should confirm that the entity has authorized the execution and delivery of the operating agreement and has authorized the persons signing the operating agreement to execute the operating agreement on the entity's behalf.

The recommended form of the opinion is as follows:

> **The Operating Agreement is a valid and binding agreement, enforceable against the LLC members [and managers] in accordance with its terms.**

In some cases, the Opinion Recipient may request that the opinion also provide that the LLC is bound by the operating agreement. Under Section 605.0106(1) of FRLLCA, a Florida limited liability company is bound by and may enforce the operating agreement, regardless of whether the LLC has itself manifested assent to the operating agreement. As such, this opinion is believed to be unnecessary.

A remedies opinion regarding an operating agreement means that (i) the rights and obligations of the LLC and its members and managers (or other equity holders or decision makers) set forth in the operating agreement, (ii) the provisions specifying a remedy in the event of a breach, and (iii) the provisions relating to governance and administration, will be given legal effect, subject to the qualifications, exclusions and assumptions, express or implied. Thus, for provisions in an operating agreement that obligate members or managers to perform an affirmative act, such as making a capital contribution upon the occurrence of a specified event, but that do not specify a remedy for a failure to perform, the opinion is understood to mean that in the event of a breach, a court applying applicable law either will require the member to perform that act (subject to qualifications, exclusions and assumptions, express or implied) or will grant money damages or some other remedy. For a provision that does specify a remedy, such as a reduction of a member's interest in the LLC if the member fails to make a contribution, the opinion is understood to mean that a court (again subject to qualifications, exclusions and assumptions, express or implied) will render effect to the specified remedy as written.

Operating agreements often contain detailed provisions on how the LLC is to be governed, how the operating agreement is to be amended, and how disputes, including interpretive questions, are to be resolved. The opinion on these provisions means that a court will require the LLC and its members and managers to abide by their terms as written (again subject to qualifications, exclusions and assumptions, express or implied).

In a structured finance transaction, the operating agreement will often include provisions that require a lender's or an independent manager's consent to dissolve, amend the operating agreement or engage in material transactions, such as a merger; and a remedies opinion on an operating agreement provides comfort that these provisions are enforceable against the members. It may also include one or more separateness covenants that are necessary to support a nonconsolidation opinion. As a result, Opining Counsel will need to consider whether to add qualifications to the remedies opinion with respect to the enforceability of these types of provisions. Because Florida has little case law on the enforceability of these types of provisions and Delaware has considerably more case law on this topic, in many cases in structured finance transactions the Opinion Recipient will require the use of a Delaware LLC.

Another problematic area, which may be open to question under Section 605.0105 of FRLLCA, relates to provisions that seek to limit or restrict fiduciary duties. As a result, Opining Counsel may wish to add a qualification to its remedies opinion regarding this subject.

Diligence Checklist – Enforceability of an Operating Agreement. To render the "enforceability" opinion on an operating agreement, Opining Counsel should take the following actions:

- Obtain a fully executed copy of the LLC's operating agreement, preferably signed by all of the LLC's members (and, if manager-managed, also by all of the managers).
- Confirm that the operating agreement has been approved by all members (and, if manager-managed, by all managers) that are entities, and that the persons who have executed the operating agreement were authorized to do so.
- Consider adding qualifications regarding various provisions in the operating agreement that may not be enforceable under Florida law or as to which Florida law is unclear because there is no case law in Florida supporting the enforceability of such provisions.

ADDITIONS TO THE REPORT – "COMMON ELEMENTS OF OPINIONS – EXCLUDED LAWS"

In Section M of the Report (pages 30-33), a list of "Excluded Laws" is provided. These excluded laws are understood to be excluded from coverage in the opinions provided in the opinion letter under customary practice, although the Report recommends that these excluded laws be expressly set forth in the opinion letter as being expressly excluded from coverage in the opinion letter. Any other laws sought to be excluded must be expressly identified as being excluded from the opinion letter.

In additional to the excluded laws already discussed in the Report, consideration should be given to including in the Opining Counsel's opinion letter the following additional excluded laws:

A. The Dodd-Frank Wall Street Reform and Consumer Protection Act.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "**Dodd Frank Act**") contains many laws that potentially affect financial institutions and other types of entities. In some cases, Opining Counsel may be familiar with those laws and how they may affect Opining Counsel's client, and therefore does not need to exclude these laws from the scope of its opinion letter. However, in many situations, because of the complexities of the Dodd-Frank Act, Opining Counsel may wish to exclude the scope of the Dodd-Frank Act from the opinion letter. In such circumstances, the following additional excluded laws may be added to the opinion letter:

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

B. Laws, Rules, and Regulations Affecting the Client's Business

The Report states (at pages 30-32) that "**Applicable Laws**" includes regulatory laws that affect the Client and its business, unless expressly excluded in the opinion letter. In many cases, Opining Counsel has little or no knowledge about the business activities of the Client. In such cases, Opining Counsel may wish to consider including the following qualification in the opinion letter:

> **… any law, rule or regulation applicable to any of the Client or the Transaction Documents solely because such law, rule or regulation is part of a regulatory regime applicable to any party to any of the Transaction Documents or any of its affiliates due to the specific assets owned, leased or operated by, or the business of, or the goods or services produced by, such party or such affiliate;**

This qualification puts the Opinion Recipient on notice that Opining Counsel is not familiar with the business of the Client and allows the Opinion Recipient to request opinion coverage of such regulatory laws that affect the Client's business if relevant to the Transaction or the Transaction Documents.

