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Guide to Doing Business

# Florida

## Prepared by Lex Mundi member firm, Akerman LLP

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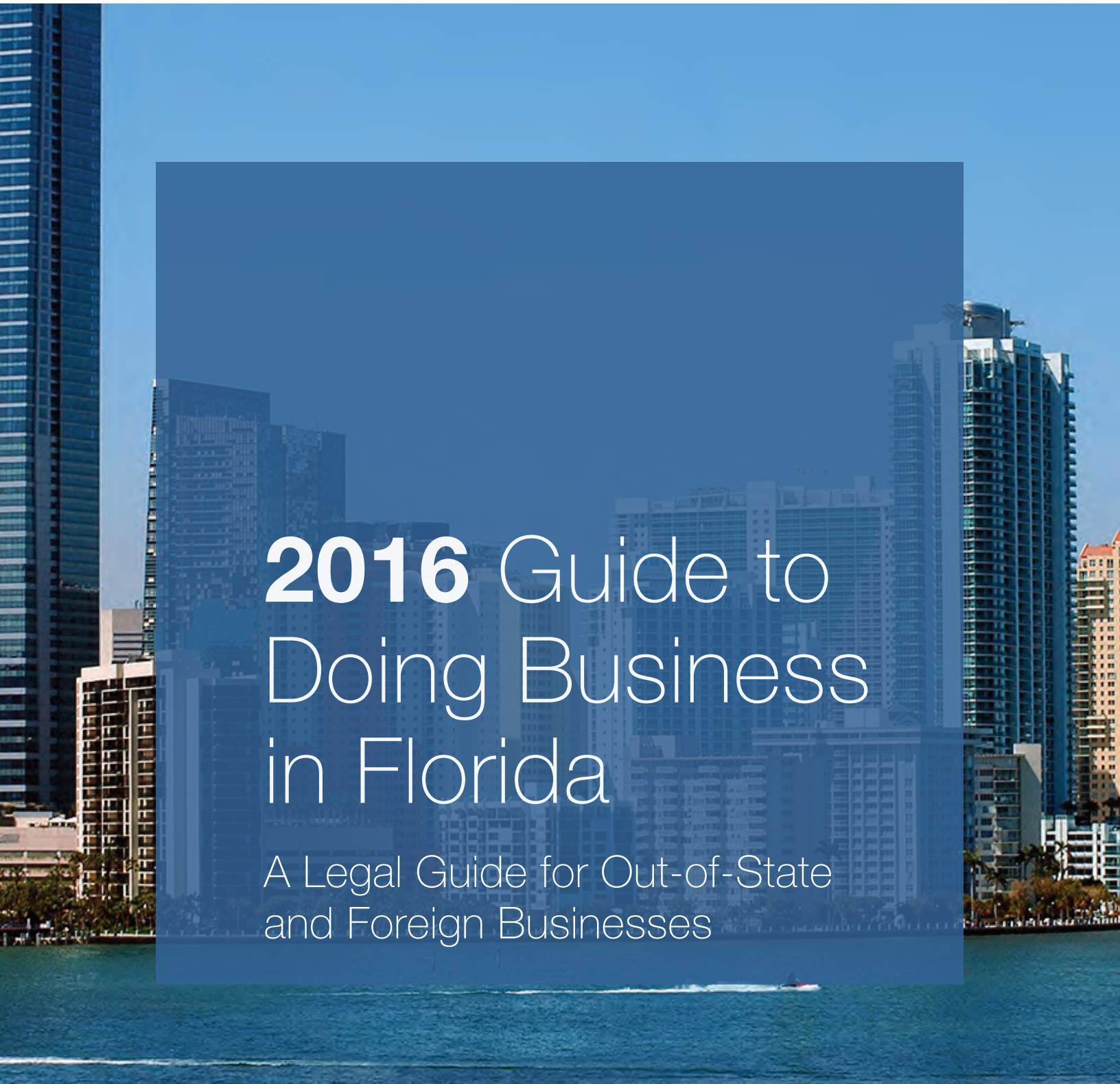

# **2016** Guide to Doing Business in Florida

## A Legal Guide for Out-of-State and Foreign Businesses

## About Akerman

Akerman LLP is a leading transactions and trial law firm known for its core strengths in middle market M&A, within the financial services and real estate industries, and for a diverse Latin America practice. With more than 600 lawyers and government affairs professionals and a network of 20 offices, Akerman is ranked among the top 100 law firms in the United States by *The American Lawyer* (2015). Akerman also is ranked among the top 50 law firms for diversity in *The American Lawyer's* Diversity Scorecard (2015).

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# GUIDE TO DOING BUSINESS IN FLORIDA

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# EDITOR'S INTRODUCTORY NOTES

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## Florida's Historic Business Trends

Ever since Ponce de Leon first landed on Florida's shores in 1513 in search of the legendary Fountain of Youth, Florida has been a destination for entrepreneurs with extraordinary dreams and imaginative commercial activities. Our stories are telling: Spanish explorers found rugged swamplands and saw the future sites of gleaming cities. Henry Flagler set down a railroad to the remote tropics and opened up a corridor to Florida winter tourism. Walt Disney built a child's dreamscape, and the world's favorite Mouse, along with Florida's tourism industry, let loose a "roar heard 'round the world." Our state's largest city of Miami has been called the Gateway to Latin America, and from our beaches NASA and now private citizens have launched rockets, satellites and spacecraft connecting us to outer space.

Today Florida remains a land well-suited for the business of big dreams. Tourism remains a hot industry, though technology, education and healthcare also continue to grow at a rapid pace. Even the events of the recent economic crisis, serious as they are, have not destroyed Florida's capacity to dream and create; to the contrary, we're seeing new innovation in fields of medical research and healthcare, simulation technology, renewable energy, telecommunications, aerospace and nanotechnology, to name just a few key industries.

## Business-Friendly Climate

Florida is well known for its business-friendly climate, both figurative and literal. Well-developed business laws, low corporate and personal tax rates, lack of state income tax, and favorable geography make Florida a favored jurisdiction for all domestic and international business. Our 19 commercial airports, 15 deep water shipping ports and two spaceports are among the busiest commercial sites in the world. Supported by these ports, "Florida-origin exports" (meaning goods produced or with significant value addition in Florida) account for more exports to Latin America and the Caribbean than are exported by any other state. Florida is among the largest recipients of foreign direct investment in the U.S., and Miami is a favored jurisdiction for international banking second only to New York in the U.S. Florida supports offices of approximately 150 foreign and domestic banking institutions which provide financing to other key participants in the commerce of the state. With the fourth largest U.S. Gross State Product (following only California, Texas and New York) and one of the largest economies in the Western hemisphere, Florida is a powerful economic engine for domestic and international businesses alike.

## Well-Qualified Workforce

Florida supports and actively develops its well-educated and well-qualified, extraordinarily culturally diverse workforce particularly in the key industries of technology, tourism and international trade. With 12 public universities, seven medical schools, 12 law schools, dozens of graduate level business schools and numerous private colleges and independent trade schools, Floridians have great access to education; in fact, no Floridian lives more than 50 miles from a postsecondary institution of learning. Florida ranks highly in the U.S. among states with workers with advanced degrees and supports tens of

thousands of international students in its schools and universities, which in turn promotes a vibrant multicultural workforce.

## Public-Private Partnerships

Florida businesses enjoy a coordinated system of economic development initiatives through several important public-private partnerships. Newcomers to Florida, whether workers or businesses, are supported by a coordinated system of workforce services administered by the Florida Department of Economic Opportunity and its divisions to provide state and federal programs and initiatives to help visitors, citizens, businesses, and communities. The Division of Strategic Business Development supports the attraction of out-of-state businesses to Florida, promotes the creation and expansion of Florida businesses and facilitates Florida's economic development partnerships. The Division of Workforce Services partners with CareerSource Florida (the principal workforce policy organization for the state) and the state's 24 regional workforce boards to strengthen Florida's business climate by supporting employers and helping Floridian workers gain and retain employment and advance in their careers. The Division of Community Development manages Florida's land planning and community development responsibilities, which helps ensure that new growth fosters economic development while protecting significant state resources. Enterprise Florida, Inc. provides startup and growth support to Floridians and newcomers alike, including site selection services, advice on trade and industry trending, and coordination of introductions to potential economic development partners. Last but certainly not least, the Florida High Tech Corridor Council supports the high tech industry and its workforce with economic development initiatives. The efforts of the Florida High Tech Corridor Council have been recognized by an honors award granted by the International Economic Development Council.

## Guide to Doing Business in Florida

In this *Guide to Doing Business in Florida* (this "Guide") prepared by the lawyers and professionals of Akerman LLP, Florida's largest law firm (based on the total number of attorneys practicing in the state) and a longstanding Lex Mundi member firm, you'll find guidance on a large variety of issues confronting both new and established businesses. Each chapter begins with the contact information of the contributing authors. Appendix 1 contains a full index of contact information for our contributing authors and our firm at large. Appendix 2 contains a listing of the state agencies mentioned in the text of this Guide. Appendix 3 contains an organizational chart showing the basic organizational structure of the Florida state government.

We hope you'll find this Guide useful as a commentary on general business and legal issues in Florida. With more than 600 lawyers and other professionals available for deployment in support of your legal needs, we look forward to providing further guidance and advice on any specific legal issues you may have.

## References and Disclaimers

Statistics for this article were provided by resources listed on Appendix 2.

The information provided in this Guide is current as of January 1, 2016, and is subject to change by future legislation. This Guide is intended to provide a summary of general business and legal issues in Florida and should not be relied upon as an alternative to the engagement of legal counsel. Any tax advice contained herein is not intended or written to be used, and cannot be used, for the purpose of avoiding tax-related penalties under the Internal Revenue Code or promoting, marketing or recommending to another party any tax-related matters addressed herein. Nothing contained in this

Guide shall be deemed to be a legal or tax opinion, and no conclusions may be inferred from or are implied by the statements or discussion contain herein.

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We hope you find this Guide of valuable use in your business activities in Florida. We look forward to helping you, your business, your customers and clients all thrive here in the Sunshine State.

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# CHAPTER 1. FOREIGN INVESTMENT AND GENERAL REGULATION OF TRADE

**Regulation of International Trade and Investment in Florida**
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## 1.1 Regulation of International Trade and Investment in Florida

Foreign investment in the U.S. and other international commercial activities involving U.S. entities are subject to a number of U.S. Federal and State statutes and related regulations. The following discussion outlines some of the more important aspects of these laws which might be relevant to someone investing in or trading with entities located in the U.S. It is important to note that apart from the topics discussed below, certain areas of activity deemed to be sensitive to the national interest are subject to further scrutiny and regulation. These include, for example, mining, power generation, defense, high technology, radio and television broadcasting, domestic air and marine transportation and fishing.

### 1.1.1 USA PATRIOT Act

In October 2001, the U.S. adopted the USA PATRIOT Act, 115 Stat. 272 (2001). The Act expands the powers of law enforcement officials to counter terrorist threats in the U.S. and abroad, and strengthens criminal laws against terrorism. It requires financial institutions to establish comprehensive anti-money laundering programs; to strengthen "know your customer" procedures; and to conduct enhanced due diligence on all accounts belonging to non-U.S. persons. As a result, when seeking to engage in various financial transactions in the U.S., foreign investors in the U.S., including their families and associates are required to be more forthcoming with information regarding such matters as ownership status and non-affiliation with certain individuals and organizations deemed to be adverse to the national security of the U.S. Potential foreign investors can expect requests for extensive financial information and long delays in the process of establishing relationships with U.S. financial institutions.

### 1.1.2 Restrictions on Foreign Investment

Under a statutory provision commonly referred to as the Exon-Florio Amendment (§ 721 of Title VII of the Defense Production Act of 1950, as added by § 5021 of the Omnibus Trade and Competitiveness Act of 1988), the President of the United States (the "President") has broad authority to investigate and prohibit any merger, acquisition or takeover by or with foreign persons which could result in foreign control of persons engaged in interstate commerce if the President determines that such merger, acquisition or takeover constitutes a threat to the national security of the U.S. Congress has indicated that the term "national security" is to be interpreted broadly and that the application of the Exon-Florio Amendment should not be limited to any particular industry.

The statute sets out a timetable for investigations of transactions which can take up to 90 days to complete. The President or his designee has 30 days from the date of receipt of written notification of a proposed (or completed) transaction to decide whether to undertake a full scale

investigation of the transaction. The President has delegated the authority to make investigations pursuant to the Exon-Florio Amendment to the Committee on Foreign Investment in the U.S. ("CFIUS"), an interagency committee made up of representatives of various executive branch agencies. Notifications of transactions are not mandatory and may be made by one or more parties to a transaction or by any CFIUS member agency.

If at the end of the initial 30-day period after notification of a transaction, CFIUS decides that a full-scale investigation is warranted, it then has an additional 45 days to complete an investigation and make a recommendation to the President with respect to the transaction. The President then has 15 days in which to decide whether there is credible evidence that leads the President to believe that the foreign interest exercising control might take action to impair the national security. If the President makes such a determination, Exon-Florio empowers the President to take any action which the President deems appropriate to suspend or prohibit the transaction, including requiring divestment by the foreign entity if the transaction has already been consummated.

U.S. law also places certain restrictions on acquisitions of businesses which require a facility security clearance in order to perform contracts involving classified information. Under Department of Defense regulations, foreign ownership may cause the Department to revoke a security clearance unless certain steps are taken to reduce the risk that a foreign owner will obtain access to classified information (DOD5220.22-R). Assuming that a foreign owner will be in a position to "effectively control or have a dominant influence over the business management of the U.S. firm," the Department of Defense may require, as a condition to continuation of the security clearance, that the foreign owner establish a voting trust agreement, a proxy agreement or a "special security agreement" approved by the Department of Defense and designed to preclude the disclosure of classified information to the foreign owner or other foreign interests.

### 1.1.3 Reporting Requirements for Foreign Direct Investment

All foreign investments in a U.S. business enterprise which result in a foreign person owning a 10% or more voting interest (or the equivalent) in that enterprise are required to be reported to the Bureau of Economic Analysis, a part of the U.S. Department of Commerce. Pursuant to the International Investment and Trade in Services Survey Act (22 U.S.C. §§ 3101-3108) and the regulations promulgated thereunder (15 C.F.R. § 806), such reports must be made within 45 days after the investment transaction. Depending on the site of the entity involved, quarterly, annual and quinquennial reports may be required thereafter.

### 1.1.4 The International Investment and Trade in Services Survey Act

The International Investment and Trade in Services Act ("IITSA" or the "Act"), passed in 1976, authorizes the President to collect information and conduct surveys concerning the nature and amount of international investment in the U.S. The IITSA's primary function is to provide the federal government with the information necessary to formulate an informed national policy on foreign investments in the U.S. It is not intended to regulate or dissuade foreign investment but is merely a tool used to obtain the data necessary to analyze the impact of such investments on U.S. interests.

Under the IITSA, international investments are divided into two classifications – direct investments and portfolio investments. Congress has delegated its authority to collect information on both types of international investments to the President. In turn, the President has delegated

the power to collect data on direct investments to the Bureau of Economic Analysis ("BEA"), a part of the Department of Commerce, and on portfolio investments to the Department of the Treasury.

A "foreign person" is any person who resides outside of the U.S. or is subject to the jurisdiction of a country other than the U.S. A "direct investment" is defined as the ownership or control, directly or indirectly, by one person of 10% or more of the voting interests in any incorporated U.S. business enterprise or an equivalent interest in an unincorporated business enterprise. Because the IITSA further defines "business enterprise" to include any ownership in real estate, (with some exceptions) any foreign investor's direct or indirect ownership of U.S. real estate constitutes a "direct investment" and falls within the requirement that reports be filed with the BEA.

Unless an exemption applies, a report on Form BE-13 must be filed with the BEA within 45 days of the date on which a direct investment is made. The form collects certain financial and operating data about the investment, the identity of the acquiring entity and certain information about the ultimate beneficial owner. In addition, a Form BE-14 must be filed by any U.S. person assisting in a transaction which is reportable under Form BE-13. The purpose is, obviously, to ensure that those required to file a Form BE-13 do so.

### 1.1.5 The Agricultural Foreign Investment Disclosure Act of 1978

The Agricultural Foreign Investment Disclosure Act ("AFIDA" or the "Act") of 1978 requires all foreign individuals, corporations and other entities to report holdings, acquisitions and dispositions of U.S. agricultural land occurring on or after February 1, 1979. The Act contains no restrictions on foreign investment in U.S. agricultural land and is aimed only at gathering reliable data from reports filed with the Secretary of Agriculture to determine the nature and magnitude of this foreign investment. Unlike the reports filed under the International Investment Security Act of 1976, reports filed under AFIDA are not confidential but are available for public inspection.

For the purposes of the Act, a "foreign person" is (i) any individual who is not a citizen or national of the U.S. and who is not lawfully admitted to the U.S.; (ii) a corporation or other legal entity organized under the laws of a foreign country; and (iii) a corporation or other legal entity organized in the U.S. in which a foreign entity, either directly or indirectly, holds 5% or more of an interest. The definition of "agricultural land" is any land in the U.S. which is used for agricultural, forestry or timber production. AFIDA requires a foreign person to submit a report on Form ASCS-153 to the Secretary of Agriculture any time he holds, acquires or transfers any interest, other than a security interest, in agricultural land. The report requires rather detailed information concerning such matters as the identity and country of organization of the owning entity, the nature of the interest held, the details of a purchase or transfer and the agricultural purposes for which the foreign person intends to use the land. In addition, the Secretary of Agriculture may require the identification of each foreign person holding more than a 5% interest in the ownership entity.

### 1.1.6 Export Controls

In general, U.S. export controls are more stringent and restrict a wider array of items than the export controls of most other countries. (See the Export Administration Act of 1979, as amended, 50 U.S.C. App. §§ 2401-2420 and the regulations promulgated thereunder, 15 C.F.R. §§ 730-799.) Except for exports to U.S. territories and possessions, and in most

cases, Canada, all exports from the U.S. should undergo a review to determine if they are subject to an export "license." An export license is an authorization which allows the export of particular goods, commodities, or technical information, software, or defense articles. Depending on the article in question, export authority from the U.S. Department of Commerce may be sought for dual-use items, or the Department of State, DDTC, for defense articles. There are additional federal regulatory agencies with jurisdiction over exports that warrant further review. Two basic types of licenses exist, general licenses and individual validated licenses or specific licenses.

There are many types of general licenses. These are authorizations which are generally available and for which it is not necessary to submit a formal application. They cover all exports which are not subject to a validated license requirement. Most exports can be made under one of these general classifications.

In contrast, individual validated licenses are required for those items for which the U.S. specifically controls the export for reasons of national security, foreign policy or short supply. If the export of a specific product to a specific destination is subject to an individual validated license requirement, it is necessary to apply for and obtain such a license from the Office of Export Administration (an office within the U.S. Department of Commerce) prior to the export. Certain commodities cannot be exported to any country without an individual validated license, while certain other commodities may require a validated license only for shipment to specified countries. The export of items with military applications and high technology items are subject to stringent regulation.

For purposes of the U.S. export control regulations, an export of technical information occurs when the information is disclosed to a foreign national even if such disclosure occurs in the U.S. Thus, if disclosure of information is subject to a validated license requirement, the disclosure may not be made to a foreign national without first obtaining the necessary validated license, whether or not the disclosure is to occur outside the U.S.

Additionally, the U.S. Department of Treasury, Office of Foreign Assets Control, maintain sanctions programs for certain countries for all financial transactions.

Finally, with regards to the importation of goods, various U.S. federal agencies have overlapping jurisdiction for the importation and entry into the U.S. market of products. The U.S. Customs and Border Protection police U.S. borders and enforce laws of not only Customs (classification, valuation, country of origin, and other priority trade programs), but also the Food and Drug Administration, Environmental Protection Agency, the Consumer Product Safety Commission, and many other federal agencies have jurisdiction to regulate and approve or license the importation and entry into market over several products.

### 1.1.7 Foreign Trade Zones

Foreign trade zones are areas in or adjacent to ports of entry which are treated as outside the customs territory of the U.S. In order to expedite and encourage trade, goods admitted into a foreign trade zone are generally not subject to the customs laws of the U.S. until the goods are ready to be imported into the U.S. or exported. These foreign trade zones are isolated, enclosed and policed areas which contain facilities for the handling, storing, manufacturing, exhibiting and reshipment of merchandise. Foreign trade zones are created pursuant to the Foreign Trade Zones Act (19 U.S.C. §§ 81a-u) and are operated as public utilities under the supervision of the Foreign Trade Zones Board. Under the Foreign Trade Zones Act, the Board

is authorized to grant to public or private corporations the privilege of establishing a zone. Regulations covering the establishment and operation of foreign trade zones are issued by the Foreign Trade Zones Board, while U.S. Customs Service regulations cover the customs requirements applicable to the entry of goods into and the removal of goods from these zones.

### 1.1.8 Anti-Dumping Law

The U.S. anti-dumping law (19 U.S.C. §§ 1671-1677) provides that if a foreign manufacturer sells goods in the U.S. at less than fair value and such sales cause or threaten material injury to a U.S. industry, or materially retard the establishment of a U.S. industry, an additional duty in an amount equal to the "dumping margin" is to be imposed upon the imports of that product from the foreign country where such goods originated. Under the statute, sales are deemed to be made at less than fair value if they are sold at a price which is less than their "foreign market value" (which generally is equivalent to the amount charged for the goods in the home market). The dumping margin is equal to the amount by which the foreign market value exceeds the U.S. price.

The Secretary of Commerce is charged with determining whether merchandise is being sold at less than fair value in the U.S. The International Trade Commission makes the determination of whether such sales cause or threaten material injury to a U.S. industry.

## 1.2 Federal Antitrust Laws

The antitrust laws of the United States are primarily reflected in five federal statutes: the Sherman Act, the Clayton Act, the Robinson-Patman Act, the Federal Trade Commission Act, and the Hart-Scott-Rodino Act.

### 1.2.1 The Sherman Antitrust Act of 1890

The Sherman Act is divided into two primary sections. Section 1 prohibits contracts, combinations, and conspiracies made in restraint of trade. Section 2 prohibits unilateral and combined conduct that monopolizes or attempts to monopolize trade. Under the Sherman Act, some restraints are "per se" unreasonable (such as price-fixing agreements between competitors) and others are subject to analysis under a "rule of reason" (such as some restrictions placed on a distributor by a manufacturer). Restraints subject to the "per se" rule are never permitted, while those governed by the "rule of reason" test will be evaluated on a case-by-case basis.

### 1.2.2 The Clayton Act of 1914

The Clayton Act prohibits certain specific anticompetitive activities. For example, the Act prohibits some corporate mergers, exclusive dealing contracts, and agreements under which one product is sold subject to the requirement that the purchaser also buy another product from the seller (known as a "tying" arrangement).

### 1.2.3 The Robinson-Patman Act of 1936

The Robinson-Patman Act prohibits a seller from discriminating (or inducing others to discriminate) among competing purchasers in the price charged for commodities "of like grade and quality." While the Act focuses on price discrimination, it also addresses other concerns such as discriminatory advertising allowances.

### 1.2.4 The Federal Trade Commission Act

The FTC Act declares unlawful "unfair methods of competition" and "unfair or deceptive acts or practices."

### 1.2.5 The Hart-Scott-Rodino Antitrust Improvements Act of 1976

The Hart-Scott-Rodino Act requires that, under certain circumstances, a company proposing to merge with or acquire another company must give prior notice of the proposed acquisition to the Federal Trade Commission and the Justice Department. Failure to report may result in very substantial fines.

### 1.2.6 Enforcement

Private individuals and corporations may bring lawsuits under the Sherman Act, the Clayton Act and the Robinson-Patman Act. Remedies may include injunctive relief, treble damages and attorney fees. The government may enforce the Sherman Act through criminal prosecutions and civil suits. In addition, the government may enforce the Clayton Act and the Robinson-Patman Act through the FTC or the Justice Department. Only the government can enforce the Federal Trade Commission Act and the Hart-Scott-Rodino Act.

## 1.3 Florida Antitrust Laws

Florida's antitrust statutes are located in Chapter 542, Florida Statutes, "Combinations Restricting Trade or Commerce," and are expressly intended "to complement the body of federal law prohibiting restraints of trade or commerce[.]" Accordingly, federal applications and interpretations of U.S. antitrust laws are directly applicable to Florida antitrust law, and such litigation in Florida often has Florida statutory claims proceeding parallel to federal statutory claims under the same analysis; however, prosecution of an antitrust violation by the Florida Attorney General is prohibited while there is a federal prosecution pending. Florida's statutes provide for civil penalties (of up to $100,000 against individuals and $1,000,000 against companies) and injunctive relief in actions brought by the Florida Attorney General. Private individuals are authorized to seek injunctive relief and treble damages, plus attorneys' fees and costs. Suit on an antitrust violation must be brought within four years of accrual of the claim, except that the statute of limitations on a private suit is tolled until one year after the conclusion of a proceeding brought by the Florida Attorney General.

Chapter 542 expressly deems written contracts barring an individual from competing after selling a business not to be illegal restraints of trade, within certain parameters, and authorizes injunctive relief as well as damages. Similarly, written contracts through which an employee agrees not to compete with an employer during employment or post-employment are approved, subject to reasonableness of time, area, and line of business covered.

For further discussion on restraints of competitive activities in an employment-agreement context, see also Section 6.3.5 of this Guide [Florida Non-Compete Statute].

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# CHAPTER 2. GENERAL REGULATION OF BUSINESS IN FLORIDA

**Business Regulations**
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## 2.1 Requirements for Qualification to Do Business in Florida

Foreign corporations, limited liability companies, and limited partnerships (including limited liability limited partnerships) must obtain a Certificate of Authority from the Florida Department of State, Division of Corporations, before they may permissibly "transact business" in Florida.

The concept of "transact[ing] business" is not specifically defined in the Florida Statutes. However, a list of activities that do not constitute transacting business (meaning, a list of activities for which foreign qualification is not required) is provided in Florida Statutes §§ 607.1501, 608.501, and 620.1903. Generally, activities that do not constitute transacting business in Florida include, but are not limited to: (1) maintaining bank accounts; (2) selling through independent contractors; (3) soliciting or obtaining orders, whether by mail or through employees, agents or otherwise, if the orders require acceptance outside of Florida before they become contracts; (4) transacting business in interstate commerce; and (5) conducting an isolated transaction that is completed within 30 days and not part of a series of repeated similar transactions.

To obtain a Certificate of Authority, a foreign entity must file an Application by Foreign Corporation (or Limited Liability Company or Limited Partnership, as the case may be) for Authorization to Transact Business in Florida and must provide an original current certificate of existence, no more than ninety (90) days old, duly authenticated by the Secretary of State or the proper official having custody of corporate records in the state or country under the law of which the entity is organized or incorporated. If the certificate of existence is in a language other than English, a translation of the certificate, under oath of the translator, must be attached to the foreign-language certificate.

The laws of Florida require that each foreign entity applying for a Certificate of Authority must designate a registered agent having a street address in the state. The registered agent must accept this designation in writing and must indicate the agent's familiarity with the obligations of being a registered agent. Registered agents are responsible for accepting service of process on behalf of the corporation, limited liability company, or limited partnership. Failure to designate and properly file on behalf of its registered agent will subject the foreign entity to a fine of up to $500.

A foreign entity's failure to obtain a Certificate of Authority will not invalidate any contracts, deeds, mortgages, security interests or corporate acts, or prevent it from defending a legal proceeding in Florida; however, such failure will prevent the entity from bringing an action in Florida, including defensive counter-claims. If a Certificate of Authority is obtained after transacting business in Florida, the Division of Corporations may collect all fees and taxes which would have been collected from the date the certificate should first have been obtained. In some cases, the statutes also direct the Division of Corporations to impose fines between $500 and $1,000 for each year or portion in which the foreign entity transacts business without a Certificate of Authority.

Foreign general partnerships (just as domestic general partnerships) are not required to take any specific action in order to transact business. However, if a foreign general partnership wishes to take advantage of the benefits afforded a Florida "registered" general partnership, it must file a partnership registration statement with the Division of Corporations. Similarly, if a foreign limited liability partnership wishes to

maintain its limited liability status in Florida, it must register and file a statement of foreign qualification. Partnership registration requires a listing of all partners and their mailing addresses or the listing of an agent who maintains the partner information. Qualification as a foreign limited liability partnership also requires the designation of a registered agent.

Florida Statutes provide a method for certain unincorporated foreign associations to qualify to transact business in Florida. The organizations to which this provision applies are any unincorporated joint stock associations for profit that are engaged in any business or businesses other than the banking, trust, or insurance business, and which have written articles of association, capital stock divided into shares, and a name including the word "company" or "association" or "society."

## 2.2 Florida Business Organizational and Regulatory Requirements, Generally

Corporations, limited liability companies, limited partnerships, and limited liability partnerships in Florida are required to file certain organizational documents with the Division of Corporations, and general partnerships may elect to do so as well. Sample forms and a fee schedule are available on the Division of Corporation's website at http://www.sunbiz.org. Organizational documents like Articles of Incorporation, Articles of Organization, and Certificates of Limited Partnership, may be filed online at http://www.sunbiz.org. Please note that general partnership registrations and qualifications as a limited liability partnership may not be filed online. There is additional guidance in the applicable Florida Statutes, as well as forms and instructions on the Division of Corporation's website, for the amendment and correction of organizational documents, the reinstatement of an administratively dissolved entity, the domestication or conversion of a foreign entity, and related matters.

Once a business has filed its organizational documents with the Division of Corporations, there may be other specific requirements that must be met depending on the type of business involved. It may also be necessary for the entity or its principals or both to register or become licensed with one or more state regulatory boards. Registration or licensing applies to many types of businesses and professions operating in Florida, especially those engaged in providing legal, healthcare, financial and other professional services to the public. Before operating any business in Florida, it is advisable to review the Florida Statutes for restrictions that may apply on the entity and its principals and to communicate with the applicable licensing boards and state departments which impose or enforce restrictions and obligations affecting persons engaged in such businesses or professions in Florida.

A detailed description of each specific business or profession is beyond the scope of this Guide. A listing of the regulated businesses in Florida is available at http://www.stateofflorida.com (not an official State of Florida website, but a good starting point).

It is important to remember that a business may also be subject to occupational license requirements for both the county and the municipality in which the business is located. Information about these licenses is typically found on the respective county's or city's website.

## 2.3 Business Name Registration Requirements

### 2.3.1 Naming Requirements for Business Entities

The Florida Statutes impose restrictions on the naming of various business entities. For example, the name of a corporation must contain the word "corporation," "company," or "incorporated" or the abbreviation "Corp.," "Inc.," or "Co." A limited liability company name must contain the words "limited liability company," the abbreviation "L.L.C.," or the designation "LLC"

as the last words of the name. There are similar naming requirements for limited partnerships, limited liability limited partnerships and limited liability partnerships. Entities owned by licensed professionals which perform professional services for the public are subject to other naming requirements.

Each business entity name must be distinguishable from the names of all other entities organized or registered in Florida and on file with the Division of Corporations, with the exception of fictitious names as noted below. The current list of active and inactive business entity names may be searched by selecting the "Look up a Business Name" option on The Division of Corporation's website at http://www.sunbiz.org. Geographical qualifiers are generally not acceptable to make a name distinguishable. For example, XYZ of Florida, Inc. would not be considered distinguishable from XYZ, Inc.

A foreign entity desiring to do business in Florida must meet these naming requirements by adding the proper designation to the entity's name, or by operating under a different name if the entity's name is not available.

### 2.3.2 Fictitious Names

Florida Statutes § 865.09 is known as the Fictitious Name Act and imposes requirements on any person or entity that transacts business under any name other than such person's legal name or the properly registered business entity name with the Florida Division of Corporations. The purpose of registering fictitious names is to give public notice as to ownership of the name. Registering the fictitious name does not grant the owner any trademark or service mark or other protection of the name against use by another party. In fact, duplicate identical fictitious names may be registered. A person registering a fictitious name must ensure that the name being registered does not violate another person's protected trade mark or service mark.

Persons or entities applying to register a fictitious name must first advertise the name at least once in a newspaper in the county where the principal place of business of the applicant will be located.

Fictitious name registrations are valid for five years and expire on December 31 of the fifth year. Renewals may be filed at any time during the fifth year. Registrations and renewals of fictitious trade names can be done online at http://www.sunbiz.org. An expired fictitious name cannot be reinstated. Upon the expiration of a fictitious name, a new application for fictitious name must be filed, including re-publishing the notice in the newspaper to comply with the publication requirement.

The business and its owners that use an unregistered fictitious name may not maintain any action, suit, or proceeding in any court of this state until the fictitious name has been properly registered and may be guilty of a misdemeanor. Contracts made by the business are enforceable against it.

There are three exemptions from the fictitious name registration requirement:

- Attorneys licensed to practice in Florida forming a business for the practice of law in Florida;
- Applicants who are registered or licensed with the Florida Department of Business and Professional Regulation or with the Florida Department of Health (although some licensing boards require fictitious name registrations); or
- Applicants who are corporations, partnerships or other commercial entities that are actively organized or registered with the Division of Corporations and are not transacting business under any other name.

## 2.4 Notice of Business Activities

In addition to filing organizational documents (such as Articles of Incorporation, Articles of Organization, Certificate of Limited Partnership, or a Partnership Registration and Statement of Qualification for a limited liability partnership) with the Division of Corporations, businesses must file an annual report with the Division of Corporations, and provide notice of the business's termination of its legal existence or withdrawal from Florida.

### 2.4.1 Annual Reports

Corporations, limited liability corporations, limited partnerships and limited liability partnerships must file annual reports between January 1 and May 1 each year. The annual reports must be filed with the Division of Corporations, and can be e-filed at http://www.sunbiz.org. In addition to the standard filing fees specified on http://www.sunbiz.org, there is a $400 late fee for annual reports filed after May 1st. The Division of Corporations takes the position that it lacks authority to abate the late fee. If a business entity fails to file its annual report by the close of business on the third Friday of September, it will be administratively dissolved in the following week, and must file for reinstatement. In the case of a limited liability partnership, failure to file the annual report will result in revocation of its statement of qualification as a limited liability partnership. The Division of Corporations will send an email to the business to remind it to file its annual report, but failure to receive this notice will not excuse the entity from paying the late fee if the annual report is filed late.

Any changes in an entity's registered agent, officers, directors, managers, the principal office and mailing address, and other information (but not the entity's name) occurring after the entity's formation or after a an annual report has been filed can and should be updated when the next annual report is filed. In some cases, an amended annual report can be filed to update such information in the event of additional changes after an annual report is filed.

### 2.4.2 Termination of Legal Existence

A business that wishes to dissolve can file Articles of Dissolution (or, in the case of a registered partnership, a Statement of Dissolution) with the Division of Corporations in accordance with Florida Statutes §§ 607.1403 (corporations), 608.441 (limited liability companies) or 620.1801 (limited partnerships). Dissolved entities may make provisions to dispose of known and unknown or contingent claims by following procedures set forth in the Florida Statutes §§ 607.1406, 1407 (corporations), 608.4421, 444 (limited liability companies) or 620.1806, 1807 (limited partnerships). The specific requirements, including written notice to all known and potential claimants, are discussed in the statutes. Managers, officers and directors of a

dissolved corporation or limited liability company who follow these procedures are not exposed to personal liability to creditors of the dissolved business.

### 2.4.3 Withdrawal from the State

A foreign corporation, limited liability company or limited partnership that wishes to cease operating in Florida must obtain a certificate of withdrawal or file a notice of cancellation with the Division of Corporations in accordance with Florida Statutes §§ 607.1520 (corporations), 608.511 (limited liability companies) or 620.1907 (limited partnerships). Corporations and limited liability companies must provide a mailing address and must commit to notify the Division of Corporations if the mailing address changes in the future. The Department of State will be designated as the entity's agent for service of process within the state, and will mail a copy of the process to the foreign corporation or limited liability company at the mailing address provided by the entity.

## 2.5 Applicability of Florida State Usury Laws

Florida Statutes chapter 687 deals with usury laws. In general, for loans of $500,000 or less, the interest rate cannot exceed 18% simple interest per year. For loans of greater than $500,000, the interest rate cannot exceed 25% simple interest per year. Florida Statutes § 687.04 provides that if a loan is usurious, then the lender may not recover any interest whatsoever, and only the principal sum of the loan contract may be enforced. If the usurious interest has already been paid to the lender, then the borrower may recover double the amount of interest paid. The lender can cure a usurious loan if the lender notifies the borrower in writing and refunds the excess interest prior to the time that the borrower asserts usury as a defense or commences a proceeding to recover usurious interest. Florida Statutes § 687.04(2).

The usury limitations apply to payments, however denominated, which constitute charges for the use of money, such as interest or finance charges. However, late charges on installment payments imposed by lessors and those regularly in the business of lending money are not included in the calculation of interest for determining whether a transaction is usurious if the late charge is not in excess of 5% of the delinquent installment and only one late charge is collected on any installment, regardless of the period in which it remains in default. Florida Statutes § 687.03(2)(c). Similarly, charges for attorney's fees in an enforcement action are not considered interest. Florida Statutes § 687.05.

If the principal amount of the loan exceeds $500,000, then any property given to the lender, the value of which depends on the success of the venture in which the loan proceeds are used, is not considered interest. Stock options and interests in profits, receipts or residual values are examples of this exception to the usury laws and are excluded from the calculation of interest. Florida Statutes § 687.03(4).

Penalties for criminal usury are covered in Florida Statutes § 687.071. The severity of the penalty increases with the rate of interest charged. If a loan constitutes criminal usury, the debt is unenforceable. Florida Statutes § 687.071(7).

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# CHAPTER 3. BUSINESS ENTITIES

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## 3.1 Florida Corporations

### 3.1.1 Introduction

The corporate form remains a popular form of entity to conduct business principally due to the protection it provides its shareholders from liability for obligations of the business. Under the laws of Florida, a corporation can be organized for any lawful purpose, except where a conflict arises with regulations or statutes that control specific types of businesses, such as Professional Corporations. For the purposes of Florida law, a corporation is considered a separate legal entity or "person." This separate status ensures that, absent certain circumstances, the shareholders of the corporation are not responsible for repaying the debts and obligations of the corporation from their personal assets.

The Florida Business Corporation Act governs the formation, operation and dissolution of corporations in the State of Florida, and general supervision is provided by the Department of State, Division of Corporations, P.O. Box 6327, Tallahassee, Florida 32314, http://www.sunbiz.org.

### 3.1.2 Formation

One or more persons may act as the incorporator or incorporators of a Florida corporation by filing Articles of Incorporation with the Department of State, Division of Corporations. Florida law provides that the Articles must be executed by a director, president or other officer, but an incorporator or fiduciary can file the formation documents if such directors or officers have not yet been chosen. There is no requirement that the incorporator be a citizen or resident of Florida. The filing documents must be type-written, in English, executed by the incorporator and a registered agent, and delivered to the Department of State with a filing fee of $35.00. Forms and instructions specific to each type of Florida entity are available on the Division of Corporations website. A corporation exists and is effective as of the date and time of its filing,

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but the incorporator may indicate a delayed effective date and time. In such case, the corporation will become effective on the specified date and time.

The Articles of Incorporation must contain the following information:

a. Name of the Corporation. The name of the corporation must include in it a word such as "Corporation," "Company," "Incorporated," or some abbreviation thereof, such as will clearly indicate that it is a corporation. A Professional Association must contain the words "Chartered" or "Professional Association". The name may not imply that the corporation is organized for a purpose other than that of a corporation, may not imply that it is connected to a government agency, and must be distinguishable from other entities or filings registered with the Division of Corporations;

b. Incorporators. The name and address of each incorporator;

c. Registered Agent and Office. The street address of the corporation's initial registered office and the name of its initial registered agent at that office, together with written acceptance stating that the registered agent is familiar with, and accepts, the obligations of the position;

d. Street and Mailing Addresses. The street address and, if different from the street address, the mailing address of the initial principal office of the corporation;

e. Number of Authorized Shares. The number of shares the corporation is authorized to issue; and

f. Describe Preemptive Rights. If any preemptive rights are to be granted to shareholders, the provision for such rights must be set forth in the Articles of Incorporation.

The Articles of Incorporation may also optionally contain the following information:

a. Initial Directors. The name and addresses of the individuals who shall serve as the initial directors;

b. Purpose. The purpose or purposes for which the corporation is organized, provided such purpose is not inconsistent with the law;

c. Par Value. A par value for authorized shares or classes of shares;

d. Powers. Provided that it is not inconsistent with Florida law, a provision defining, limiting, and regulating the powers of the corporation and its board of directors and shareholders;

e. Personal Liability. Provided that it is not inconsistent with Florida law, a provision setting forth the imposition of personal liability on shareholders for the debts of the corporation to a specified extent and upon specified conditions;

f. Management. A provision describing the management of the business and regulating the affairs of the corporation; and

g. Other. Any further provisions that are required or permitted to be set forth in the Bylaws of the corporation.

If the Articles of Incorporation are determined by the Department of State to be incomplete and inappropriate for filing, the Department of State may return the document filed to the person filing it with a written explanation of its deficiency. The applicant can then file the document again within 60 days and request the same initial filing date, and, if the document is approved, it will be effective as of that original date.

A corporation may correct a document filed with the Department of State within 30 days after filing the document if it contains an inaccuracy, was defectively executed, or was defectively transmitted. To correct the filing, Articles of Correction must be prepared that describe the document and its original filing date, specify the inaccuracy that needs to be corrected, correct the accuracy, and deliver the Articles of Correction to the Department of State. Articles of Correction are effective as of the filing date of the original document.

### 3.1.3 Organization

Articles of Incorporation provide the fundamental rules and structure that govern the corporation's existence. However, Articles of Incorporation will often not provide the level of detail required to organize and manage the routine day-to-day existence of a corporation. More detail is set forth in the corporation's Bylaws, which, unlike the Articles of Incorporation, are not filed with the Department of State and are therefore not public record. Initial Bylaws of the corporation may be adopted by its incorporators or by the initial board of directors. In general, Bylaws of a corporation contain provisions determining the number of officers and directors, as well as their powers and duties; the time and manner of holding shareholder meetings and board meetings; voting rights and procedures; filling of vacancies on the board or among officers; indemnification provisions pertaining to directors and officers; fiscal year audits and financial reporting; and other miscellaneous organizational matters such as amendment procedures.

Corporations are organized around a hierarchical control structure which is managed by or under the direction of the board of directors and its officers. Shareholders will be called upon to vote on important corporate issues, such as electing directors, approving mergers, selling of all the corporation's assets or dissolving the corporation itself. As part of the organization of the corporation, the initial board of directors will meet in person or through a written consent and ratify the acts taken in connection with the initial formation of the corporation and to further adopt the written Bylaws.

### 3.1.4 Capitalization

A corporation has many options for raising its initial capital; these options include various kinds of equity (such as common stock, preferred stock, options, or warrants) and numerous types of debt instruments (such as convertible notes, subordinated notes, bonds, or commercial paper).

If a corporation (or any other form of business organization) elects to raise capital through the sale of its securities to investors, it should be aware that the issuance of securities to investors

is regulated both by United States law and by state law, and care must be taken by the corporation to avoid violation of the complex provisions of these laws. Users of this Guide are advised to refer to Chapter 4 [Securities Regulation] and to seek the advice of an attorney well-versed in the various state and federal securities laws to ensure compliance with all applicable regulations.

### 3.1.5 Issuance of Shares

The corporation can only sell shares that are authorized to be issued. The Articles of Incorporation will set forth the number of shares that the corporation is authorized to issue, but the corporation will likely authorize the issuance of shares through the board of directors (although that right may be reserved to the shareholders by the Articles of Incorporation). Shares may be issued 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 in writing, or other securities of the corporation. The board of directors has the discretion to determine whether the consideration is adequate, but it must make such determination for the shares to be considered validly issued, fully paid and non-assessable.

It is not required under Florida law that shares of corporations be evidenced by certificates, but if such certificates exist, they must be signed by officers designated in the Bylaws or by the board of directors.