C. EU and Other Bail-In Rules

On January 1, 2016, the European Union Bank Recovery and Resolution Directive (the "**BRRD**") became effective. The BRRD establishes a framework for the recovery and resolution of European credit institutions and investment firms and has been adopted into the national law of most member states of the European Economic Area ("**EEA**"), which includes the following countries - Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden (see below for some initial commentary addressing this issue now that the United Kingdom has left the European Union). Among the broad resolution powers conferred on bank regulators under the BRRD and the implementing legislation of EEA member countries (the "**Bail-In Legislation**") are the powers to write down, reform the terms of, cancel and convert into equity the liabilities of failing EEA Financial Institutions (the "**Writedown and Conversion Powers**").

Under Article 55 of the BRRD, financial institutions in the EEA are required to ensure that all contracts governed by non-EEA law include contractual recognition of, and agreement to be subject to, the Bail-In Legislation ("**Contractual Recognition Provisions**"). These Contractual Recognition Provisions must provide that: (A) the liabilities may be subject to the Writedown and Conversion Powers; (B) the parties to the contract agree to accept those provisions being applied; and (C) the terms of the contract may be amended as necessary to render effect to the exercise of the Writedown and Conversion Powers (a "**Bail-In Action**"). These rules are often collectively referred to as the "**E.U. Bail-In Rules**."

When Opining Counsel represents a borrower, Opining Counsel may need to consider the impact of the E.U. Bail-In Rules on the enforceability of a credit agreement (and, by extension, the collateral and other documentation of the credit facility) against the borrower. The E.U. Bail-In Rules are complex and often are outside the general knowledge of Opining Counsel. At the same time, counsel for the Opinion Recipient (when the Opinion Recipient is a financial institution) is much more likely to have an understanding of these rules.

As a result, in most cases, Opining Counsel should expressly exclude the E.U. Bail-In Rules from the scope of a remedies opinion on a credit agreement containing Contractual Recognition Provisions. The recommended form of exclusion is as follows:

> ***We express no opinion on the enforceability of any provision of any [Credit and Security Document] incorporating the [Bail-In Legislation] or authorizing any [Bail-In Action].***

Under this approach, Opining Counsel declines to render an opinion on whether a U.S. court would enforce the E.U. Bail-In Rules. Because this exception only applies to the Contractual Recognition Provisions, it does not excuse Opining Counsel from having to conclude that all the other provisions of the agreement are enforceable under the law governing the agreement. This approach leaves it to Recipient's Counsel, rather than borrower's counsel, to advise the lenders or agents on the enforceability under U.S. law of the Contractual Recognition Provisions, the BRRD and the Bail-In Legislation. That advice may take the form of a legal opinion if, as permitted by Article 55 of the BRRD, an EU regulator asks for it.

Some commentators take the position that this qualification is unnecessary because these EU Bail-In Rules are already excluded from the opinion letter under either the bankruptcy exception or the equitable principles limitation. Others believe that the qualification should be narrower or more targeted. An alternative form of qualification is often expressed as follows:

> ***We express no opinion as to the enforceability of the [Loan Parties'] obligations under the [Credit and Security Documents owed to, or for the benefit of, a Lender that becomes the subject of a [Bail-In Action].***

The EU Bail-In Rules are complex and should only be dealt with by counsel knowledgeable on this topic. An excellent article on the EU Bail-In Rules by Ettore Santucci of Goodwin Procter LLP is contained in the Spring 2016 edition of "*In Our Opinion*", the publication of the ABA Business Law Section Legal Opinions Committee, starting at page 11.

Now that the United Kingdom has left the European Union, it is believed that the EU Bail-In Rules should no longer apply in the United Kingdom. However, there is some expectation that similar bail-in rules may be adopted in the United Kingdom or existing United Kingdom laws may be applied in a similar fashion. Accordingly, if the loan transaction has, or potentially has, implications in the United Kingdom, the qualification used by Opining Counsel to address the bail-in exclusion may need to be adjusted to incorporate the definitional language relating to bail-in language and bail-in actions appearing in the applicable loan documents.