Restriction on the transfer of shares can be placed on the shares through the Articles of Incorporation, the Bylaws, or shareholder agreements. A restriction in place at the time the shares are issued is valid and enforceable against the holder or a transferee of the holder if the restriction is authorized by the Florida Business Corporation Act and its existence is conspicuously noted on the front or back of the certificate.

Under Florida law, shareholders do not have preemptive rights to acquire a pro rata share of newly issued shares unless that right is specifically granted in the Articles of Incorporation. Thus, the board of directors may issue additional authorized but un-issued shares free of any claims of existing shareholders.

### 3.1.6 Management

A corporation is managed by one or more directors, who need not be residents of Florida or shareholders of the corporation (unless otherwise stated in the Articles of Incorporation). Closely held corporations with fewer than 100 shareholders may dispense with or limit the authority of the board of directors through an agreement amongst the shareholders. If a corporation has directors, they will be elected by the shareholders at an annual meeting. Florida law limits the division of directors into groups of not more than three equal classes, whose terms of office expire in a staggered manner.

Unless prohibited by the Articles of Incorporation, the board of directors of a corporation may designate an executive committee from among its members. An executive committee has the right to exercise all of the authority of the board of directors except the authority to approve or recommend to shareholders actions required to be approved by shareholders; fill board vacancies; adopt, amend or repeal the Bylaws; reacquire corporate shares; and issue or contract for the sale of shares.

The daily affairs of the corporation are supervised by its officers. A corporation must have officers described in its Bylaws or appointed by the board of directors. Two or more offices may be held by the same individual. Officers serve at the pleasure of the board of directors and may be removed from office at any time, with or without cause.

### 3.1.7 Liability of Directors

A director will have no liability to the corporation or its shareholders if the director discharges his or her duties in good faith and in a manner that the director reasonably believes to be in the best interest of the corporation and with that degree of diligence, care and skill which an ordinarily prudent person would exercise under similar circumstances if serving in a like position. Florida law further substantially restricts the grounds for asserting personal liability against a director. Under Florida law, a director is not personally liable for monetary damages to the corporation or its shareholders or third parties unless, among other things, the director's breach or failure to perform his or her duties as director constitutes a violation of the criminal law, a transaction for which the director derived an improper personal benefit, or an unlawful distribution.

Additionally, Florida law permits a corporation to indemnify a director who may be party to any third party action if the director acted in good faith and in a manner reasonably believed not to be opposed to the best interest of the corporation. Indemnification may not be available in a derivative action if the director is found liable, unless a court determines that the director is fairly entitled to such indemnification. Under Florida law, any determination of indemnification must be made in keeping with the statutory requirements and standards by a majority vote of a quorum of disinterested directors, by independent legal counsel, or by a majority of disinterested shareholders.

### 3.1.8 Actions by Directors and Shareholders

Directors may act at a meeting of the board or through written consents. Meetings may be regular or special and may be held in or outside of Florida. Notice requirements for special meetings shall be at least two days prior to the meeting unless otherwise stated in the Bylaws. Directors do not have to attend meetings in person and may be present via some form of distance communication, as long as all the directors present can hear each other simultaneously.

Unless otherwise provided in the Articles of Incorporation or Bylaws, a majority vote of the directors at a meeting where a quorum is present constitutes an action by the board. Unless the Articles or Bylaws provide otherwise, a majority of the directors then in office constitutes a quorum. The Articles or Bylaws may change the number of directors required for a quorum, but in no event may a quorum consist of less than one third of the currently serving directors. Directors may also act without a meeting by unanimous written consent.

The corporation must hold an annual meeting at which shareholders elect directors. Unless otherwise provided in the Articles of Incorporation, action may be taken by the shareholders without a meeting, notice or vote, if consent in writing setting forth the action taken is signed by the minimum number of votes necessary to authorize such action at a meeting. Notice stating the place, day and hour of the meeting (and in the case of a special meeting, the purpose for such meeting) must be given to shareholders with a right to vote not less than ten but not more than 60 days before the meeting. The board of directors may authorize shareholders and proxy holders to participate in meetings by means of remote communication. If the corporation has

not held an annual meeting for a thirteen-month period, or if the corporation has failed to hold a special meeting properly demanded by a shareholder pursuant to Florida Statutes, then any shareholder entitled to vote in an annual meeting may apply to the circuit court to order a meeting to be held.

Notice to shareholders must be in writing unless oral notice is expressly authorized by the Articles of Incorporation or the Bylaws and such notice is provided under reasonable circumstances, and may be communicated by telephone, voicemail, or other electronic means, or by mail or other method of delivery. Notice by electronic transmission is considered written notice. Written notice to shareholders is effective upon deposit into the U.S. mail, if mailed postpaid and correctly addressed to a shareholder's address or when electronically transmitted to a shareholder in a manner authorized by the shareholder, and notice to such corporation may be addressed to its registered agent at its registered office, to its electronic mail address as authorized, or to its secretary at its principal office. Multiple shareholders who reside at one address must give consent to receive a combined notice, but a shareholder who fails to object in writing within 60 days of written notice of the corporation's intent to use single notice is deemed to have consented.

Unless the Articles of Incorporation provide otherwise, voting for directors is not cumulative and each shareholder is entitled to one vote for each share standing in his or her or its name on the books. The majority of shares outstanding constitutes a quorum unless the Articles of Incorporation specify otherwise. Shareholders may vote by a proxy that they appoint by written instrument or by electronic transmission, and a proxy is valid for eleven months unless otherwise provided in the proxy itself. Shareholders of the corporation may appoint a proxy by signing an appointment form or transmitting or authorizing an electronic transmission, which proxy is usually revocable except in certain circumstances.

Florida has adopted a control-share acquisition statute based on a similar law upheld by the U.S. Supreme Court in *Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987). The statute limits the ability of a person or group of persons to vote the stock of a corporation if such person or group of persons has voting power to elect directors of the corporation and the person or group of persons control at least one-fifth of the corporation's stock. The Articles of Incorporation or Bylaws of the corporation can exclude the corporation and its shareholders from the statute's application. Additionally, the statute contains several other exceptions to its requirements.

Additionally, voting trusts are permitted under Florida law and may be created when shareholders enter into a written trust agreement, deposit a copy with the corporation, and transfer the shares to the trustee. Two or more shareholders may also provide for the manner in which they will vote their shares by signing a voting agreement. A transferee shareholder of shares covered by the voting agreement is bound by the agreement if the transferee takes shares subject to such agreement with notice thereof. Affiliate transactions are prohibited in certain situations, unless the requirements of the Florida statutes are complied with. Affiliate parties may be prohibited in certain situations from obtaining stock by sale, lease, exchange, mortgage, pledge or other disposition, but a corporation may opt out of this provision of the statutes.

### 3.1.9 Distributions to Shareholders

The board of directors may authorize and the corporation may make distributions to its shareholders, subject to the restrictions in the Articles of Incorporation, unless the corporation

would not be able to pay its debts as they become due in its usual course of business or the corporation's total assets would be less than the sum of its total liabilities plus (unless the Articles of Incorporation permit otherwise) any amounts needed to satisfy the preferential rights upon dissolution of any shareholders whose preferential rights are superior to those receiving the distribution.

Except for corporations that make an election under Subchapter S of the Internal Revenue Code, a corporation is taxed on any earnings before they are passed down to shareholders. Once received by the shareholders, these distributions are then taxed at the shareholder's applicable individual tax rate. Thus, the corporation is subject to what is called "double taxation."

### 3.1.10 Liability of Shareholders

Shareholders of a corporation generally enjoy protection from personal liability for the obligations of the corporation. Shareholders are under no obligation to the corporation or its creditors to pay for shares, other than the obligation to pay the corporation any unpaid portion of consideration for which the shares were originally issued to the shareholder.

Under certain circumstances, usually extraordinary in nature, a court of equity may "pierce the veil" of a corporation to impose personal liability upon shareholders for the corporation's obligations. Among the factors that might lead a court to pierce the veil are the shareholder's failure to observe corporate formalities, such as keeping corporate records, electing directors and officers, holding meetings, and commingling corporate and non-corporate funds and assets. It is important to observe these formalities of corporate existence, even though the instances of veil piercing by the courts are unusual.

### 3.1.11 Extraordinary Transactions

Certain extraordinary transactions involving corporations, including mergers, share exchanges, conversion to a different form of business organization, sale of all or substantially all assets out of the ordinary course of business, and voluntary dissolution, require, in addition to board of director approval, approval of the corporation's shareholders. In addition, shareholders who object to such transactions and who do not vote in favor of them may, under certain circumstances, elect to dissent from the transaction and, by following detailed procedures set forth in the Florida Business Corporation Act, demand to be paid the fair value of their shares, as determined by an appraisal. Appraisal rights are not available for holders of any class of shares which are either traded on a national securities exchange or for a class of shares which has at least 2,000 shareholders or a market value of at least $10 million (excluding such value held by subsidiaries, senior executives and directors, and beneficial shareholders owning more than 10% of such shares) and in cases where the shareholders are required to accept any consideration other than cash for their shares.

### 3.1.12 Foreign Corporations

A corporation formed under the laws of another jurisdiction but which conducts business in Florida is required to obtain a Certificate of Authority to transact business in Florida. To obtain a Certificate of Authority, the corporation must file a certificate of existence issued from an authorized officer of the jurisdiction of the corporation's formation evidencing said incorporation and translated under oath if in a foreign language.

For the purposes of Florida law, the activities that do not constitute transacting business in Florida include, but are not limited to: (1) maintaining bank accounts; (2) selling through independent contractors; (3) soliciting or obtaining orders, whether by mail or through employees, agents or otherwise, if the orders require acceptance outside of Florida before they become contracts; (4) transacting business in interstate commerce; and (5) conducting an isolated transaction that is completed within 30 days and not part of a series of repeated similar transactions.

Corporations that transact business without a Certificate of Authority are liable to the state for all fees and taxes that would have been imposed by the state had the corporation duly qualified, and any non-complying foreign corporations are liable to the state of Florida for a penalty of not less than $500 but not more than $1,000 for each year or part of a year during which they transact business. Additionally, corporations transacting business in Florida without a Certificate of Authority may not maintain any action in Florida courts, including defensive counter-claims, until such certificate is obtained. However, a failure to obtain a Certificate of Authority will in no way impair the validity of an contract, deed, mortgage, security interest or act of the corporation and does not prevent the corporation from defending itself in any proceeding in Florida.

The application for the Certificate of Authority must contain the following information:

a. Name. The name of the corporation;

b. Jurisdiction. The jurisdiction where the foreign corporation is incorporated;

c. Date. The date upon which the corporation was incorporated;

d. Duration. The duration of the corporation;

e. Addresses. The street address of the principal business office of the corporation, as well as the address of the registered office in the state of Florida and name of the resident agent;

f. Directors and Officers. The name and usual addresses of its current directors and officers; and

g. Other. Any further provisions that are required by the Department of State.

The Certificate of Authority grants the authority to transact business in Florida and continues until surrendered by the corporation, suspended by the state, or revoked. Further, the corporation's name must comply with Florida naming conventions and it may have to register its corporate name with additions, if any, required by Florida law, if its name is not distinguishable from corporate names that are not available under Florida law. Registration is renewed annually by a foreign corporation by filing an annual renewal application.

For more general information on regulation of foreign entities in Florida, see Chapter 2 of this Guide [General Regulation of Business in Florida].

### 3.1.13 Filing and Recordkeeping

The Florida Business Corporation Act requires that each corporation keep the following records:

a. Articles in Effect. Its Articles or restated Articles of Incorporation and all amendments to them currently in effect;

b. Bylaws in Effect. Its Bylaws or restated Bylaws and all amendments to them currently in effect;

c. Resolutions Pertaining to Shares. Resolutions adopted by its board of directors creating one or more classes or series of shares and fixing their relative rights, preferences, and limitations, if shares issued pursuant to such resolutions are outstanding;

d. Minutes and Shareholder Actions. The minutes of all shareholders' meetings and records of all actions taken by shareholders without a meeting for the past three years;

e. Shareholder Communications. Written communications to all shareholders generally or all shareholders of a class or series within the past three years, including the financial statements furnished for the past three years;

f. Directors and Officers. The names and business street addresses of its current directors and officers; and

g. Annual Report. The most recent annual report delivered to the Department of State.

Florida law additionally requires that unless modified by resolution of the shareholders within 120 days of the close of the corporation's fiscal year, a corporation shall mail to its shareholders an annual financial statement within 120 days after the end of the fiscal year.

The corporation is also required to file an annual report with the Florida Department of State prior to May 1 of the subsequent calendar year. The annual report should be compiled on the form available at the Department of State website, http://www.sunbiz.org, and only contains basic corporate information and no financial information. For more information on filing annual reports in Florida, see Chapter 2 of this Guide [General Regulation of Business in Florida].

### 3.1.14 Taxes and Subchapter S Corporations

Florida currently has a corporate income tax rate of 5.5%, and corporations must file a Form F-1120 Corporate Income/Franchise and Emergency Excise Tax Return with the state. Unless exempt, all corporations and artificial entities that conduct business or earn or receive income in Florida, including foreign corporations, must file a Florida corporate income tax return. A corporation will be required to pay all federal tax on the income it earns and its shareholders must pay federal taxes on dividends distributed by the corporation, unless the corporation is an S corporation.

For United States income tax purposes, corporations may be designated as either "C" corporations or "S" corporations. An S corporation generally does not pay corporate income tax, but its shareholders pay taxes on their pro rata share of the corporate earnings, regardless of whether those earnings are distributed to the shareholders. To qualify as an S corporation, the corporation must comply with strict IRS guidelines and complete the requisite election form and must be approved by all shareholders.

For more information on taxation of business entities, see Chapter 5 of this Guide [Taxation].

## 3.2 Florida Limited Liability Companies

### 3.2.1 Introduction and Note about New LLC Law

An increasingly popular form of business entity is the limited liability company ("LLC"), which combines some of the most favorable characteristics of both partnerships and corporations to provide its principals with greater flexibility in structuring their company to achieve business and tax objectives. Members of LLCs enjoy protection from direct claims of creditors of the LLC analogous to a corporation, paired with the ability to be treated for tax purposes as a disregarded entity and afforded the pass-through taxation option of a partnership. When an LLC elects to be treated as a disregarded entity for tax purposes, income and expenses are reported as though the members incurred them directly, and profits or losses are taxed at the ownership (individual member) level rather than at the entity (company) level. Ownership of an LLC is vested in members rather than shareholders, and members can be individuals, for-profit organizations, or not-for-profit organizations.

Under the Florida Revised Limited Liability Company Act ("FRLLCA"), a limited liability company can be organized for any lawful purpose but remains subject to the statutes and regulations of the State of Florida for regulating businesses. For purposes of Florida law, a limited liability company is considered a separate legal entity or "person." This separate status ensures that, absent certain circumstances, the members of the limited liability company are not responsible for repaying the debts and obligations of the company from their personal assets. The FRLLCA governs the formation, operation and dissolution of limited liability companies in the State of Florida, and general supervision is provided by the Department of State, Division of Corporations, P.O. Box 6327, Tallahassee, Florida 32314, http://www.sunbiz.org.

### 3.2.2 Formation

One or more persons or entities may form a limited liability company by filing Articles of Organization with the Department of State, Division of Corporations. Owners of an LLC are referred to as "members," and an LLC with one member is a "single-member LLC" and is afforded the same pass through tax treatment as an LLC with two or more members but treated as a sole-proprietorship rather than a partnership. Articles of Organization must be filed by one or more members or authorized representatives of the LLC. The current filing fee is $125. Forms and instructions specific to each type of Florida entity are available at http://www.sunbiz.org, and filing can be completed electronically.

An LLC exists and is effective at the time of the filing of the Articles of Organization, unless the Certificate of Formation provides for a future effective date.

The Articles of Organization must contain the following information:

a. Name of the Limited Liability Company. The name of the LLC must include in it the words "Limited Liability Company," the abbreviation "L.L.C." or the designation "LLC" as the last words of the name of the LLC. The Division of Corporations has interpreted this to prohibit the use of any other entity designations, even if accompanied by a "LLC" reference (such as "XYZ LLC Co."). The name may not imply that the LLC is organized for a purpose other than that of an LLC, may not imply that it is connected to a government

agency, and must be distinguishable from other entities or filings registered with the Division of Corporations, except that a limited liability company may register under a name that is not otherwise distinguishable with the written consent of the non-distinguishably named entity with written consent, if the consent is filed with the Division of Corporations at the time of the name's registration;

b. Principal Street Addresses. The street address of the principal office of the LLC (which need not be in Florida); and

c. Mailing Addresses. If different from the principal office street address, the mailing address of the LLC (which need not be in Florida); and

d. Initial Registered Agent and Registered Agent's Florida Address. The name and street address of the LLC's initial registered agent for service of process in the state of Florida. A third party agent may serve in this role for the LLC.

The Articles of Organization may also optionally contain the following information:

a. A declaration as to whether the limited liability company is member-managed or manager-managed (if not designated, the limited liability company will be presumed to be member-managed);

b. For a manager-managed limited liability company, the names and addresses of one or more of the managers of the limited liability company;

c. For a member-managed limited liability company, the names and addresses of one or more of the members of the company;

d. A description of the authority or limitation on the authority of a specific person in the company or a person holding a position or having a specified status in the company; and

e. Any other provisions not inconsistent with law.

The Articles of Organization must be executed by at least one member or the authorized representative of a member.

Members or managers, as applicable, have an obligation to correct inaccurate information in the Articles of Organization (whether such inaccuracy existed when the Articles of Organization were filed or whether such inaccuracy is due to changed circumstances), and a failure to do so may expose the member or manager, as applicable, to liability to third parties.

### 3.2.3 Management and Control: The LLC Operating Agreement

The management and control of the LLC is governed by the Florida Revised Limited Liability Company Act ("FRLLCA"), to the extent that the LLC does not override the default provisions of the act through the adoption of an Operating Agreement. It is in the best interest of an LLC to adopt an Operating Agreement to govern the management of the LLC. The Operating Agreement serves as a form of Bylaws and shareholder agreement for the LLC. In Florida, members of an LLC may enter into an Operating Agreement, whether in writing or not, at any

time before or after the filing of the Articles of Organization, and the Operating Agreement takes effect on the date of formation or the date specified in the Operating Agreement.

An LLC may be member-managed or manager-managed. In a member-managed LLC, unless otherwise provided in the Articles of Organization or Operating Agreement, management shall be vested in the members or elected managing members in proportion to the then-current percentage or other interest of members in the profits of the LLC, and the decision of a majority-in-interest of the members or elected managing members shall be controlling. In a manager-managed LLC, unless otherwise provided in its Articles of Organization or Operating Agreement, each manager has equal rights in the management and conduct of the LLC's business, and any matter relating to the business of the LLC may be exclusively decided by the manager or, if there is more than one manager, by a majority. A manager must be designated, appointed, elected, removed or replaced by a vote, approval, or consent of the majority-in-interest of the members; and will hold office until a successor has been elected and qualified, unless said manager resigns or is removed.

The FRLLCA is a "default statute". That is, except for the non-waivable provisions set forth above, to the extent that an Operating Agreement does not govern a particular matter, the FRLLCA will be deemed to control.

The Operating Agreement may not:

a. Vary a limited liability company's capacity to sue or be sued in its own name.

b. Vary the applicable law (Florida law is always applicable to Florida limited liability companies).

c. Vary the requirement, procedure, or other provision of the FRLLCA pertaining to:

    1. Registered agents; or

    2. The Department, including provisions pertaining to records authorized or required to be delivered to the Department of State for filing under the FRLLCA;

d. Vary the provisions of the FRLLCA relating to judicial orders.

e. Eliminate the duty of loyalty or the duty of care (except that it may alter where not manifestly unreasonable or where willful or intentional misconduct are not authorized).

f. Eliminate the obligation of good faith or fair dealing.

g. Unreasonably restrict the right of members to information.

h. Vary the power of a person to dissociate.

i. Vary the grounds for dissolution.

j. Vary the requirements for winding up of an LLC's business, activities, or affairs.

k. Unreasonably restrict the right of a member to maintain an action against the LLC.

l. Prevent a court from appointing a special litigation committee.

m. Vary the right of a member to approve a merger, interest exchange, or conversion.

n. Vary the required contents of a plan of merger, interest exchange, conversion or domestication.

o. Unreasonably restrict the rights of a third party.

p. Provide for indemnification for bad faith, willful misconduct, or a knowing violation of law; from a transaction in which an indemnified member or manager derived an improper personal benefit; for improper distributions; or where there has been a breach of the duties of loyalty or care (except as may be modified as set forth above).

An LLC is bound by the actions of each of its managers as agents of the LLC. Managers are required to act in good faith and with the care an ordinary prudent person of similar circumstances would use (the duty of care) and in conformity with what the manager perceives to be in the best interest of the LLC (the duty of loyalty). These duties may not be eliminated or unduly reduced by provisions in the Operating Agreement. If a manager acts in accordance with these duties of care and loyalty, he or she will not be liable for acts or omissions made as a manager of the LLC.

### 3.2.4 Statements of Authority and Denial

A Florida LLC may file a Statement of Authority or Statement of Denial with the Department of State to notify third parties regarding the authority, or lack thereof, of a member or manager to bind the LLC.

A Statement of Authority must include:

a. The name of the LLC as it appears in the records of the Department of State and the street and mailing addresses of its principal office; and

b. The name and/or position reflecting the authority, or lack thereof, of all persons having such status or holding such office to (i) execute an agreement transferring real property held by the LLC or (ii) otherwise bind the LLC.

A statement of authority gives implied notice to a third party of a party's authority with regard to binding the LLC. A Statement of Denial may be filed with the Department of State, denying authority previously granted by the Statement of Authority.

### 3.2.5 Limited Liability of Members and Managers

The FRLLCA provides that a member or manager of an LLC is not liable for a debt or obligation of the LLC and is not liable to the LLC or any other member or manager for such person's good faith reliance on the provisions of the LLC's Articles of Organization or Operating Agreement. This provision shields members to the extent that liability may exceed their investment in the LLC and prevents them from being obligated to the LLC, other members, managers, or creditors of the LLC for obligations not assumed through the member's capital contribution or other investment.

### 3.2.6 Remedies of Member Creditors: The "Olmstead Patch"

Traditionally, Florida law followed the "pick your partner" principle in regards to LLCs, providing that members of Florida LLCs had the right to determine their partners in business. Judgment debtors of LLC members were limited to grants of charging orders, which gave such debtors an assignment of the member's economic interest in the LLC while leaving the non-economic powers in the hands of the debtor.

In *Olmstead v. Federal Trade Commission*, 40 So. 3d 76 (Fla. 2010), the Florida Supreme Court ruled that Florida law permits a court to order a judgment debtor to surrender all right, title and interest in a single-member LLC to satisfy an outstanding judgment interest against the member of the single-member LLC. The Court determined that an interest in an LLC is a type of "corporate entity" and was personal property, akin to corporate stock. This raised concern that the judgment could apply to multi-member LLCs as well as single-member LLCs, and that judgment debtors could foreclose upon all of a member's interest in a multi-member LLC, violating the "pick your partner" principle in multi-member LLCs.

In response to the decision in *Olmstead*, an effort was led by the Florida Bar to propose a "patch" to Florida's LLC Act to remove the uncertainty that was created. The patch, now codified in § 605.0503 of the FRLLCA, provides that, with respect to multi-member LLCs in Florida, a charging order is the "sole and exclusive remedy" by which a judgment creditor of a member or an assignee of a member may satisfy a judgment from a judgment debtor's interest in an LLC or rights to distributions from a member's interest in an LLC. The statute makes it clear that foreclosure of a judgment debtor's interest in a multi-member LLC is not allowed. With respect to single-member LLCs, while a charging order is expressed to be the sole and exclusive remedy of a judgment creditor, if the judgment creditor can show that, under a charging order, distributions will not satisfy the judgment in a reasonable period of time, the court may order a foreclosure sale of the LLC interest, pursuant to which the purchaser in such a sale becomes the member of the LLC and the judgment debtor's membership interest ceases.

### 3.2.7 Capitalization and Distributions

An LLC offers the same flexibility in raising capital as a for-profit corporation. Members may contribute tangible property or services to the LLC, and such contributions may include property, services, cash, or a promissory note or other obligation to contribute such property or services in the future. A promissory note must be in writing and signed by the member contributing the cash, property or services. Unless otherwise provided in the Articles of Organization or Operating Agreement, if a member promises in writing to make a certain contribution, the member is obligated to the LLC to perform that enforceable contribution promise, even if the member is unable to perform because of the member's death, disability or any other reason.

The LLC may make distributions to its members in accordance with its Operating Agreement except that no distribution may be made that would render the LLC insolvent. Distributions are generally made on an equal basis to each member based on each member's capital contribution to the extent that such contributions have been received by the LLC. Therefore, if the LLC wishes to make distributions in a manner other than pro rata based on each member's capital contributions, it should address such intentions in its Operating Agreement.

### 3.2.8 Recordkeeping and State Reports

LLCs are required to file an annual report each year with the Department of State by May 1 of the subsequent year. This annual report is filed on a prescribed form, and must contain the following information: (1) the name and address of the LLC; (2) the names and addresses of the managers or the managing members of the LLC; and (3) the name of the Florida registered agent. No financial information is required to be filed with the Department of State. The current annual filing fee for timely filed reports is $138.75, and there is a $400 penalty for the late filing of reports. Annual reports can be filed electronically at http://www.sunbiz.org.

For more information on filing annual reports in Florida, see Chapter 2 of this Guide [General Regulation of Business in Florida].

### 3.2.9 Taxation of LLCs

As discussed above, unless an LLC elects to be treated as a corporation for federal and state tax purposes, it is generally not subject to entity-level taxation of its income under the federal tax laws. However, LLCs are still required to file informational tax returns. Unless a member is exempt from federal income taxation, its distributive share of membership income and loss is treated as income or loss to the member and reported on his, her or its individual return, regardless of whether a distribution of the income reported was ever made. Taxation of this annual income will increase the member's basis in his, her or its share of the LLC, and when a distribution is eventually made, it will not be taxed again on the receipt of the cash to the extent that the member still has basis in the member's share of the LLC. There are many tax implications to forming an LLC and business owners should consult an accountant or tax attorney before proceeding with formation to fully understand how their tax liabilities and reporting obligations may be impacted.

For more information on taxation of business entities, see Chapter 5 of this Guide [Taxation].

## 3.3 Florida Partnerships

### 3.3.1 Introduction

General partnerships, limited partnerships, limited liability partnerships, and limited liability limited partnerships are several forms of unincorporated organization that Florida recognizes as statutory entities under the laws of the State of Florida. Partnerships generally provide an extremely flexible framework for government and management of a business operation. Profits and losses in a partnership are allocated according to the terms of the Partnership Agreement, but importantly, unlike LLCs, all of the assets of each partner in a general partnership are at risk and may be made available to satisfy the obligations of the partnership, rather than just the capital contributed to the entity.

To reduce potential liability exposure, limited partnerships ("LPs") were created and permit the creation of a special class of partners known as "limited" partners. Limited partners provide

capital to the partnership but do not participate in its management. In a limited partnership, the limited partners are only liable to the partnership to the extent of their capital contributions, but the general partner does not have liability protection. The general partner manages the business affairs of a limited partnership. Limited partnerships are frequently used as financing vehicles where the investors will have no role in the management of the business and a simple structure is needed to carry out the business of the partnership.

Limited liability partnerships ("LLPs") function like general partnerships but provide extra protection for the general partners, such as personal immunity for partnership liabilities. A partner's liability with respect to an LLP is usually limited to his or her investment in the partnership.

Limited liability limited partnerships ("LLLPs") function like limited partnerships but provide extra protection for the general partner, similar to a limited liability partnership. This form of partnership can be used to combine the effects of a limited partnership with a limited liability partnership.

### 3.3.2 General Partnerships

The Florida Revised Uniform Partnership Act ("FRUPA") governs the formation, operation and dissolution of Florida general partnerships. A partnership is formed when there is an association of two or more persons (a broadly defined term) to carry on as co-owners of a business with the intention to make a profit, whether or not the persons intend to form a partnership.

a. Formation. No filings with the Department of State are required in order to form a general partnership. However, a general partnership may optionally file a Statement of Partnership Registration with the State. If the partners elect to file a Statement of Partnership Registration, then the Statement must include: (1) the name of the general partnership; (2) the address of the chief executive officer of the partnership and the address for the principal office of the partnership; and (3) the names and mailing addresses of all of the partners or the name and address of an agent who shall maintain a list of the names and mailing addresses of all of the partners. The fee to file a Statement of Partnership Registration is currently $50, and the form required to file can be found at http://www.sunbiz.org.

b. Partnership Agreement. After formation, a written or oral Partnership Agreement governs the relationship among the partners and between the partners and the partnership. Where the Partnership Agreement remains silent, FRUPA governs the relationships among the partners and between the partners and the partnership. Similar to LLCs, the Partnership Agreement may not restrict a partner's or former partner's access to books and records and may not eliminate certain fiduciary duties of loyalty or care, nor the obligation of good faith and fair dealing.

   Although a partnership can be formed without a written Partnership Agreement, the partners' best interests will be served if their intentions and corresponding business relationship are clearly stated in a written Partnership Agreement. In the absence of a written Partnership Agreement, acts and conduct of the persons involved are tested to determine whether a partnership was intended.

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Generally, a written Partnership Agreement will address the amount of capital to be contributed to the partnership by the various partners, which contributions may be made in cash, property, or in-kind services. When a partner makes a loan to the partnership, such loan should be clearly documented in writing to avoid the loan being treated as a capital contribution. Due to the fact that the partners in a general partnership are personally liable for fulfilling the debts of the partnership, the Partnership Agreement will often limit the ability of the partnership to borrow funds or require all partners to approve any such borrowings.

c. Management. Generally, every partner conducting the usual business of the partnership has the authority to bind the partnership unless the partner has no authority and the person with whom the partner is dealing is aware of the fact that the partner has no authority to act on behalf of the partnership. This general authority may be modified by filing a certificate of partnership with the state.

Because each partner in a general partnership is financially responsible for the debts of the partnership, partnerships often appoint a managing partner and otherwise limit the authority of the other partners. However, problems arise when third parties are unaware of the limitation of the Partnership Agreement, because such third parties will not be bound by these limitations and are free to conduct business with any partner such conduct binds the partnership.

Partnerships are further bound by the acts or omissions of any partner acting within the scope of the partnership or within the ordinary course of business of the partnership. Any losses resulting from such actions are the responsibility of the partnership (and therefore, each of the partners). Partnership Agreements also frequently address partnership actions outside the scope of the partnership and require approval of the partners before any one partner can conduct such business on behalf of the partnership.

d. Profits and Losses. Partners agree among themselves through their Partnership Agreement as to how and when capital contributions will be returned, repayment of loans will be made, and the allocation and distribution of profits and losses to the individual partners. Florida law requires that, if there is no Partnership Agreement, each partner is repaid his or her capital contribution and loans, and shares equally in the profit after repayment by the partnership of all liabilities. If a partnership desires anything other than an equal share of profits, the Partnership Agreement should specifically provide as such.

e. Partner Liability. Unless an election is made to become a limited liability partnership, every partner in a general partnership is jointly and severally liable for all debts and obligations owed by the partnership, which may be collected from a partner's personal assets if the partnership is insolvent. Partners are also personally jointly and severally liable for any wrongful act or omission made by a partner in the ordinary course of business or with express partnership authority and any misappropriation of cash or property of a third person by any of the partners acting within the scope of his or her apparent authority.

A newly admitted partner to an existing partnership shall not be liable for any liabilities incurred before he or she was admitted to the partnership, however the newly admitted partner may see a reduced value in the partnership due to any such outstanding obligations, as such obligations may still be settled from the existing partnership property.

This treatment of liability is a significant detriment to forming a general partnership for a number of businesses, especially where other entities exist that better limit the liability of their principals. There are certain techniques to limit exposure to partners, such as limits on liability negotiated in particular documents of the partnership, such as loans or leases, as well as the procurement of liability insurance, but none of these can fully hedge the risk of the potential liability of a general partnership.

f. Transferability of Partnership Interests. Under Florida law, a partner may transfer his or her interest in the partnership's profits to another person without causing the dissolution of the partnership, but the assignee does not become a partner in the partnership and is not entitled to participate in the management or administration of the partnership's affairs. Unless modified by the Partnership Agreement, this interest is a profits-only interest, and the transferee does not become a partner without further action by the partners of the partnership to make the transferee a partner. Under Florida law, a partner's interest in a partnership is personal property.

A partner's interest in a partnership may be subject to a charging order upon application by a judgment creditor of a partner or a partner's transferee to a court having jurisdiction. The court may charge the transferable interest of the judgment debtor to satisfy the judgment, and this charge constitutes a lien on the transferable interest of the judgment debtor in the partnership. The court may order a foreclosure of the interest subject to the charging order at any time and the purchaser at the foreclosure sale has the rights of a transferee to receive profits from the partnership.

g. Dissolution or Termination of the Partnership. A general partnership can exist perpetually or be limited to a fixed timeframe of existence as set forth in the Partnership Agreement. If the partnership is perpetual and at-will, dissolution is caused when the partnership gets notice of any partner's (other than a dissociated partner) intent to withdraw as a partner from the partnership. In the case of a partnership for a fixed term, the partnership may be dissolved by the end of the fixed term, by the mutual agreement of all partners to wind up the affairs of the partnership, by the occurrence of any event which makes it unlawful for the partnership to continue its business, by the death of any partner, by the bankruptcy of any partner or the partnership, or by judicial decree.

Once a partnership has been dissolved, it is not terminated until the process of winding up its business is completed. The authority of the remaining partners in the partnership that has elected to dissolve is limited to any authority necessary to complete the task of winding up the business.

In winding up the business, the assets of the partnership, including the contributions of the partners, must be applied to discharge the partnership's obligations to creditors, including partners who are creditors. Any surplus after the obligations of the partnership are paid shall be distributed to the partners in accordance with their right to distributions as set forth in the Partnership Agreement or under Florida law.

If the liabilities of the partnership exceed the assets of the partnership, the creditors of the partnership may look to the partners to fulfill the outstanding obligations of the partnership. In the event any partner is insolvent or cannot be sued for his or her contribution and refuses to make such contribution, the remaining partners shall be required to contribute additional amounts necessary to satisfy the remaining obligations.

### 3.3.3 Limited Partnerships

The Florida Revised Uniform Limited Partnership Act ("FRULPA") governs Florida limited partnerships. A limited partnership may be formed for any lawful purpose, including not-for-profit purposes.

a. Formation. A Florida limited partnership is formed when at least two persons decide to form and operate a limited partnership with at least one of the partners being a general partner and at least one of the partners being a limited partner. To complete the formation, a Certificate of Limited Partnership must be filed with the Department of State and must contain: (1) the name of the limited partnership; (2) the address of the limited partnership's principal office and the name and address of the initial registered agent in the State of Florida; (3) the names and addresses of the general partners; and (4) a statement (or election) as to whether the limited partnership is a limited liability limited partnership. The name of the limited partnership must contain the words "Limited Partnership" or "Limited" or the abbreviation "L.P." or "Ltd." or the designation "LP." The current filing fee for a limited partnership is $1,000 ($965 for filing and $35 for designation of a registered agent), and forms for filing can be found at http://www.sunbiz.org. The Department of State requires the limited partnership to file an annual report by May 1 of the subsequent year, and the current filing fee is $500 if filed timely or $900 if filed late.

b. Partnership Agreement. Once formed, the limited partnership's Partnership Agreement and the FRULPA govern the operation and management of the limited partnership. As with general partnerships, the Partnership Agreement may be oral or written and is subject to the same limitation on elimination of fiduciary duties of loyalty or care and the obligation of good faith and fair dealing as a general partnership. Limited partnerships can be capitalized through the same means as a general partnership.

A limited partnership may file a Statement of Partnership Authority with the Department of State. The Statement of Partnership Authority sets forth the names of the partners authorized to execute an instrument transferring real property held in the name of the partnership, and may also state or include the authority, or limited on the authority, of some or all of the partners to enter

into other transactions on behalf of the partnership, or any other matter. Except in transactions involving real property, third parties entering into transactions with the partnership are deemed to have knowledge of the authority granted under the Statement of Partnership Authority filed with the Department of State. Third parties entering into transactions with the partnership involving real property are deemed to have knowledge when the Statement of Partnership Authority is recorded in the office for recording transfers of such real property. Authority granted under a Statement of Partnership Authority may be revoked upon the filing of a cancellation with the Department of State.

Because under a limited partnership, the limited partners are not liable for the obligations of the partnership but general partners are, third party financing is obtained somewhat differently than under a general partnership. In determining whether to make a loan to the partnership, third party lenders will rely primarily on the limited partnership's assets and operations and on the creditworthiness of the general partners. The Partnership Agreement may also provide for the addition of new limited partners as a means to raise additional capital for the partnership.

c. Management. Typically, the general partner or partners manage the business and activities of the limited partnership. General partners in a limited partnership manage the partnership subject to those restrictions on authority present in a general partnership. Limited partners do not have the authority to bind the limited partnership. The Partnership Agreement should clearly delineate the authority granted to the general partner and any limitations on that authority. Certain management actions may be set forth in the Partnership Agreement to require the approval of various numbers of partners. If there is more than one general partner, the Partnership Agreement can provide for the differentiation of authority of each of the general partners.

Unless otherwise provided in the Partnership Agreement, the general partner has the authority to delegate his or her rights and powers to manage the limited partnership. Subject to the Partnership Agreement, the general partner also maintains the books and records of the limited partnership. FRULPA sets forth the rights of the limited partners to certain information, including financial information, regarding the limited partnership, but the general partners of the limited partnership have the rights and powers subject to the restriction of a partner in a general partnership.

d. Profits and Losses. Just like a general partnership, the limited partnership may choose to allocate profits and losses according to the Partnership Agreement, and it is advised to do so if the partners wish to avoid the default statutory rule regarding profits and losses. If no such provision is in place in the Partnership Agreement, profits and losses and distributions of the limited partnership shall be allocated among the partners on the basis of the value of the contributions made by each partner, as stated in the partner's capital account.

e. Liability of the Partners. In Florida, an obligation of a limited partnership, whether arising in contract, tort, or in some other fashion, is not an obligation

of the limited partners. A limited partner is not personally liable, directly or indirectly, by way of contribution or otherwise, even if the limited partner participates in the management of the business. The general partners, however, jointly and severally share all liability for all obligations of the limited partnership. As with a general partnership, a general partner who is admitted to a partnership is not liable for the obligations incurred by the partnership prior to the new general partner's admission.

f. Transferability of Limited Partnership Interest. Transfers of limited partnership interests are governed by FRULPA but are treated similarly to general partnerships. The profits interest of the personal property is transferable, but the transferee is not made a partner in the partnership without approval from the current partners.

The Partnership Agreement may provide for evidence of the interest in the limited partnership in the form of certificates, which may be assigned and evidence the interest transferred. Partnership interests may also be the subject of a charging order in the same fashion as the interests of general partnerships, except that no foreclosure of the interest in a limited partnership is available to judgment creditors.

g. Dissolution or Termination of the Limited Partnership. Dissolution occurs upon one of the following events: (1) an event set forth in the Partnership Agreement; (2) the consent of all general partners and all limited partners; (3) the dissociation of a person who is a general partner; (4) the passage of 90 days after the dissociation of the limited partnership's last limited partner, unless before the end of the period the limited partnership admits at least one limited partner; (5) the signing and filing of a Declaration of Dissolution by the Department of State; or (6) a circuit court orders the LP to dissolve.

Once a limited partnership has been dissolved, it is not terminated until the process of winding up its business is completed. The authority of the remaining general partners in the limited partnership that has elected to dissolve is limited to any authority necessary to complete the task of ending the business. If there are no general partners remaining to wind up the affairs of the limited partnership, the individual appointed to wind up the activities of the limited partnership shall be appointed by the consent of the limited partners owning a majority of the rights to receive distributions as limited partners at the time the consent is effective.

In winding up the business, the assets of the limited partnership, including the contributions of the partners, must be applied to discharge the limited partnership's obligations to creditors, including partners who are creditors. Any surplus after the obligations of the limited partnership are paid shall be distributed to the partners in accordance with their right to distributions as set forth in the Partnership Agreement or under Florida law.

If the liabilities of the limited partnership exceed the assets of the limited partnership, the creditors of the limited partnership may look to the general partners to fulfill the outstanding obligations of the limited partnership. In the event any general partner is insolvent or cannot be sued for his or her

contribution and refuses to make such contribution, the remaining general partners shall be required to contribute additional amounts necessary to satisfy the remaining obligations.

### 3.3.4 Limited Liability Partnerships

FRUPA also governs Florida limited liability partnerships. An LLP is essentially a general partnership that has made an election to be treated as a limited liability partnership. A general partnership may be formed as, or may later become, an LLP pursuant to FRUPA.

Generally, an LLP is managed and operated in the same fashion as a general partnership, but partners of an LLP have different liabilities then partners of a general partnership. An obligation of a limited liability partnership, whether arising in contract, tort or otherwise, is solely the obligation of the LLP, and no partner of an LLP is liable for an obligation of the LLP solely by reason of being or acting as a partner. Essentially, by electing to form an LLP, a general partnership is agreeing to observe extra filing requirements and formalities in exchange for a limit of the partners' liabilities.

In order for an existing general partnership to become an LLP, there must be a vote to amend the Partnership Agreement and a filing of a Statement of Qualifications with the Department of State. To form initially as an LLP, a general partnership must file a Statement of Qualification in accordance with FRUPA at the time of initial formation.

The Statement of Qualification must contain all of the information required to file a general partnership and a statement that the partnership elects to be a limited liability partnership. Further, the name of the LLP must contain as the last words of its name "Registered Limited Liability Partnership, "Limited Liability Partnership," the abbreviations "R.L.L.P.," "L.L.P.," or the designation "RLLP" or "LLP."

The filing fees for a statement of qualification are currently $25. An LLP must also file an annual report with the Department of State by May 1 of the subsequent year, and the current filing fees for the annual report are $25. Forms required for filing are available at http://www.sunbiz.org.

### 3.3.5 Limited Liability Limited Partnerships

FRULPA also governs Florida limited liability limited partnerships. An LLLP is essentially a limited partnership that has made an election to be treated as a limited liability limited partnership. A limited partnership may be formed as, or may later become, an LLLP pursuant to FRULPA.

Generally, an LLLP is managed and operated in the same fashion as a limited partnership, but the general partners of an LLLP have different liabilities from the general partners of a limited partnership. An obligation of a limited liability limited partnership, whether arising in contract, tort or otherwise, is solely the obligation of the LLLP, and no general partner is liable for such obligation of the LLLP solely by reason of being or acting as a general partner (it is also the case that, as with limited partnerships, the limited partners of an LLLP are not liable for the obligations of the LLLP).

In order for an existing limited partnership to become an LLLP, there must be a vote to amend the Partnership Agreement and the filing of an Amended or Restated Certificate of Limited Partnership with the Department of State signed by all general partners. To form initially as an

LLLP, a limited partnership must elect in the initial Certificate of Limited Partnership to be formed as an LLLP.

Further, the name of the LLLP must contain as the last words of its name "Limited Liability Limited Partnership," the abbreviations "L.L.L.P.," or the designation "LLLP."

## 3.4 Florida Sole Proprietorships

### 3.4.1 Introduction

Persons conducting a social enterprise alone in the State of Florida without the protections afforded by incorporation are called sole proprietors. A sole proprietorship has no legal existence apart from its owner, which means that the owner of a sole proprietorship is personally liable for the debts and obligations of the proprietorship. Profits and losses are borne directly by the proprietor. The proprietor may operate under a fictitious name that is registered with the Florida Department of State. See www.sunbiz.org. Such registration provides limited protection for exclusive use of the name, absent trademark or service mark registrations.

### 3.4.2 Advantages and disadvantages

The main advantage of forming a sole proprietorship is that it may be formed without any expense or formality. The main disadvantage of forming a sole proprietorship is that the owner is wholly liable for all debts and obligations of the enterprise; all of the personal assets of the owner and any other assets devoted to the enterprise can be seized to make payments. In addition, a sole proprietorship itself cannot be sold since there is complete unity between the enterprise and its owner, although the assets used in the enterprise can be sold. A sole proprietorship generally terminates upon the death of its owner.