D. Hague Securities Convention

The Hague Securities Convention became effective as a matter of U.S. law on April 1, 2017. It provides choice-of-law rules for many commercial law issues affecting intermediated securities and thereby preempts portions of the corresponding choice-of-law rules provided or mandated by the common law, Articles 1, 8 and 9 of the UCC and by related federal book-entry regulations.

The Hague Securities Convention rules are complex and a full description of these rules is beyond the scope of this Report, although a brief overview is provided below in "*Additions to the Report – Opinions With Respect to Collateral Under the Uniform Commercial Code*."

Opinions on this topic should only be rendered by a knowledgeable Opining Counsel. As a result, Opining Counsel should consider excluding the application of the Hague Securities Convention from the scope of an opinion letter covering enforceability of the Transaction Documents, choice of law, or matters arising under the UCC (such as perfection of a security interest). The recommended form of exception is as follows:

> **We express no opinion as to the applicability or effect of the choice-of-law rules of the Hague Securities Convention for matters governed by Article 2(1) of that Convention.**

ADDITIONS TO THE REPORT – "OPINIONS WITH RESPECT TO COLLATERAL UNDER THE UNIFORM COMMERCIAL CODE"

A. Perfection Opinions – Location of Debtor for Limited Liability Partnership.

The Report, in discussing the location of various types of debtors for purpose of analysis in regard to perfection opinions on collateral under the UCC, inadvertently left off the location of a limited liability partnership. To remedy that oversight, the following paragraph should be added to Section 7, entitled "Location of Debtor" (contained on pages 140-141 of the Report), as the last paragraph of such Section:

> A partnership may become a limited liability partnership pursuant to Section 620.9001 of the Florida 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)(rrr) of the Florida UCC. Thus, 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.

B. Hague Securities Convention.

The Hague Securities Convention became effective as a matter of U.S. law on April 1, 2017. It provides choice-of-law rules for many commercial law issues affecting intermediated securities and thereby preempts portions of the corresponding choice-of-law rules provided or mandated by the common law, Articles 1, 8 and 9 of the UCC and by related federal book-entry regulations. In most cases, the choice-of-law results under the Convention will be the same as those under the UCC, but there are some differences.

The Convention's choice-of-law rules apply to a wide range of commercial law issues affecting the ownership or transfer of interests in "securities held with an intermediary," which generally tracks what U.S. lawyers know as UCC Article 8's indirect holding system. The Convention defines "securities" as "any shares, bonds or other financial instruments or financial assets (other than cash), or any interest therein," a definition broader in some respects than the corresponding one in UCC Article 8. However, the Convention's scope is fixed, in contrast to the scope of UCC Article 8, which is subject to expansion beyond securities by agreement between the intermediary and its customer or account holder. The Convention's exclusion of "cash" (i.e., credit balances) from the definition of "securities" also contrasts with the UCC Article 8 system. Nonetheless, the Convention is designed like the UCC to be flexible in scope overall, with fluid, broad coverage that will meet the demands of market practices.

The Convention applies to any transaction or dispute "involving a choice" between the laws of two or more nations — a circumstance that may arise in any intermediated securities transaction, either at the transaction's outset or later in its life. Without limitation, the "choice" will be involved whenever any of the issuer, the underlying certificates or the issuer's books, or a wide range of parties (including account holder, intermediary, clearing corporation, secured party, adverse claimant, creditor of account holder, and creditor of intermediary) have connecting factors to different nations, regardless of whether the nations in question are parties to the Convention. Many of these elements, while having been acknowledged by U.S. lawyers for general transaction planning purposes, are immaterial to a choice-of-law analysis under UCC §§ 8-110 and 9-305 alone.

Given the very broad range of facts that can cause the Convention's "choice" to arise, virtually every intermediated securities transaction should be planned with both the Convention and the UCC in mind. For purposes of opinion giving, at the most basic level, Opining Counsel will need to assume expressly or confirm (a) that the account in question is a "securities account" as defined in both the Convention and the UCC and (b) that every broker, custodian bank, clearing corporation or similar party is an "intermediary" as defined in the Convention and a "securities intermediary" as defined in the UCC.

The commercial law issues to which the Convention applies are those (and only those) enumerated in Convention Article 2(1). The issues are expressed in broad and sometimes overlapping terms, but for purposes of this discussion, the issues clearly include perfection of a security interest and the exercise of remedies against collateral. A number of other important issues also are covered by the Convention, including priority, whether a purchaser takes free of adverse claims (also not discussed here because opinions on secondary sales transactions are a separate subject), and the characterization of a transaction as being a collateral transfer to secure an obligation or an outright disposition as against third parties.

For reference, an excellent article on the Hague Securities Convention by Steven O. Weise of Proskauer Rose LLP is contained in the Spring 2017 edition of "*In Our Opinion*", the publication of the ABA Business Law Section Legal Opinions Committee, starting at page 11.

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