## 3.5 Florida Joint Ventures

A joint venture is not a statutory entity or form of doing business in the State of Florida. Rather, it is a contractual arrangement whereby more than one person or entity join forces to operate a venture. Many joint ventures operate by agreement only; the participants do not have to create a separate entity as the vehicle for a joint venture. However, nonprofit corporations, for-profit corporations and limited liability companies can each function as the entity vehicle for joint ventures.

## 3.6 Florida Not For Profit Corporations

### 3.6.1 Introduction

The Florida Not For Profit Corporation Act governs the formation, operation and dissolution of nonprofit corporations in the State of Florida. A nonprofit corporation in Florida is managed by its board of directors and operated by its officers and employees. Instead of shareholders, a nonprofit corporation may, but is not required to, have members. Nonprofit corporations, of course, are specifically organized to not earn profits. No part of the income or surplus of a Florida nonprofit corporation may be distributed to its members, directors or officers; however, reasonable compensation may be paid for services rendered.

A nonprofit corporation has an existence of its own independent of the terms of office or employment of members, directors or officers. It can sue or be sued in its own name and can own real estate or other assets in its own name.

### 3.6.2 Advantages and Disadvantages

Where profit is not a goal and the enterprise can be funded without the need for access to capital, the nonprofit corporation is the preferred vehicle for pursuing social objectives. Although nonprofit corporations are not prohibited from engaging in commercial activities, the directors of a nonprofit are duty-bound to devote primary attention to the promotion of the social mission of the nonprofit corporation rather than the production of net income.

On the other hand, if outside capital is needed, a for-profit corporation (or limited liability company) is likely to be the preferred option because nonprofit corporations cannot issue capital stock. The directors of a for-profit corporation owe strict duties to the shareholders to maximize profits and value. Therefore, unless the directors and managers can tie the social mission of their for-profit corporation directly to its business purpose, they can be sued for breach of their duties to shareholders and for misuse of corporate assets if they focus too much on the social mission and forego profits. To address this concern, Florida authorizes the business corporations to become social purpose corporations (Sections 607.501 *et seq.* of the Florida Business Corporation Act) or benefit corporations (Sections 607.601 *et seq.* of the Florida Business Corporation Act), each of which is further discussed in Section 3.7 of this Guide.

### 3.6.3 Formation

A nonprofit corporation attains its separate legal status through the filing and approval by the Department of State of the State of Florida of its Articles of Incorporation. This document is in essence a contract between the state and the nonprofit corporation in which the State of Florida grants individual legal status to the nonprofit corporation in exchange for the nonprofit corporation's commitment to follow its rules.

The Florida Not For Profit Corporation Act requires that the Articles of Incorporation of a nonprofit corporation include (a) the name and street address of the initial principal office and, if different, the mailing address, of the nonprofit corporation; (b) the purpose(s) for which the nonprofit corporation is being organized; (c) a statement of the manner in which the directors are to be elected or appointed (or the Articles may specify that the method of election is contained in the nonprofit corporation's Bylaws); (d) any provisions, not inconsistent with the Florida Not For Profit Corporation Act, which limit in any manner the corporate powers or the nonprofit corporation authorized under the Act; (e) the street address of the nonprofit corporation's initial registered office and the name of its initial registered agent at that address, together with a written acceptance of appointment as a registered agent; and (f) the name and address of each incorporator.

In addition, the Articles may set forth (1) the names and addresses of the initial directors; (2) any provision, not inconsistent with law, regarding the regulation of the nonprofit corporation's internal affairs; (3) the manner of termination of membership in the nonprofit corporation; (4) the rights upon termination of membership; (5) the transferability of membership; (6) the distribution of assets upon dissolution or final liquidation; (7) any designation of one or more classes of members; (8) the names of any persons or the designation of any groups of persons who are to be the initial members; (9) a provision to the effect that the nonprofit corporation will be

subordinate to and subject to the authority of any head or national association; and (10) any provision that is required or may be set forth in the Bylaws of the nonprofit corporation. The Articles of Incorporation must be in writing in English and be executed by the incorporator. The Articles may, but need not contain the corporate seal, an attestation by the secretary or assistant secretary, or an acknowledgement, verification or proof. The Articles of Incorporation must be delivered to the Florida Department of State in Tallahassee, Florida.

A nonprofit corporation may, but is not required to, have members.

### 3.6.4 Management and Control

Once the nonprofit corporation has been established, the initial board of directors must meet (in person/by consent) to ratify the acts in connection with the initial formation of the nonprofit corporation and adopt Bylaws which set forth the rules and procedures governing the decision-making process of the board of directors and the general operation and management of the nonprofit corporation consistent with the applicable statutes of the State of Florida and the Articles of Incorporation. If the initial directors are not named in the Articles of Incorporation, the incorporators must hold an organizational meeting at the call of a majority of the incorporators to elect directors and complete the organization of the nonprofit corporation.

Typically, the Bylaws of a nonprofit corporation contain provisions governing member, director and officer qualifications, powers, and duties; voting; filling of vacancies; meetings; property holding and transfer; indemnification of directors and officers; committees; bank accounts; fiscal year audits and financial reports; conflicts of interest; and amendment and dissolution procedures.

The power to alter, amend, or repeal the Bylaws or adopt new Bylaws is vested in the board of directors unless otherwise provided in the Articles of Incorporation or the Bylaws.

### 3.6.5 Liability of Members, Directors and Officers

A nonprofit corporation may, but is not required to, have members. A member of a Florida nonprofit corporation is not, as such, personally liable for any act, debt, liability or obligation of the nonprofit corporation, however, a member may become liable for dues, assessments, or fees, as provided by law.

Directors and officers who are a party to any proceeding (other than an action by, or in the right of the nonprofit corporation) may be indemnified by a Florida nonprofit corporation by reason of the fact that such person was serving as a director or officer of the nonprofit corporation against liability in connection with such proceeding, including any appeal therefrom, if such person acted in good faith and in a manner they believed to be in, or not opposed to, the best interests of the nonprofit corporation and, with respect to any criminal action or proceeding, had no reasonable cause to believe that their conduct was unlawful.

Section 617.0834 of the Florida Not For Profit Corporation Act grants immunity from civil liability to officers and directors of nonprofit corporations organized under § 501(c)(3), 501(c)(4) or 501(c)(6) of the Internal Revenue Code of 1986, as amended (the "Code"), or of an agricultural or a horticultural organization recognized under § 501(c)(5) of the Code, for any statement, vote, decision, or failure to take an action, regarding organizational management or policy by an officer or director, unless: (a) the officer or director breached or failed to perform his or her duties as an officer or director; and (b) the officer's or director's breach of, or failure to perform,

his or her duties constitutes: (i) a violation of the criminal law, unless the officer or director had reasonable cause to believe his or her conduct was lawful or had no reasonable cause to believe his or her conduct was unlawful. A judgment or other final adjudication against an officer or director in any criminal proceeding for violation of the criminal law estops that officer or director from contesting the fact that his or her breach, or failure to perform, constitutes a violation of the criminal law, but does not estop the officer or director from establishing that he or she had reasonable cause to believe that his or her conduct was lawful or had no reasonable cause to believe that his or her conduct was unlawful; (ii) a transaction from which the officer or director derived an improper personal benefit, directly or indirectly; or (iii) recklessness or an act or omission that was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

### 3.6.6 Mergers, Acquisitions and Dissolution

Section 617.1102 of the Florida Not For Profit Corporation Act provides that a nonprofit corporation organized under the laws of the State of Florida may merge with one or more other business entities only if the surviving entity of such merger is a nonprofit corporation or other business entity that has been organized as a not-for-profit entity under a governing statute or other applicable law that allows such a merger.

Sections 617.1402 and 617.1403 of the Florida Not For Profit Corporation Act governs the dissolution of Florida nonprofit corporations. Section 617.1402 provides that a nonprofit corporation desiring to dissolve and wind up its affairs must adopt a resolution to dissolve as follows:

a. If the nonprofit corporation has members. If the nonprofit corporation has members entitled to vote on a resolution to dissolve, and unless the board of directors determines that because of a conflict of interest or other substantial reason it should not make any recommendation, the board of directors must adopt a resolution recommending that the nonprofit corporation be dissolved and directing that the question of such dissolution be submitted to a vote at a meeting of members entitled to vote thereon, which may be either an annual or special meeting. Written notice stating that the purpose, or one of the purposes, of such meeting is to consider the advisability of dissolving the nonprofit corporation must be given to each member entitled to vote at such meeting in accordance with the Articles of Incorporation or the Bylaws. A resolution to dissolve the nonprofit corporation shall be adopted upon receiving at least a majority of the votes which members present at such meeting or represented by proxy are entitled to cast.

b. If the nonprofit corporation has no members. If the nonprofit corporation has no members or if its members are not entitled to vote on a resolution to dissolve, the dissolution of the nonprofit corporation may be authorized at a meeting of the board of directors by a majority vote of the directors then in office.

At any time after dissolution is authorized, the nonprofit corporation may dissolve by delivering Articles of Dissolution to the Department of State for filing, which Articles of Dissolution must set forth: (a) the name of the nonprofit corporation; (b) if the nonprofit corporation has members entitled to vote on dissolution, the date of the meeting of members at which the resolution to dissolve was adopted, a statement that the number of votes cast for dissolution was sufficient

for approval, or a statement that such a resolution was adopted by written consent and executed in accordance with applicable law; and (c) if the nonprofit corporation has no members or if its members are not entitled to vote on dissolution, a statement of such fact, the date of the adoption of such resolution by the board of directors, the number of directors then in office, and the vote for the resolution. A nonprofit corporation is dissolved upon the effective date of its Articles of Dissolution.

### 3.6.7 Recordkeeping and State Reports

In accordance with § 617.1601 of the Florida Not For Profit Corporation Act, a nonprofit corporation must keep copies of the following records: (a) its Articles of Incorporation or restated Articles of Incorporation and all amendments to them currently in effect; (b) its Bylaws or restated Bylaws and all amendments to them currently in effect; (c) the minutes of all members' meetings and records of all action taken by members without a meeting for the past 3 years; (d) written communications to all members generally or all members of a class within the past 3 years, including the financial statements furnished for the past 3 years under § 617.1605 of the Florida Not For Profit Corporation Act; (e) a list of the names and business street, or home if there is no business street, addresses of its current directors and officers; and (f) its most recent annual report delivered to the Department of State under § 617.1622 of the Florida Not For Profit Corporation Act.

Section 617.1622 of the Florida Not For Profit Corporation Act requires that each nonprofit corporation organized or qualified to do business in Florida file an annual report. The annual report must set forth: (a) the name of the nonprofit corporation and the state or country under the law of which it is incorporated; (b) the date of incorporation or, if a foreign corporation, the date on which it was admitted to conduct its affairs in the State of Florida; (c) the address of the principal office and the mailing address of the nonprofit corporation; (d) the nonprofit corporation's federal employer identification number, if any, or, if none, whether one has been applied for; (e) the names and business street addresses of its directors and principal officers; (f) the street address of its registered office in the State of Florida and the name of its registered agent at that office; and (g) such additional information as may be necessary or appropriate to enable the Department of State to carry out the provisions of the Florida Not For Profit Corporation Act. The deposit of such report, on or before May 1, in the United States mail in a sealed envelope, properly addressed with postage prepaid, constitutes compliance with the foregoing provisions.

For more information on filing annual reports in Florida, see Chapter 2 of this Guide [General Regulation of Business in Florida].

### 3.6.8 Insurance

Nearly every type of activity by a nonprofit corporation can become the target of some kind of a claim by a firm or an individual that alleges damage or injury by the nonprofit corporation or individuals responsible for it (*i.e.*, directors, officers or employees). Even if the claim is without merit, the costs of defending against the claim can be very substantial. To encourage qualified individuals to accept positions as directors and officers, many nonprofit corporations purchase insurance to cover director and officer (D&O) liability. In addition, most responsible nonprofit corporations purchase a basic comprehensive general liability policy that covers liability for accidents in the nonprofit corporation's offices, at sponsored meetings and the like. Liability insurance for nonprofit corporations is often a very complicated matter. Consultation with an

experienced and knowledgeable agent or consultant is essential in order to obtain the right coverage at the lowest premium.

### 3.6.9 Tax Exempt Status

Forming an organization as a nonprofit corporation does not necessarily indicate that it is also a tax exempt organization. In order for the nonprofit corporation to also be classified as a tax exempt organization, it must (a) qualify as an exempt organization under the Code, and (b) obtain a determination letter on tax exempt status by filing a Form 1023 (for 501(c)(3) corporations) or Form 1024 (for other exempt organizations) with the IRS. The laws and regulations governing tax exemption and the process of obtaining tax exempt status are highly complex. Consultation with an experienced and knowledgeable tax attorney or other tax advisor is strongly recommended when a nonprofit corporation is considering applying for tax exempt status.

## 3.7 Florida Benefit and Social Purpose Corporations

### 3.7.1 Introduction

Traditionally, the corporate form has, above all, required that corporations work in the best interest of their shareholders, and corporations have been vulnerable to shareholder lawsuits if they did otherwise. However, a growing trend has emerged allowing corporations to form as "Benefit" or "Social Purpose" corporations.

Florida is one of three states that allow for "Social Purpose" corporations, which are for-profit entities that enable the corporation, instead of maximizing shareholder profit, to consider social or environmental issues. A "Benefit Corporation", which is allowed in 30 states and the District of Columbia, is a similar organization that is formed for a "general public benefit".

### 3.7.2 Formation

Both Social Purpose Corporations and Benefit Corporations are formed by the same rules as those of general Florida Corporations. In addition to the requirements of formation of a Florida Corporation, both Social Purpose Corporations and Benefit Corporations must specify certain other information with regard to their election.

The Articles of Incorporation of a Special Purpose Corporation must set forth one or more specific public benefits of the corporation in addition to its purpose under general corporate law. A "public benefit" is defined as one that has a positive effect (or the minimization of negative effects), taken on a whole, on the environment or one or more categories of persons or entities, other than shareholders in their capacity as shareholders. The statute lays out certain examples public benefits, such as: (i) providing low-income or underserved individuals or communities with beneficial products or services, (ii) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business, (iii) protecting or restoring the environment, (iv) improving human health, (v) promoting the arts, sciences, or advancement of knowledge, and (vi) increasing the flow of capital to entities that have as their stated purpose the provision of a benefit to society or the environment.

A Benefit Corporation has the purpose of creating general corporate public benefit. The Articles of Incorporation of a Benefit Corporation "may identify one or more specific public benefits as its purpose in addition to the general public benefit". The statute lays out an

identical list of specific public benefits as for Special Purpose Corporations, but adds as an example "Any other public benefit consistent with the purposes of the Benefit Corporation".

### 3.7.3 Management

Both Special Purpose and Benefit Corporations are subject to the same Officer and Director rules as general Florida Corporations. However, the statutes set forth additional requirements and standards of conduct for each type of entity.

Directors of a Social Purpose Corporation must, in addition to their general duties as directors, consider the effects of any action or inaction on not only the Social Purpose Corporation's shareholders but also on its ability to accomplish its public benefit or specific public benefit purpose. Additionally, a director of a Social Purpose Corporation may consider the effects of any action or inaction on the employees and work force of the Social Purpose Corporation, its subsidiaries and suppliers, on the interests of customers and suppliers as beneficiaries of the public benefit or specific public benefit purpose, on community and societal factors, on the local and global environment, and on the short-and-long term interests of the Social Purpose Corporation.

Directors of a Benefit Corporation have similar duties, except that they must (rather than may) consider the effects of any action on each of the above, and may also consider other pertinent factors that they deem appropriate.

Both Social Purpose and Benefit Corporations may specify a "Benefit Director". This director, in addition to his or her general duties as a director, must also include in the Annual Benefit Report his or her opinion on whether the corporation complied with its benefit purpose and whether the officers or other directors have complied with their duties.

Officers of a Social Purpose Corporation or Benefit Corporation may consider the same factors as directors in performing their duties as an officer. Social Purpose Corporations or Benefit Corporations may also specify a "Benefit Officer", who has the duty of preparing the Annual Benefit Report.

### 3.7.4 Annual Benefit Report

Both Social Purpose and Benefit Corporations are required to prepare for their shareholders an "Annual Benefit Report", which is a narrative description of the ways in which the public benefit has actually been benefited and any circumstances that hindered that benefit. The Articles of Incorporation may also set forth that the Annual Benefit Report must be prepared by some third party standard, and if it is, the Report must set forth the rationale for that standard, as well as any rationale for changing the standard.

The Annual Benefit Report must be sent to all shareholders no later than 120 days following the end of the fiscal year, or at the same time the corporation delivers any other required annual

report to its shareholders. Failure to submit an Annual Benefit Report may result in a court order to furnish and payment of attorney's fees to a shareholder who brings suit for such purpose.

# CHAPTER 4. SECURITIES REGULATION

**Securities Regulation**
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The following is intended to provide a very general overview of the basic regulation of offerings, issuance and transfers of securities under Florida law. There are many exceptions and special rules that could apply. Parties are urged to contact a Lex Mundi-affiliated securities advisor regarding the imposition of United States federal and Florida securities regulations on issuers, investors and their respective business activities.

## 4.1 Introduction

In addition to legal requirements under federal law, securities in Florida are regulated under the Florida Securities and Investor Protection Act (the "Act") (Chapter 517 of the Florida Statutes). The Act is administered by the Securities Division of the Florida Office of Financial Regulation (the "Office"). The contact information for the Office is as follows: 200 East Gaines Street, Tallahassee, FL 32399; Tel: (850) 487-9687.

Section 517.021(22) of the Act, broadly defines "security" to include any of the following: (a) a note; (b) a stock; (c) a treasury stock; (d) a bond; (e) a debenture; (f) an evidence of indebtedness; (g) a certificate of deposit; (h) a certificate of deposit for a security; (i) a certificate of interest or participation; (j) a whiskey warehouse receipt or other commodity warehouse receipt; (k) a certificate of interest in a profit-sharing agreement or the right to participate therein; (l) a certificate of interest in an oil, gas, petroleum, mineral, or mining title or lease or the right to participate therein; (m) a collateral trust certificate; (n) a reorganization certificate; (o) a preorganization subscription; (p) any transferable share; (q) an investment contract; (r) a beneficial interest in title to property, profits, or earnings; (s) an interest in or under a profit-sharing or participation agreement or scheme; (t) any option contract which entitles the holder to purchase or sell a given amount of the underlying security at a fixed price within a specified period of time; (u) any other instrument commonly known as a security, including an interim or temporary bond, debenture, note, or certificate; (v) any receipt for a security, or for subscription to a security, or any right to subscribe to or purchase any security; and (w) a viatical settlement investment.

Pursuant to § 517.07 of the Act, it is unlawful and a violation of the Act for any person to sell or offer to sell a security within the State of Florida[1] unless the security is exempt under § 517.051 of the Act; is sold in an exempt transaction under § 517.061 of the Act; is a federally covered security; or is registered pursuant to the Act.

[1] Note that typically the sale or offer to sell a security to a resident of the State of Florida is within the scope of the Act, irrespective if the purchaser or intended purchaser is not physically located at the time of purchase or offer to purchase within the geographical boundaries of the State of Florida.

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## 4.2 Registration of Securities

(a) Registration by Qualification. Section 517.081 of the Act authorizes the Office to prescribe forms, the filing of documents, the furnishing of information and the payment of fees for the registration of securities, which are not otherwise entitled to be registered by notification, as more fully described below. The Office utilizes the Regulatory Enforcement and Licensing (REAL) System for the registration of securities offerings. This online system enables filers to submit their application form and fees electronically. Paper applications received by the Office will not be accepted but will be returned to the applicant with instructions for filing electronically.

The Office has prescribed rules for registering securities by qualification in Chapter 69W-700, F.A.C. Those rules relate to the following: (1) the filing of a prospectus; (2) the contents of a prospectus; (3) circulation of a preliminary prospectus; (4) promoters equity investment ratio; (5) voting rights; (6) options or warrants granted to underwriters; (7) options or warrants granted to officers, employees and others; (8) escrow of proceeds from the sale of securities; (9) preferred stock or debt securities; (10) fractional undivided interests in oil and gas titles; (11) oil and gas participation plans; (12) insurance company licenses; (13) real estate investment trusts; (14) offering price of equity securities; (15) submission of sales reports; (16) termination date of registration (the date on which a prospectus may no longer be used); (17) independent transfer agent and/or registrar; (18) amendments subsequent to effectiveness; (19) unsound financial condition of issuer; and (20) loans and other affiliated transactions.

An application to register securities must include (1) Application for Registration of Securities—Form OFR-S-1-91; (2) an irrevocable written Uniform Consent to Service of Process—Form OFR-S-5-91, or Form U-2; (4) a Uniform Corporate Resolution—Form OFR-S-6-91, or Form U-2A; (5) Exhibit I (General Issue)—Form OFR-S-7-91; (6) financial statements dated within 90 days from the date of filing, provided that year-end audited statements may be required, depending upon the size of the issuer; (7) exhibits and additional information as required or requested by the Office; and (8) an application fee in the amount of $1,000.

(b) Registration by Notification. Pursuant to Section 517.082 of the Act, securities offered or sold pursuant to a registration statement filed with the Securities and Exchange Commission (the "SEC") under the United States Securities Act of 1933, as amended (the "Securities Act"), are entitled to registration by notification, provided that prior to the offer or sale the registration statement has become effective.

Registration by notification may not be available to register securities where the offering price at the time of effectiveness with the SEC is $5 or less per share.

An application for registration by notification is required to be filed with the Office and is required to contain the following information and be accompanied with the following: (1) an application to sell executed by the issuer, any person on whose behalf the offering is made, a dealer registered pursuant to the Act, or any duly authorized agent of any such person setting forth the name and address of the applicant, the name and address of the issuer, and the title of the securities to be offered and sold; (2) copies of such documents filed with the SEC as the Office may by rule require; (3) an irrevocable written consent to service of process; and (4) a nonrefundable fee of

$1,000 per application. An application for notification registration or shelf filing may be filed on either Uniform Form U-1 or Florida Form OFR-S-3-91. As with registrations by qualification, the Office utilizes the Regulatory Enforcement and Licensing (REAL) System for the registration of securities offerings by notification. See Rule 69W-800.001 for additional filing instructions.

Self-underwritten registered offerings, either by qualification or notification, may require the issuer to register as a dealer under the Act, and may also require those principals of the issuer who are involved in the offering and selling of such securities to become registered under the Act as a registered representative of such issuer, as further described below.

## 4.3 Exempt Securities

Section 517.051 of the Act contains a list of securities that are exempt from the registration requirements under the Act (Section 517.07). The exemptions are self-executing, thus no filing with the Office is required to claim an exemption, although the burden of proof as to the applicability of the exemption remains on the issuer claiming the exemption.

Exempt securities under the Act include the following: (1) certain government securities; (2) certain bank securities; (3) certain railroad and public service utility securities; (4) certain bank, trust company, savings institution, building or savings and loan association, international development bank and credit union securities; (5) certain securities, other than common stock, providing for a fixed return; (6) certain securities of nonprofit agricultural cooperatives; (7) certain notes, drafts, bills of exchange, or banker's acceptance; (8) certain securities of not for pecuniary profit institutions; and (9) certain insurance, endowment policies, annuity contracts, optional annuity contracts and self-insurance agreements. Please note that the foregoing list is qualified in its entirety by the provisions of Section 517.051 of the Act.

## 4.4 Exempt Transactions

Section 517.061 of the Act contains a list of transactions that are exempt from the registration requirements under the Act (Section 517.07). The exemptions are self-executing, thus no filing is required to be made with the Office to claim an exemption, although the burden of proof as to the applicability of the exemption remains on the issuer claiming the exemption.

Exempt Transactions under the Act include the following: (1) certain transactions involving a fiduciary; (2) certain transactions involving a pledgee; (3) certain isolated sales or offers of securities; (4) certain corporate, trust, or partnership distributions out of earnings or surplus; (5) certain securities issued to equity security holders or other creditors in the process of a reorganization of a corporation, trust or partnership; (6) certain distributions of the securities of an issuer exclusively among its own security holders; (7) certain institutional investor transactions; (8) certain sales of securities from one corporation to another corporation; (9) certain offers or sales of securities from one corporation to another corporation, or to security holders thereof, pursuant to a vote or consent of such security holders in connection with mergers, share exchanges, consolidations, or sale of corporate assets; (10) the issuance of certain notes or bonds in connection with the acquisition of real property or renewals thereof; (11) certain offerings to not more than 35 purchasers in a 12-month period; (12) the sale of certain securities by a bank or trust company; (13) certain unsolicited purchases or sales of securities by a dealer registered under the Act; (14) the offer or sale of certain shares of a corporation which represent ownership of specific apartment units; (15) the offer or sale of

certain securities under an employee benefit plan; (16) the sale by or through a registered dealer of certain securities options; (17) the offer or sale of certain securities, as agent or principal, by a dealer registered under the Act, when such securities are offered or sold at a price reasonably related to the current market price of such securities; (18) the offer or sale of any security effected by or through a person in compliance with Section 517.12(17) of the Act (*i.e.,* certain purchases or offers to purchase securities to Canadian residents); (19) other transactions defined by rules adopted by the Office from time to time; and (20) certain non-issuer transactions. Please note that the foregoing list is qualified in its entirety by the provisions of Section 517.061 of the Act.

Note that Florida does not recognize as an exempt transaction a transaction that is exempt under the Securities Act pursuant to Rule 504 of Regulation D unless such transaction can otherwise fit within one of the permitted exemptions pursuant to Section 517.061 of the Act. As under the Securities Act, exemptions under the Act are not mutually exclusive (*i.e.,* transactions may be exempt under one or more provisions of the Act).

## 4.5 Broker-Dealer, Investment Advisor Registration

(a) Broker-Dealer. A dealer is any person, other than an associated person under Chapter 517 of the Act, who engages in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person. Dealers registered or not with the Financial Industry Regulatory Authority (FINRA) must obtain registration in the states where they conduct business, including Florida. In addition, pursuant to Section 517.12(1) of the Act, no dealer, associated person, or issuer of securities shall sell or offer for sale any securities in or from offices in the State of Florida, or sell securities to persons in the State of Florida from outside the state, by mail, or otherwise, unless the person has been registered with the Office pursuant to the provisions of Chapter 517 of the Act.

The Florida Division of Securities utilizes the Regulatory Enforcement and Licensing (REAL) System for the registration of dealers that are not members of FINRA. The online system enables non-FINRA member dealers to submit their application form and fees electronically. With respect to FINRA members, the Office participates in the Central Registration Depository (CRD) system for the registration of FINRA member dealers. The CRD online system enables dealers to register in all desired states and FINRA via a single electronic form.

All dealers that are members of FINRA shall register with the OFR by filing the documents and fees prescribed in Section 517.12(10), F.S., and Rules 69W-600.001 and 69W-600.0091, Florida Administrative Code (F.A.C.), through the CRD.

Dealer registration filing requirements are prescribed under Section 517.12(10) of the Act and Rule 69W-600.001, F.A.C. Typically, an application to register as a dealer or issuer/dealer must include: (1) a Uniform Application for Broker Dealer Registration, Form BD; (2) the payment of a statutory fee in the amount of $200; (3) a Uniform Application for Securities Industry Registration or Transfer, Form U-4; (4) financial statements and reports as required under Rules 69W-300.002, 69W-600.015, 69W-600-016 and 69W-600.017, F.A.C.; (5) if applicable, proof of effective registration with the SEC; (6) proof of insurance by the Securities Investor Protection Company when required by Section 517.12(16) of the Act,; (7) with respect to any applicant registering as an issuer/dealer, Issuer/Dealer Compliance Form (OFR-DA-5-91); (8) any direct or

indirect owner or control person required to be reported on Form BD who is not currently registered in Florida with the firm they are seeking to join or act as a direct or indirect owner or control person, must submit fingerprint cards in accordance with 69W-600.006(3), F.A.C. and pay the requisite filing fee; (9) when specifically requested by the Office, full documentation as to affirmative responses to questions regarding disciplinary action; and (10) when specifically requested by the Office, a copy of the Articles of Incorporation and amendments thereto, if a partnership, a copy of the partnership agreement, or if a limited liability company, a copy of the Articles of Organization.

An associated person of a dealer means any person who for compensation refers, solicits, offers, or negotiates for the purchase or sale of securities. A person whose activities fall within this definition is required to register with the Office as an associated person of a dealer pursuant to Section 517.12(1) of the Act. The Office will not register any person as an associated person of a dealer, unless the dealer with which the associated person seeks registration, is lawfully registered with the Office.

(b) Investment Advisor. An investment adviser is generally defined as any person who receives compensation in the business of advising others as to the value of securities or as to the advisability of investments in, purchasing of, or selling of securities. Investment advisers must obtain registration in the states where they conduct business.

Pursuant to § 517.12(4), Florida Statutes, no investment adviser or associated person of an investment adviser or federal covered adviser shall engage in business from offices in the State of Florida, or render investment advice to person of the State of Florida, by mail or otherwise, unless the investment adviser is registered pursuant to the provisions of the Act and associated persons of the federal covered adviser or investment adviser have been registered with the Office pursuant to Section 517.12 of the Act. Federal covered advisers are defined as investment advisers with more than $100 million in assets under management, and who typically are required to be registered with the SEC. No federal covered adviser is permitted to engage in business from offices in the State of Florida, or render investment advice to Florida residents, unless the federal covered adviser has made a notice filing with the Office pursuant to Section 517.1201 of the Act.

An application to register as an investment adviser (other than a federal covered adviser) must include: (1) a Uniform Application for Investment Advisers Registration, Form ADV; (2) the payment of a statutory fee in the amount of $200; (3) a Uniform Application for Securities Industry Registration or Transfer, Form U-4; (4) financial statements and reports as required under Rules 69W-300.002, 69W-600.015, 69W-600-016 and 69W-600.017, F.A.C.; (5) any direct or indirect owner or control person required to report on Form ADV, who is not currently registered in Florida with the firm they are seeking to join or act as a direct or indirect owner or control person, must submit fingerprint cards in accordance with 69W-600.006(3), F.A.C.; (6) when specifically requested by the Office, full documentation as to affirmative responses to questions regarding disciplinary action; and (7) when specifically requested by the Office, a copy of the Articles of Incorporation and amendments thereto, if a partnership, a copy of the partnership agreement, or if a limited liability company, a copy of the Articles of Organization.

An "associated person" of an investment adviser means any person who for compensation refers, solicits, offers, or negotiates for the purchase or sale of investment advisory services. A person whose activities fall within this definition is required to register with the Office as an associated person of a state registered adviser pursuant to Section 517.12(4) of the Act. The state registered adviser with which the associated person seeks registration must be lawfully registered with the Office. Registration as an associated person of a state registered adviser does not constitute registration as an associated person of a dealer, or vice-versa. The two associated person registrations are separate and distinct. The Office participates in the Central Registration Depository (CRD) system for registration of associated persons for state registered advisers. All state registered advisers requesting associated person registration must file the Form U-4, Uniform Application for Securities Industry Registration or Transfer, documents and fees prescribed in Section 517.12(10) of the Act, and Rule 69W-600.002, F.A.C., through the CRD. State registered advisers not dually registered as a FINRA member broker dealer are required to submit fingerprint results for associated person applicants to the Office.

## 4.6 Antifraud provisions

Pursuant the Act, it is unlawful and a violation of the provisions of the Act for a person (a) in connection with the rendering of any investment advice or in connection with the offer, sale, or purchase of any investment or security, directly or indirectly: (1) to employ any device, scheme, or artifice to defraud; (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a person; (b) to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, communication, or broadcast which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received directly or indirectly from an issuer, underwriter, or dealer, or from an agent or employee of an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount of the consideration; or (c) in any matter within the jurisdiction of the Office, to knowingly and willfully falsify, conceal, or cover up, by any trick, scheme, or device, a material fact, make any false, fictitious, or fraudulent statement or representation, or make or use any false writing or document, knowing the same to contain any false, fictitious, or fraudulent statement or entry.

# CHAPTER 5. TAXATION

**Federal Taxation**
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The following is intended to provide a very general overview of the basic United States federal income taxation of various types of taxpayers and a very general overview of the basic Florida taxation of common business activities. There are many exceptions and special rules that could apply. Taxpayers are urged to contact a Lex Mundi-affiliated tax advisor regarding the imposition of United States federal and Florida state taxes on them and their business activities.

## 5.1 United States Federal Income Taxation

### 5.1.1 Federal Taxation of United States Individuals

United States citizens and tax residents are subject to United States federal income taxes on their worldwide income. The United States tax on worldwide income requires the payment of taxes on wages, salaries, gains, rents, dividends, interest, royalties and profits of every kind from all foreign and United States sources. The tax base also includes certain income of foreign companies controlled by United States citizens and tax residents, including certain dividends, capital gains, royalties and rents earned by the foreign companies, even if the income is not paid out to the owners of the companies. Investments in foreign companies and foreign bank accounts for which a United States citizen or tax resident has signatory authority must be disclosed annually.

### 5.1.2 Federal Income Taxation of United States Corporations

United States corporations are subject to United States federal income tax on their worldwide income. State corporate income taxes are deductible for purposes of calculating the federal income tax base.

### 5.1.3 Federal Income Taxation of Nonresident Foreign Individuals

Nonresident foreign individuals who are not classified as United States tax residents are subject to United States income tax with respect to income which is effectively connected with the conduct of a trade or business in the United States. This income is subject to tax at the graduated income tax rates that normally apply to United States individual taxpayers. Such taxpayers are required to file federal income tax returns in the United States.

A foreign individual generally is considered to be engaged in a United States trade or business if the individual is engaged in business activities in the United States on a regular basis. Foreign persons whose United States activities are limited to certain investment activities, such as trading in stocks or securities for their own account, generally are not considered to be engaged in a United States trade or business. Payments received for services rendered in the United States as an employee, independent contractor or otherwise are considered to be

effectively connected income. United States federal income taxation can even extend to certain types of foreign source income, if attributable to an office or other fixed place of business within the United States.

Income earned by foreign individuals from the sale of United States real property interests is treated as income which is effectively connected with a United States trade or business and taxed as described above, even if the ownership of the real estate is passive. Subject to certain exceptions which apply to publicly traded companies, income from the sale of shares of capital stock in a United States corporation with a majority of its assets invested in United States real estate is also treated as effectively connected income subject to United States federal income tax. Gains from disposition of United States real property interests are taxed at the same rates which apply to United States taxpayers.

Buyers of United States real property interests from foreign sellers generally are required to withhold 10% of the gross purchase price and remit it to the government as a deposit against the actual tax liability of the foreign seller unless a reduced withholding amount is requested and approved by the government. Reduced withholding typically will be approved only if the 10% withholding amount exceeds the maximum United States federal income tax liability the seller can incur on the transaction.

Except for certain gains from the disposition of United States real property interests described above, capital gains earned by non-resident foreign individuals from the sale of stocks, bonds and other securities issued by United States companies are not subject to United States federal income tax unless they are earned in connection with the conduct of a United States trade or business.

Certain types of income earned by foreign individuals from sources within the United States which are not effectively connected with the conduct of a United States trade or business are subject to a flat 30% withholding tax determined without reference to any deductions. Income subject to the gross 30% withholding tax generally includes dividends and interest paid by United States corporations, certain interest paid by United States branches of foreign corporations, rents and royalties for the use of property located in the United States, and other fixed or determinable annual or periodic income or gains from United States sources. The 30% tax must be withheld by the person making the payment and remitted to the government. The 30% withholding tax, however, generally does not apply to interest on bank deposits or to portfolio interest. Portfolio interest generally includes non-contingent interest on registered obligations paid to payees who do not own, directly or constructively, 10% or more of the voting power of the payor. The 30% withholding tax also does not apply with respect to rents received for the use of United States real property where the lessor makes a special election to treat the rental income as effectively connected income taxed on a net basis after giving effect to applicable deductions. Liquidating distributions by United States corporations also are generally exempt from the 30% withholding tax. The 30% withholding tax may be reduced or even eliminated in cases where the foreign taxpayer receiving the payments qualifies for benefits under an income tax treaty between the United States and the taxpayer's country of tax residence. Tax treaties differ, and the specific treaty must be consulted.

Many countries have treaties with the United States to avoid double taxation with respect to income taxes. Persons who are tax residents of treaty countries may benefit from rules which are more favorable than the general rules which are summarized above. The availability of treaty benefits and the scope of such benefits should therefore be considered carefully in each particular case.

### 5.1.4 Federal Income Taxation of Foreign Corporations

Foreign corporations generally are subject to United States federal tax in the same manner and to the same extent as nonresident foreign individuals, described above, although at rates applicable to corporations.

In addition to the tax imposed on earnings which are effectively connected with a United States trade or business, foreign corporations which are engaged in a United States trade or business through a United States branch are also subject to an additional, second-level branch profits tax. The branch profits tax generally applies to earnings of the United States branch that are not reinvested in the United States business. It is intended to be a substitute for the withholding tax that applies to dividends paid to foreign persons and can also apply in cases where earnings from the conduct of a United States business are not repatriated, but are not reinvested in the United States business. United States earnings that are not reinvested are not subject to the branch profits tax if the branch is terminated and several detailed rules are complied with. Because of the broad scope of the branch profits tax, foreign corporations frequently conduct United States activities indirectly through United States corporate subsidiaries. As in the case of the 30% withholding tax, the branch profits tax may be reduced or eliminated if the foreign taxpayer qualifies for benefits under a tax treaty. The branch profits tax does not apply to non-corporate taxpayers.

### 5.1.5 Federal Income Taxation of Unincorporated Businesses or Branches

Foreign individuals conducting business in the United States as a sole proprietorship are subject to United States federal income taxation on the income earned from United States activities, with only one level of United States federal income taxation. In the case of a foreign corporation conducting a United States business directly through a branch, earnings which are not reinvested in the business may be subject to an additional branch profits tax, as described above. The branch profits tax does not apply to natural persons.

### 5.1.6 Federal Income Taxation of Joint Ventures, Partnerships and Limited Liability Companies

A partnership (including a general partnership, a limited partnership, a limited liability partnership, or a limited liability limited partnership) or joint venture conducting business in the United States generally is required to file income tax returns in the United States reporting its activities. The partnership or joint venture generally is not obligated to pay United States federal income taxes with respect to its earnings; instead, each of the partners is responsible for paying United States federal income taxes with respect to its share of income earned by the partnership or joint venture, as if such share had been earned directly by the partner, even if none of the income is distributed to the partners. The branch profits tax may apply to a foreign corporation's share of the United States effectively connected income earned by a partnership or joint venture of which the foreign corporation is a partner. In addition, the partnership or joint venture is required, on a quarterly basis, to withhold on the effectively connected income earned by the partnership or joint venture which is allocable to a foreign partner, and remit this amount to the government as a deposit against the actual United States federal income tax liability of the foreign partner. The withholding rate generally is the highest United States income tax rate which could be applicable to the foreign partner. If the income qualifies for a preferential rate such as the long-term capital gain tax rate applicable to a non-corporate taxpayer, such tax rate is applied for purposes of calculating the withholding amount.

The rules of United States federal income taxation of a limited liability company ("LLC") generally depend upon the number of members of the LLC. If an LLC has only one member, absent an election to be classified as an association taxable as a corporation, its separate existence generally is disregarded for United States federal income tax purposes, and its member is treated as if it owns the LLC's assets and conducts its activities directly. Hence, the LLC is treated for federal income tax purposes as if it were an unincorporated business or branch operated by its sole member, and the tax consequences described above with respect to unincorporated businesses and branches apply. The classification of a single-member LLC as a disregarded entity applies for United States federal income tax purposes only, and it does not affect the separation of the legal existence of the LLC from its member.

If an LLC has more than one member, absent an election to be classified as an association taxable as a corporation, it generally is treated as a partnership for federal income tax purposes, and the tax consequences described above with respect to partnerships and joint ventures apply.

## 5.2 Florida State Taxation

The following is intended to provide a very general overview of the basic Florida state taxation of various types of taxpayers and common business activities. There are many exceptions and complex special rules that could apply. Taxpayers are urged to contact a Lex Mundi-affiliated tax advisor regarding the imposition of Florida state taxes on parties and their business activities.

### 5.2.1 Florida State Sales and Use Tax

Florida imposes a 6% tax on (i) sales at retail and leases of tangible property, (ii) commercial leases of real estate, (iii) parking spaces and storage, (iv) transient rentals (hotels and short term residential leases), (v) admissions, and (vi) tangible personal property used, consumed, distributed, or stored for use or consumption, but not sold in state. Sales/Use Tax is subject to numerous statutory exemptions and limitations, including:

a. Groceries,

b. Medical equipment,

c. Sales for resale,

d. Casual sales, and

e. Certain industrial and agricultural equipment.

### 5.2.2 Discretionary County Sales and Use Surtax

When legislatively authorized, counties may levy surtax on transactions subject to sales, use, services, rentals, admissions, etc. The surtax on most sales is up to 1.5%, but the surtax on transient rentals can be up to 7%. In both cases, such county taxes are applied in addition to the 6% state sales tax.

### 5.2.3 Communications Services Tax

A communications services tax is levied on sales price of communications services which originate and terminate in this state or originate and terminate in this state and charged to service address in this state when sold at retail. The rate of this tax varies depending on local option taxes imposed.

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### 5.2.4 Income Tax on Corporations

Florida's income tax is applicable to subchapter C corporations only, at a rate of 5.5% of the Florida tax base. The Florida tax base is calculated based upon an allocable portion of the corporation's Federal income tax base.

Partnerships, S corporations and limited liability companies are exempt unless a Federal subchapter C corporate election is in place, however, owners of such pass through entities who are subchapter C corporations are subject to Florida corporate income tax if the pass through entity does business in Florida or owns property in Florida.

### 5.2.5 *Ad Valorem* Property Tax

Unless expressly exempted, all real property and all personal property used for business purposes in Florida are subject to ad valorem taxation. With limited exceptions, any claim for exemption must be filed with county property appraiser on or before March 1 of the year.

For further discussion on ad valorem property taxes in the context of real estate transactions, see Section 9.4.4 of this Guide [Ad Valorem Real Estate Taxes].

### 5.2.6 Documentary Stamp Tax/Transfer Tax

Excise taxes, commonly referred to as "Stamp Taxes," are imposed on the following:

a. Deeds, instruments, or other writings whereby any real property or any interest therein is transferred 70¢ on each $100 of consideration therefor ($1.05 on each $100 in Miami-Dade County). For purposes of computing the documentary stamp tax, consideration generally includes any debt to which the real estate is subject. The documentary stamp tax also applies to certain transfers of interests in legal entities (such as limited liability companies) used as conduits to transfer Florida real estate;

b. Promissory notes, nonnegotiable notes, written obligations to pay executed or delivered in Florida and on renewals thereof, 35¢ per $100 of obligation, not to exceed $2,450 when not secured by a mortgage or security interest filed or recorded in Florida; and

c. Filed or recorded mortgages, trust deeds, security agreements, or other evidences of indebtedness and for each renewal of same, stamp tax of 35¢ on each $100 of indebtedness or obligation evidenced thereby. There is no cap on the documentary stamp tax applied on these instruments. When a mortgage is recorded, the tax is on the mortgage, not the note.

Mortgages are also subject to an 0.2% assessment of nonrecurring intangible tax.

Apportionment may apply if taxable obligations are also secured by out-of-state real property or personal property.

For further discussion on Documentary Stamp Taxes in the context of real estate transactions, see Section 9.4.3 of this Guide [Documentary Stamp Taxes].

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### 5.2.7 Reemployment Tax

Reemployment tax is imposed on each employer (i) which has had in employment at least one individual for some portion of day in each of 20 different calendar weeks (whether or not consecutive), in current or preceding calendar year, or (ii) who has paid wages in any calendar quarter in excess of $1,500 in current or preceding calendar year. The initial rate of employer contribution is 2.7%, but the experience rating of employer may reduce or increase the rate.

### 5.2.8 Additional Florida Taxes

The following additional taxes are administered by the Florida Department of Revenue. Specific information on imposition and rates can be found on the Florida Tax Law Library or by contacting a Lex Mundi-affiliated Florida tax advisor.

a. Alcoholic Beverage Taxes. State excise tax on malt beverages, wines, and other alcoholic beverages paid by consumer and collected by manufacturer or distributor.

b. Cigarette Tax. Imposed at varying rates.

c. Motor Fuel (and diesel fuel) tax per gallon is imposed upon importation of motor fuels.

d. Aviation fuel tax per gallon is imposed upon importation of aviation fuel.

### 5.2.9 Taxes Not Imposed

The following taxes are often imposed by other states but are not imposed by the State of Florida:

a. Tax Upon Estates of Decedents.

b. Generation-Skipping Transfer Tax.

c. Income Tax. Individuals, S Corporations, Partnership, Trusts and Limited Liability Companies that are disregarded or taxed as partnerships for Federal Tax purposes are not subject to income taxes in Florida. However to the extent that entities which are disregarded or taxed as partnerships for federal tax purposes have members or partners which are subchapter C corporations, such members or partners may be subject to Florida corporate taxes.

d. Intangible Personal Property Tax.

# CHAPTER 6. LABOR AND EMPLOYMENT

**Labor and Employment**
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## 6.1 Federal Labor and Employment Statutes

### 6.1.1 Age Discrimination in Employment Act ("ADEA").

The ADEA forbids discrimination based on age in employment decisions. The ADEA applies to employers engaged in interstate commerce who have 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

### 6.1.2 Americans with Disabilities Act ("ADA").

The ADA proscribes discrimination in employment based on the existence of a disability. Furthermore, the Act requires that employers take reasonable steps to accommodate disabled individuals in the workplace. This Act applies to employers engaged in interstate commerce who have 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

### 6.1.3 Employee Polygraph Protection Act ("EPPA").

The EPPA greatly restricts polygraph testing of employees. The EPPA applies to all employers engaged in interstate commerce. Exempted are employers whose primary business purpose is running a security service or manufacturing, distributing or dispensing a controlled substance.

### 6.1.4 Equal Pay Act ("EPA").

The EPA was an amendment to the Fair Labor Standards Act and is designed to promote equal pay for men and women who do the same jobs. Therefore, if the minimum wage provision of the FLSA is applicable to one's business, then the EPA is applicable as well.

### 6.1.5 Fair Labor Standards Act ("FLSA").

The FLSA establishes the minimum wage, overtime and child labor laws for employers engaged in industries affecting interstate commerce, regardless of the number of employees.

### 6.1.6 Family and Medical Leave Act ("FMLA").

The FMLA requires that eligible employees be allowed to take up to twelve weeks of unpaid leave per year for the birth or adoption of a child or the serious health condition of the employee or the spouse, parent or child of the employee; or because of qualifying exigencies arising out of a covered family member's call to active duty in the armed forces. The FMLA also requires that eligible employees be allowed to take up to twenty-six weeks of unpaid leave per year to care for ill or injured military service members. This Act applies to all employers engaged in commerce where the employer employs 50 or more employees for each working day during each of 20 or more calendar weeks in the current or preceding calendar year.

### 6.1.7 Federal Contractors.

Employers that are federal contractors or subcontractors, depending on the type and size of their contracts, may have affirmative action obligations under Executive Order 11246 and the Vocational Rehabilitation Act. Certain federal contractors are also covered by the Drug-Free Workplace Act.

### 6.1.8 Other Federal Regulations.

Many employers operate in industries that are regulated by federal agencies. For example, the Department of Transportation requires employers to drug test employees who drive motor vehicles of over 26,000 pounds. Employers in regulated industries must be aware of any requirements imposed by federal or state regulations.

### 6.1.9 National Labor Relations Act and Labor Management Reporting and Disclosure Act.

These statutes set forth the guidelines governing labor-management relations. They apply to all employers who are engaged in any industry in or affecting interstate commerce, regardless of the number of employees. Employers who operate under the Railway Labor Act are not subject to these Acts.

### 6.1.10 Occupational Safety and Health Act ("OSHA").

OSHA is the act that established the mechanism for establishing and enforcing safety regulations in the workplace. It applies to all employers who are engaged in an industry affecting commerce, regardless of the number of employees.

### 6.1.11 Title VII.

Title VII is the broad civil rights statute that forbids discrimination in hiring based on race, religion, gender and national origin. It applies to employers engaged in interstate commerce who have 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

### 6.1.12 Worker Adjustment Retraining and Notification Act ("WARN").

WARN requires employers to give sixty days' notice to their employees of plant closings or mass layoffs. WARN applies to all businesses that employ 100 or more employees, excluding part-time employees, and to businesses that employ 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime).

### 6.1.13 Immigration Reform and Control Act ("IRCA").

IRCA requires that employers verify employment authorization for all employees hired on or after November 6, 1991. Employers are subject to significant fines and penalties for failure to comply with documentation requirements under IRCA, as well as for hiring unauthorized workers or discriminating against persons who appear or sound foreign.

## 6.2 Federal Employee Benefits Regulations

### 6.2.1 Employee Retirement Income Security Act of 1974 ("ERISA").

ERISA governs implementation and maintenance of most types of employee benefit plans, including most retirement programs, life and disability insurance programs, medical reimbursement plans, healthcare plans, and severance policies. ERISA sets out a detailed regulatory scheme mandating certain reporting and disclosure requirements, setting forth fiduciary obligations and, in most types of retirement plans, coverage, vesting and funding requirements. ERISA generally preempts state laws governing employee plans and arrangements.

### 6.2.2 Consolidated Omnibus Budget Reconciliation Act ("COBRA").

COBRA requires employers to make continuing coverage under medical reimbursement and healthcare plans available to certain terminated employees, at the cost of the employees. The usual period for which this coverage must be continued is eighteen months. COBRA contains very specific procedures for notifying terminated employees of their COBRA rights.

## 6.3 State Labor and Employment Considerations

### 6.3.1 Florida Civil Rights Act ("FCRA").

FCRA is patterned after Title VII and protects employees against discrimination based on the same protected status as protected by Title VII, as well as: marital status unless the employer has instituted an anti-nepotism policy; individuals with AIDS/HIV or who are perceived to have such conditions; and individuals with sickle-cell traits. Like Title VII, FCRA applies to employers engaged in interstate commerce who have 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

### 6.3.2 Florida Minimum Wage Act.

Effective January 1, 2016, Florida's minimum wage is $8.05 per hour. The Florida Minimum Wage Act applies to all employers who are covered by the FLSA. The Florida Department of Economic Opportunity is required to calculate a new minimum wage annually and publish the new minimum wage each January 1.

### 6.3.3 Whistleblower Laws.

Florida laws prohibit both private sector and public sector employers from discriminating or retaliating against employees who have objected to the employer's violation or a law, rule, or regulation; refused to participate in such violations; or threatened to disclose such violations to a governmental agency. Florida's private sector whistleblower act applies to all private employers with 10 or more employees. Florida's public sector whistleblower act applies to all public agencies, regardless of the number of employees.

### 6.3.4 Florida Worker's Compensation Anti-Retaliation Provision.

This statute prohibits all employers from terminating an employee's employment in retaliation for filing a worker's compensation claim.

### 6.3.5 Florida Non-Compete Statute.

Florida's non-compete statute allows for the enforcement of non-compete agreements under the following circumstances: (1) the agreement must be in writing; (2) the agreement must be reasonable in time and geographic scope; and (3) the agreement must be reasonably necessary to protect one or more statutorily-defined legitimate business interests.

Florida courts will presume a restrictive covenant six months or less in duration to be reasonable and more than two years in duration to be unreasonable unless the restrictive covenant is applicable to the seller of a business, in which case a duration of less than three years is presumptively enforceable and greater than seven years is presumptively unenforceable.

Florida courts will presume a restrictive covenant regarding the use and disclosure of trade secrets five years or less to be reasonable and more than 10 years to be unreasonable, however, trade secrets may additionally be further protected pursuant to Florida Statutes Chapter 688 (for further discussion, see Section 7.2.5 of this Guide [State of Florida Uniform Trade Secrets Act]).

Protected interests under the Florida non-compete statute include, but are not limited to: (1) trade secrets; (2) valuable confidential business or professional information that otherwise does not qualify as trade secrets; (3) substantial relationships with specific prospective or existing customers, patients, or clients; (4) customer, patient, or client goodwill associated with an ongoing business/practice, a specific geographic area, or a specific marketing/trade area; and extraordinary or specialized training.

### 6.3.6 Preservation and Protection of Right to Keep and Bear Arms in Motor Vehicles Act ("Florida Gun Law").

With limited exceptions, Florida employers may not: (1) prohibit an employee with a concealed-carry permit from securing a gun in a vehicle in the employer's parking lot; (2) ask an employee with a concealed carry permit whether he or she has a gun in a vehicle in the parking lot, take any action against that employee based on statements about whether the employee has a gun in a vehicle in the parking lot for lawful purposes, or search a vehicle in the parking lot for a gun; (3) condition employment on whether a person has a concealed-carry permit; or (4) terminate an employee with a concealed-carry permit, or otherwise discriminate against that employee for having a gun in a vehicle on the business's property, unless the gun is exhibited on the property. This law applies to all Florida employers.

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# CHAPTER 7. INTELLECTUAL PROPERTY

**Intellectual Property**
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## 7.1 Federal Intellectual Property Law

### 7.1.1 Copyright Law

This area is governed exclusively by federal law, Title 17, U.S.C.

(a) In General. Copyright law provides the author of a copyrightable work (or such person's employer in the case of a "work made for hire") with certain specific exclusive rights to use, distribute, modify and display the work. Generally, works are entitled to copyright protection for the life of the author plus 70 years. However, as to works made for hire, copyright protection is for the shorter of 95 years after publication or 120 years after creation. Anyone who without authority exercises the rights reserved exclusively to the copyright owner is considered to infringe the copyright and may be liable for actual or statutory damages and may be subject to injunctive relief.

(b) Copyrightable Works. Works of authorship that qualify for copyright protection include literary works, musical works (including lyrics), dramatic works, choreographic works, audiovisual works, pictorial, graphic and sculptural works, sound recordings and architectural works. The Computer Software Copyright Act of 1980 expressly made computer software eligible for copyright protection, a point previously in doubt. The precise scope of copyright protection for computer software has not yet been fully defined. Constantly developing technology is likely to present many new issues, presently unforeseen. All works eligible for copyright protection must meet two specific requirements. First, the work must be fixed in some tangible form; there must be a physical embodiment of the work so that the work can be reproduced or otherwise communicated. Second, the work must be the result of original and independent authorship. The concept of originality does not require that the work entail novelty or ingenuity, which are concepts of importance to patentability.

(c) Advantages of Copyright Registration. Copyright protection automatically attaches to a work the moment that the work is created. However, "registration" of the work with the U.S. Copyright Office provides advantages. A certificate of registration is prima facie evidence of the validity of the copyright, provided registration occurs not later than five years after first publication. With respect to works whose country of origin is the U.S., registration is a prerequisite to an action for infringement. Registration within three months after publication or before infringement entitles the copyright owner to an award of statutory damages and attorney's fees. Otherwise, the copyright owner is only entitled to damages, not attorney's fees. Registration also is a useful means of providing actual notice of copyright to those who search the copyright records.

(d) Copyright Registration Application Process. In order to obtain registration of copyright, an application for registration must be filed with the U.S. Copyright Office. The application must be made on the specific form prescribed by the Register of Copyrights and must include the name and address of the copyright claimant, the name and nationality of the author, the title of the work, the year in which creation of the work was completed, and the date and location of the first publication. In the case of a work made for hire, a statement to that effect must be included. If the copyright claimant is not the author, a brief statement regarding how the claimant obtained ownership of the copyright must be included. An application must be accompanied by the requisite fee, and a copy of the work must be submitted.

(e) Copyright Notice. Until 1989, all publicly distributed copies of works protected by copyright and published by the authority of the copyright owner were required to bear a notice of copyright. A copyright notice is no longer mandatory, but a copyright notice is still advantageous. For example, the defense of "innocent infringement" is generally unavailable to an alleged infringer if a copyright notice is used.

If a copyright notice is used, the notice should be located in such a manner and location to sufficiently demonstrate the copyright claim. The notice should consist of three elements. First should be the symbol of an encircled "C," or the word "copyright," or the abbreviation "copr." Second should be the year of first publication. Third should be the name of the copyright owner.

(f) Works Made for Hire. In a "work made for hire" the employer is presumed to be the author. Authorship is significant because a copyright initially vests in the author. The parties can rebut the presumption of employer authorship by an express written agreement to the contrary. The term "work made for hire" applies to any work created by an employee in the course and scope of employment or a particular work listed at 17 U.S.C. § 101. On occasion there is dispute as to whether a work created by an employee arose from the employment. To avoid this issue, employers often require execution of a formal employment agreement under which the employee expressly agrees that all copyright rights will belong to the employer. A similar agreement is also advisable in connection with the engagement of an independent contractor to perform copyrightable services for a business, but the employer should be aware that only certain types of works may be considered a "work made for hire" when created by an independent contractor. If the particular matter cannot be a "work made for hire," the employer should negotiate an agreement for the assignment of the copyright by the independent contractor.

(g) Copyright Protection for Foreign Authors. Copyright protection is available under U.S. law for foreign authors until the copyrightable work is published. If the work has been published, the availability of continued U.S. copyright protection is dependent upon the location of the publication and the nationality or domicile of the author. Copyright protection continues in the U.S. subsequent to publication if publication by the foreign author occurs in the U.S., or occurs in a country that is a party to the Universal Copyright Convention or to the Berne Convention, or occurs in a country named in a Presidential copyright proclamation. If the work is first published by a foreign

author outside the U.S., continued copyright protection in the U.S. is only available if the foreign author is either a domiciliary of the U.S. or a national or domiciliary of a country that is party to a copyright treaty to which the U.S. is also a party. A person is generally a domiciliary of the country in which the person resides with the intention to remain permanently.

### 7.1.2 Patents

This area is governed exclusively by federal law, Title 35, U.S.C., *et al.*

(a) In General. One who invents or discovers a new machine or device or a new manufacturing process may be able to obtain a U.S. patent. The U.S. patent law changed March 16, 2013, from a first-to-invent to a modified first-inventor-to-file system. It is now imperative that an inventor be the first to file a patent application in the U.S., and it behooves an inventor to not delay in seeking U.S. patent protection. A U.S. patent provides the inventor with the exclusive right for a specified time to exclude others from making, using, importing, offering to sell, or selling in the U.S. the patented invention. A U.S. patent does not provide the affirmative right to make, use, import, offer to sell or sell a patented product. A freedom to operate opinion is often created for one desiring to assess infringement risks before introducing a product to the U.S. market. A patent provides the holder with a limited monopoly on the use of the patented invention. A valid patent forecloses use of the patented invention by any other party, even if another party independently conceives the identical invention. A utility patent, which generally governs the functional aspects of a machine, manufacturing process, or composition of matter is enforceable beginning at the grant of the patent and ending 20 years (plus up to 5 more years for certain delays) after the filing date of the regular patent application. A design patent, which covers the design or appearance of an article of manufacture, is enforceable for 14 years from the granting date of the patent. A provisional patent, which may be filed before a utility patent application, establishes a priority filing date and provides up to 12 months to further develop the invention without filing a regular patent application. Anyone without authority from the patent holder who makes, uses, imports, or sells in the U.S. the patented invention during the life of the patent is considered to "infringe" the patent and may be liable for damages.

(b) Effect of Foreign Patents. A foreign patent is generally not enforceable in the U.S. Furthermore, an invention that is the subject of a foreign patent cannot be the subject of a U.S. patent, unless an application for a U.S. patent is filed within one year following application of the foreign patent. Accordingly, an inventor who holds a foreign patent and who fails to apply for a U.S. patent within one year from the date of application of a foreign patent will usually have no recourse against others who use the invention in the U.S.

(c) Patentability Under Federal Patent Statutes. To be eligible for a federal utility patent, an invention must fall into one of the classes of patentable subject matter set forth in the United States patent statutes. These classes are machines (*e.g.*, a mechanism with moving parts), articles of manufacture (*e.g.*, a hand tool), compositions of matter (*e.g.*, a plastic), and processes (*e.g.*, a method of refining). An improvement falling within any of these

classes may also be patentable. Discoveries falling outside these categories are not patentable, unless some other statutory provision applies.

In addition to being within one of the four classes and being fully disclosed, a utility invention must also be:

(i) "novel," in that it was not previously known to or used by others in the United States or printed or described in a printed publication anywhere, *i.e.*, disclosed entirely within a single reference document;

(ii) "non-obvious" to a person having ordinary skill in the relevant art, *i.e.*, disclosed entirely in parts in two or more reference documents; and

(iii) "useful," in that it has utility, actually works, and is not frivolous or immoral.

A design patent may be obtained for the ornamental design of an article of manufacture. A design patent offers less protection than a utility patent, because the patent protects only the appearance of an article, and not its construction or functional aspects of the article.

A plant patent may be obtained by anyone developing a new variety of asexually reproduced plant, such as a tree or flower. Some plants may also be protectable with a utility patent or under the Plant Variety Protection Act, administered by the United States Department of Agriculture.

In order to determine novelty and, hence, patentability of an invention, it is often useful to search the records of the internet and the U.S. Patent and Trademark Office. Within the USPTO, one may examine all U.S. patents, many foreign patents, and a large number of technical publications. A patent search is customarily performed by a patent attorney or by an individual with similar technical training, sometimes referred to as a patent agent. A patent attorney or patent agent may be asked to render an opinion regarding the patentability of a particular invention. An inventor can then make an informed decision as to whether to proceed with the cost of an actual patent application.

(d) Patent Application Process. A U.S. patent application must be filed with the U.S. Patent and Trademark Office. A complete patent application includes four elements. First, the application must include the "specification." The specification is a description of what the invention is and what it does. The specification can be filed in a foreign language, provided that an English translation, verified by a certified translator, is filed within a prescribed period. Second, the application must include an oath or declaration. The oath or declaration certifies that the inventor believes himself or herself to be the first and original inventor. If the inventor does not understand English, the oath or declaration must be in a language that the inventor understands. Third, the application must include drawings, if essential to an understanding of the invention. Fourth, the appropriate fee must be included.

After a proper application is filed, the application is assigned to an examiner with knowledge of the particular subject matter. The examiner makes a thorough review of the application and conducts a search of existing concepts in the relevant area to determine whether the invention meets the requirements of patentability. The examiner will make two determinations of patentability on the merits of the invention. First, the invention claimed cannot be disclosed completely within a single prior art document. Second, the invention cannot be disclosed in part in two or more prior art documents which would have been obvious to one of ordinary skill in the art. U.S. patent law was recently updated on March 16, 2013, to expand the definition of prior art to include all documents "available to the public," including documents in the U.S. and abroad, and evidence of public use and offers for sale in the U.S. and abroad. The patent review process generally takes from 18 months to three years or longer. Rejection of a patent application by the examiner may be appealed to the Board of Patent Appeals. Decisions of the Board of Patent Appeals may be appealed to the federal courts. Provisional patent application requirements are less stringent than a regular patent application. For instance, the oath or declaration of the inventor and claims are not required and the application is held for the 12-month period without examination.

(e) Markings. After a patent application has been filed, the product made in accordance with the invention may be marked with the legend "patent pending" or "patent applied for." After a patent is issued, products may be marked "patented" or "pat.," together with the U.S. patent number. Marking is not required, but it may be necessary to prove marking in order to recover damages in an infringement action because damages are only recoverable after a finding of infringement and actual or constructive knowledge of the patent. The marking requirement may also be met by marking the patented product with an internet address of a web page that identified the patent numbers associated with the product.

(f) Rights to Patented Inventions. Disputes sometimes arise between employers and employees over the rights to inventions made by employees during the course of employment. Because of this, employers often require employees to execute formal agreements under which each signing employee agrees that all rights to any invention made by the employee during the term of employment will belong to the employer.

### 7.1.3 Federal Trademarks

This area is governed by both state and federal law.

(a) In General. A trademark is often used by a manufacturer to identify its merchandise and to distinguish its merchandise from items manufactured by others. A trademark can be a word, a name, a number, a slogan, a symbol, a device, or a combination. A trademark should not be confused with a trade name. Although the same designation may function as both a trademark and a trade name, a trade name refers to a business title or the name of a business; a trademark is used to identify the goods manufactured by the business. A business that sells services rather than goods may also use a

service mark to distinguish its services. Generally, service marks and trademarks receive the same legal treatment.

(b) Selection of Trademark. A manufacturer should carefully consider the trademark selected for its merchandise. The level of protection against infringement of a trademark varies with the "strength" or "uniqueness" of the trademark. "Descriptive" marks are the weakest and least defensible. A descriptive trademark is a name that describes some characteristic, function, or quality of the goods. A "fanciful" mark, the strongest type of mark, is a coined name that has no dictionary definition. A "generic" word is not available for protection.

Evaluation should also include consideration of the likelihood of success in obtaining federal and state registrations of the trademark. For example, a trademark that is "merely descriptive" cannot be registered under either federal or Florida law.

Selection of a trademark should be accompanied by a trademark search to determine whether another manufacturer has already adopted or used a mark that is the same or similar to the one desired. Publications provide lists of existing trademarks, registered and unregistered, and there are businesses that specialize in trademark searches. Actual and potential trademark conflicts should be avoided, lest the manufacturer become involved in an expensive infringement lawsuit. Of even greater concern is the potential loss of the right to use a mark after considerable expenditure in advertising merchandise bearing the mark.

(c) Advantages of Trademark Registration. Under the trademark laws of the United States and Florida, the principal method of establishing rights in a trademark is actual use of the trademark. "Registration" of a trademark is not legally required but can provide certain advantages.

Federal registration of a trademark is presumptive evidence of the ownership of the trademark and of the registrant's exclusive right to use of the mark in interstate commerce, strengthening the registrant's ability to prevail in any infringement action. Federal registration is also a prerequisite for bringing a lawsuit under the federal trademark laws, for an award of attorney's fees and for an award of statutory damages.

After five years of continued use of the mark following federal registration, the registrant's exclusive right to use of the trademark becomes virtually conclusive upon filing a statement. Federal registration may assist in preventing the importation into the U.S. of foreign goods that bear an infringing trademark. There are also other less tangible advantages of registration, such as the goodwill arising out of the implication of government approval of the trademark.

State registration provides some advantages, though these advantages are not quite as extensive as federal registration. State registration is usually advisable, particularly in situations in which a manufacturer's sales will occur only in Florida.

(d) Federal Registration Application Process. 15 U.S.C. § 1051, *et seq.* Federal trademark registration requires that a trademark application be filed with the U.S. Patent and Trademark Office. The application must identify the mark and the goods with which the mark is used or is proposed to be used, the date of first use, and the manner in which it is used. The application must be accompanied by payment of the requisite fee, a drawing page depicting the mark, and three specimens of the mark as it is actually used. After the application is filed, it is reviewed by an Examining Attorney who evaluates, among other matters, the substantive ability of the mark to serve as a valid mark and the possibility of confusion with existing marks. If the examiner rejects the application, the examiner's decision can be appealed to the Trademark Trial and Appeals Board. An adverse decision by that body can be appealed to federal court.

If the application is approved, the mark is published in an official publication of the Patent and Trademark Office. Opponents of the registration have 30 days after publication, or such additional time as may be granted, to challenge the registration. If no opposition is raised, or if the opponent's claims are rejected, an applicant whose mark is already in use receives a "certificate of registration."

An applicant whose trademark is proposed for registration before actual use receives, upon approval of the application, a "notice of allowance." An application who receives a notice of allowance must within six months of the receipt of the notice furnish evidence of the actual use of the trademark. The applicant then is entitled to a certificate of registration. Failure to furnish evidence of the actual use of the mark within the time allowed results in rejection of the application. The time period for proving actual use can be extended for up to three years.

(e) Post-Certificate Federal Procedures. A certificate of trademark registration issued by the Patent and Trademark Office remains in effect for 10 years. However, registration expires at the end of six years, unless the registrant furnishes evidence of continued use of the trademark. The initial 10-year term of a certificate of registration can be renewed within the term's last six months for an additional 10-year term by furnishing evidence of continued use of the mark and paying a fee.

After at least five years of continuous use of a trademark following the receipt of a certificate of registration, a registrant can seek to have the status of the trademark elevated from "presumptive" evidence of the registrant's exclusive right to use of the trademark to virtually conclusive evidence of an exclusive right. To do so, the registrant must furnish the Patent and Trademark Office with evidence of continuous use of the trademark for at least five years. Additionally, there must not be any outstanding lawsuit or claim that challenges the registrant's rights to use the mark.

## 7.2 State Intellectual Property Considerations

### 7.2.1 Patents

This area is governed exclusively by federal law, Title 35, U.S.C. *et al.*

### 7.2.2 Copyright Law

This area is governed exclusively by federal law, Title 17, U.S.C.

### 7.2.3 State of Florida Trademarks

This area is governed by state law, Florida Statutes, Title XXXIII, Chapter 495, and federal law.

(a) In General. A trademark is often used by a manufacturer to identify its merchandise and to distinguish its merchandise from items manufactured by others. A Florida trademark can be a word, name, symbol, or device or any combination thereof used by a person to identify and distinguish the goods or services of such person, including a unique product, from those manufactured or sold by others, and to indicate the source of the goods, even if unknown.

A business that sells services rather than goods may also use a service mark to distinguish its services. Generally, service marks and trademarks receive the same legal treatment. Common law rights in marks used, but not registered, are preserved by Florida statute.

(b) Selection of Trademark. See discussion above under Section 7.1.3.(b).

(c) Advantages of Trademark Registration. Under the trademark laws of Florida, the principal method of establishing rights in a trademark is actual use of the trademark. "Registration" of a trademark is not legally required but can provide certain advantages over federal registration. In particular, an owner of a trademark registered in Florida may receive attorney's fees if successful in a trademark infringement action "according to the circumstances of the case" as determined by the court. Such threshold is a lower than the federal U.S. standard of an "exceptional case" in the Lanham Act. Additionally, the court has discretion to award damages up to three times actual damages and, if the amount based on profits is inadequate or excessive, the court may award damages "according to the circumstance of the case." Thus, much latitude is available to the court.

(d) State Registration Application Process. An application for registration to the State of Florida may be made by any individual, firm, partnership, corporation, union, association, or other organization. Applications for Florida trademarks are submitted to the Florida Department of State, Division of Corporations (the "Department"), using the required application form available on the Department's website. The application must identify the name and business address of the person applying for such registration, the mark and the goods with which the mark is used or is proposed to be used, the date of first use when the goods are sold or transported in Florida, and the manner in which it is used. The application must also include a statement that the applicant is

the owner of the mark, that the mark is in use, and that, to the best of the applicant's knowledge, no other person except a related company has registered such mark in this state, or has the right to use such mark in this state, either in the identical form thereof or in such near resemblance thereto as to be likely, when applied to the goods or services of such other person, to cause confusion, to cause mistake, or to deceive. The application must be accompanied by payment of the requisite fee, a drawing page depicting the mark, and three specimens of the mark as it is actually used. After the application is filed, it is reviewed. The application may be amended by the Department upon agreement from the applicant, within three months of the request for amendment. Upon compliance, the Department shall issue a "certificate of registration" to the applicant.

(e) Post-Certificate State Procedures. A certificate of registration issued by the state of Florida remains in effect for five years. The initial five-year term of a certificate of registration can be renewed within the term's last six months for an additional five-year term by furnishing evidence of continued use of the mark, a verified statement that the mark is still in use in the State of Florida or a statement that its nonuse is due to special circumstances that excuse its nonuse, and payment of a fee.

A trademark registered in the state of Florida may be canceled by the department upon receipt of a voluntary request; nonrenewal; upon a finding by a court of abandonment, that the registrant is not the owner, that the registration was granted improperly, that the mark was obtained fraudulently, or that the mark has become generic; or when a court orders cancellation of the mark on any ground.

(f) Infringement. On behalf of the owner of a mark, a court may enjoin the manufacture, use, display, or sale of any counterfeits or imitations thereof, require forfeiture of profits derived from wrongful display, manufacture, use, or sale and to pay costs of the action, and may order seizure of counterfeit goods under the control of the defendant.

(g) Dilution. The owner of a mark that is famous in the state of Florida is entitled to an injunction and other relief against another person's commercial use of a mark or trade name if such use begins after the mark has become famous and is likely to dilute the distinctive qualities of the famous mark. Factors used to determine whether a mark is famous are stated at Florida Statutes § 495.151.

### 7.2.4 State of Florida Deceptive and Unfair Trade Practices Act

The State of Florida Deceptive and Unfair Trade Practices Act, Chapter 501.200, *et al.*, makes unlawful unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce and makes state consumer protection in Florida consistent with federal consumer protections.

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### 7.2.5 State of Florida Uniform Trade Secrets Act

The State of Florida Uniform Trade Secrets Act, Chapter 688, *et al.*, makes unlawful actual or threatened misappropriations of trade secrets. A trade secret is defined as information, including a formula, pattern, compilation, program, device, method, technique, or process that derives independent economic value, actual or potential, from not being generally known to or accessible by other persons who can obtain economic value from its disclosure or use and is information that is the subject of efforts to maintain its secrecy. An action for misappropriation of trade secrets must be brought within three years after the misappropriation is discovered or, by exercise of reasonable diligence, should have been discovered. A complainant may recover damages for actual loss and unjust enrichment caused by the misappropriation that is not accounted for in the actual loss analysis. Attorney's fees are available if a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made in bad faith, or willful and malicious misappropriation exists.

# CHAPTER 8. COMMERCIAL BANKING OPPORTUNITIES

## Commercial Banking Opportunities

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Commercial Banking Opportunities

Florida is served by more than 300 banks, including the largest nationally chartered banks and credit unions, regional institutions and local community banks. Florida's economy has historically been based on real estate development and the tourist economy. However, the number and quality of institutions of higher learning in the state are also creating financing opportunities for innovation technology and development.

Florida does not require out-of-state financial institutions to become authorized to do business in Florida in order to extend credit into Florida from outside of the state. Out-of-state banks can establish de novo (new) branches without Florida authorization. However, branching through acquisition of a Florida-chartered bank requires regulatory approval of that acquisition.

Florida chartered banks are regulated through the Office of Financial Regulation, a division of the Financial Services Commission which is comprised of the members of the Florida cabinet. Bank holding companies doing business in the state through affiliates are required to be registered to do business in the state through the Secretary of State, Division of Corporations.

Florida's climate and its position as a gateway to Latin America attract enterprise from across the country. A large number of regional banks have followed their customers to Florida, establishing branches across the state. The influx of a retirement population with ties to out-of-state banks has also spurred banking migration to Florida. At the same time, a number of Florida-originated banks have, by merger and acquisition, become part of major national banks while retaining their Florida connections to business development.

Florida's geographic position has made it a destination for South and Central American business as well as a growing expatriate community. Miami is reported to host more international financial institutions than any U.S. city other than New York. Miami's connection to Latin America has attracted foreign financial institutions from England, Germany, Israel, and South Africa, to name only a few countries. Florida also has an active and growing expatriate community which has also attracted a number of international financial institutions and international money services businesses.

# CHAPTER 9. REAL ESTATE

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## 9.1 Ownership and Title

The grantee in a deed of land must generally be a person, natural or artificial, in existence at the time of the conveyance, and legally capable of accepting the deed and holding title to real property. *See Tucker v. Cole*, 3 So.2d 875 (1941). A deed from an owner of real property to a nonexistent entity is a nullity. *See Belcher Center LLC v. Belcher Center, Inc.*, 883 So.2d 338 (Fla. 2d DCA 2004) and citations therein.

An individual generally must be at least 18 years of age (Florida Statutes § 743.07) and mentally competent / not under a mental disability to hold title to real property in Florida. An individual is not required to be a resident of the United States to hold title in Florida; however, the conveyance of real property by non-citizens generally may create certain non-Florida specific issues, specifically with respect to taxation. For example, the Foreign Investment in Real Property Tax Act, codified at 26 U.S.C. §§ 1445, imposes income tax on foreign persons disposing of United States real property interests. Further, Florida law provides significant protections for homestead properties related to certain liens of creditors, devise and descent of the homestead property, and transfers or encumbrances by spouses without the joinder of the other spouse. *See* FLA. CONST. art. VII, § 6(a); FLA CONST. art. X, §§ 4(a)(1) & 4(c).

A domestic business entity may generally acquire, hold title to, and convey real property in Florida if authorized, current, and in accordance with its applicable governing documents, as more specifically set forth within the applicable provisions of Chapters 607 (corporations), 608 (limited liability companies), 617 (corporations not for profit), and 620 (partnerships), Florida Statutes. Each of the respective entities provides certain liability shields that would impact liabilities arising from the ownership of real property.

Similarly, a foreign business entity may generally acquire, hold title to, and convey real property in Florida if authorized, current, and in accordance with its applicable governing documents. In addition, a foreign business entity generally does not need to be registered in Florida to merely hold title or enforce rights in real property. *See Batavia, Ltd. v. U.S. By and Through Dept. of Treasury, Internal Revenue Service*, 393 So.2d 1207, 1208 (Fla. 1st DCA 1980). However, foreign entities should review the requirements

for registering with the Florida Secretary of State Division of Corporations if planning to manage real property, develop real property, or engage in similar real estate activities in Florida.

In addition, Chapter 692, Florida Statutes, sets forth certain additional statutory requirements concerning the conveyance of real property by or to particular entities (both domestic and foreign) in Florida.

## 9.2 Concurrent Ownership

### 9.2.1 Tenancy in Common

Under Florida law, except in the case of a tenancy by the entireties (discussed below), a conveyance to two or more persons creates a tenancy in common unless the instrument creating the estate expressly provides for the right of survivorship. In a tenancy in common, each cotenant owns an undivided interest and possessory right in and to the real property. Possession is the only unity necessary for a tenancy in common. Each cotenant has a separate estate that is freely alienable, can be attached by creditors, is descendible to heirs, and is devisable by will. Unless otherwise agreed to by the cotenants, each cotenant is generally liable for its proportionate share of the obligations arising from ownership of the real property, even if only one cotenant is in possession of the property. A cotenant in possession of the property may generally seek contribution from the other cotenants regarding payment of the proportionate expenses. Unless otherwise agreed to by the cotenants, all rents and profits received concerning the real property are generally to be proportionately shared by all cotenants. Any cotenant may file an action to partition such cotenant's common interest in the real property.

### 9.2.2 Joint Tenancy with Rights of Survivorship

Under Florida law, except in the case of a tenancy by the entireties (discussed below), the instrument of conveyance must provide for right of survivorship for a joint tenancy to be created. Otherwise, the tenants will be tenants in common. Each joint tenant owns an undivided interest and possessory right in and to the real property. The unities required for creation of a joint tenancy in Florida are (a) unity of time; (b) unity of title; (c) unity of possession; and (d) unity of interest. In the event of death of a joint tenant, the real property passes by operation of law to the surviving joint tenant. Each joint tenant has a separate estate that is freely alienable and attachable by creditors. A joint tenant may mortgage its interest in the real property. A joint tenancy is converted to a tenancy in common when a joint tenant conveys its undivided interest in the property to another person. Any joint tenant may file an action to partition such joint tenant's interest in the real property.

### 9.2.3 Tenancies by the Entireties

Only a married couple may own real property as tenants by the entireties. A conveyance of real property to a married individual is presumed to create a tenancy by the entireties. A tenancy by the entireties is a joint tenancy with a fifth unity, the marriage of the parties. Unlike a joint tenancy, a tenancy by entireties includes a right of survivorship regardless of whether the conveying instrument establishes such right, *i.e.*, as long as the five unities are present, there is a right of survivorship. Unlike a joint tenancy, a tenancy by the entireties may not be terminated by one spouse without the other spouse's consent. In addition, neither spouse can sell, mortgage, or encumber the real property without the other spouse's consent. Creditors generally cannot attach property held in tenancy by the entireties unless such creditors are joint creditors of both spouses. A tenancy by the entireties automatically terminates and becomes a tenancy in common upon dissolution of the marriage.

## 9.3 Spousal Rights in Real Estate

### 9.3.1 General Rule: Spouses Deemed to Take Title as Tenants by the Entireties

In Florida, a conveyance of real property to persons who are married is deemed to create a tenancy by the entireties, unless a contrary intention is clearly shown in the deed of conveyance. This is true whether or not the persons are stated to be married in the deed itself. Spouses may elect to own property as tenants in common, if they wish to do so, and if the intention is clearly stated in the deed of conveyance.

An individual who owns real property may subsequently create a tenancy by the entireties in that property with his/her spouse. The creation of an estate by the entireties can be accomplished by conveyance to one spouse, with a statement in the deed that the transaction is intended to create a tenancy by the entireties, or by a conveyance to both spouses. If the property is subject to a mortgage, consent of the mortgagee may be required for such a conveyance. In addition, such a conveyance may trigger documentary stamp tax consequences.

According to Florida Statutes § 689.11, interspousal conveyances of property, including homestead property, no longer require spousal joinder. For instance, one spouse may convey to the other his/her interest in property, whether or not homestead, without joinder of the transferee spouse.

An individual who owns real property at the time of marriage continues to own that property, subject only to homestead rights of his/her new spouse, if the property constitutes homestead property. If the property is not homestead property, the spouse does not acquire an interest in the real estate by virtue of a subsequent marriage, and the new spouse is not required to join in any mortgage or conveyance.

For so long as an interest in real property is vested in husband and wife as tenants by the entireties, a judgment against one spouse will not attach to the property. If property is owned as tenants by the entireties, neither spouse, acting alone, may convey any interest in the property or mortgage or otherwise encumber the property. Any conveyance or mortgage of property owned by the entireties should be by means of one instrument executed by both spouses. It is possible that separate deeds or mortgages, each executed by one spouse, could be collectively construed as one instrument of conveyance or mortgaging, but such construction might require judicial intervention.

### 9.3.2 Dissolution or Death

Upon dissolution of a marriage, persons who formerly owned property as tenants by the entireties shall thereafter be deemed to own the property as tenants in common, as of the time the judgment of dissolution becomes final, in accordance with Florida Statutes, § 689.15, unless the judgment dissolving the marriage specifically provides otherwise.

If property is owned as tenants by the entireties, upon the death of one spouse, title automatically vests in the surviving spouse, so long as the spouses remained continuously married during their ownership of the property. This is true whether or not the property was homestead property. Although it is sometimes requested or required, by a title insurance company or other party, that an affidavit of continuous marriage be recorded, it is presumed, in

absence of evidence to the contrary, that a marriage is continuous from the date of its inception.

### 9.3.3 Alienation of Homestead Property

If record title to homestead property is vested in one married person, the spouse must join in any mortgage, encumbrance, or conveyance of that property. However, in the absence of spousal joinder, Florida courts may nonetheless impose a constructive trust or equitable lien on the property in favor of a creditor where the mortgage is obtained by fraud and the subject funds are used to acquire or improve homestead property. *See, e.g.*, *Hirchert Family Trust v. Hirchert*, 65 So.3d 548 (Fla. 5th DCA 2011).

If record title to homestead property is vested in one married person, upon the death of that person, title vests in the surviving spouse if there are no lineal descendants. If there are lineal descendants, the surviving spouse takes a life estate, and a vested remainder vests in the lineal descendants. For surviving spouses who cannot afford / are not willing to assume the burdens associated with a life estate, Florida Statutes § 732.401(2) allows the spouse to forgo his/her rights to a life estate and instead take an undivided one-half in interest in the property, with the other half passing to any lineal descendants, per stirpes. Such election is irrevocable once made.

## 9.4 Purchase and Sale of Property

### 9.4.1 Purchase Agreements

In Florida, there is no general presumption that the initial purchase agreement is to be prepared by seller or purchaser. Many commercial transactions begin with a non-binding letter of intent and the parties then negotiate who will prepare the initial purchase agreement. In residential transactions, it is common but not required that the purchaser will submit an initial purchase agreement to the seller for the seller's review.

Essential elements of a real estate purchase agreement under Florida law are: (a) identity of the seller and purchaser, (b) the amount of consideration to be paid, and (c) an adequate description of the subject real property. A description of the subject real property is considered adequate if a land surveyor can locate the real property using such surveyor's professional training and tools. To comply with the Statute of Frauds, Florida Statutes § 689.01, a contract to sell real property in Florida must be in writing, signed by the party to be changed and be definite in its term without the use of parol evidence. Other typical provisions in a commercial transaction may include deposit requirements; due diligence/inspection periods; title insurance and survey review/objection periods; representations and warranties; conditions precedent to closing; establishment of the closing date; the documents necessary for closing; required title insurance; the allocation of responsibilities for payment of title insurance premiums, documentary stamp taxes, and other closing costs and expenses; prorations of ad valorem real estate taxes; time of the essence; default/remedy/specific performance provisions; grounds for termination of the purchase agreement; non-jury trial and venue provisions; merger and integration clauses; financing contingencies (if applicable); and provisions dealing with the recording/non-recording of the purchase agreement or a memorandum thereof in the public records.

### 9.4.2 Protection Against Fraud

While there are a number of statutory consumer protection disclosures required (particularly with regard to the sale of residential properties) which are beyond the scope of the general summary set forth in this Guide, fraud in connection with the sale and purchase of real property is generally governed by Florida common law. In commercial real estate transactions, Florida case law holds that the doctrine of caveat emptor generally applies, *i.e.*, the seller of commercial real property generally does not have to disclose known facts materially affecting the value of the property. In residential transactions, Florida case law holds that sellers of real property are required to disclose facts materially affecting the value of the property. Florida recognizes the torts of fraudulent misrepresentation and negligent representation, both of which have been successfully used by aggrieved purchasers of real estate.

### 9.4.3 Documentary Stamp Taxes

The Florida documentary stamp tax is due on all deeds transferring Florida real property for monetary consideration or any other consideration that has a reasonably determinable pecuniary value. The current documentary stamp tax rate on deeds is $.70 cents per $100.00 of the consideration, or any fraction thereof, in all Florida counties except Miami-Dade County, where the rate is $.60 cents per $100.00, plus the Miami-Dade County local-option surtax of $.45 cents, which typically only applies to properties other than single-family residences. Payment of documentary stamp taxes on deeds in residential transactions is customarily the seller's responsibility and may be subject to negotiation in commercial transactions. Additionally, the Florida documentary stamp tax is due on promissory notes or other obligations for indebtedness. *See infra*, Section 9.4.5(c) and (d).

### 9.4.4 Ad Valorem Real Estate Taxes

Ad valorem real estate taxes are billed in arrears on a calendar year basis. Such taxes are billed in November of each year and due by March 31st of the following year, with the following discounts for early payment: a 4% discount if paid in November, a 3% discount if paid in December, a 2% discount if paid in January, and a 1% discount if paid in February. Taxes are delinquent on April 1st. It is customary for ad valorem real estate taxes to be prorated at the real estate closing based on the prior calendar year's tax amount (fully discounted) if the closing takes place prior to when the actual tax amount for the current calendar year is known. In such instance, frequently the purchase agreement provides that the tax prorations will be adjusted when the actual taxes are known at the request of either party. Alternatively, the purchase agreement may state that the tax prorations are final.

### 9.4.5 Closing

(a) Deed. There are generally four types of deeds from which the parties may chose: (a) statutory warranty deed, (b) warranty deed, (c) special warranty deed, and (d) quit claim deed. A statutory warranty deed coveys good title with the present covenants of seisin and the covenant against encumbrances, and the future covenants of further assurances and quiet title. A warranty deed should provide the same warranties and covenants as a statutory warranty deed. The form of warranty deed, special warranty deed, and quit claim deed have not been adopted by statute, but custom and time have resulted in some generally accepted forms. In contrast to a statutory warranty deed or a warranty deed, a special warranty deed covenants only to protect grantees from the claims of others specifically claiming through the

grantor. A special warranty deed is akin to a covenant deed in some other jurisdictions. A quit claim deed generally does not contain any of the traditional covenants or warranties of title, and is often granted to clear title defects, in lieu of foreclosure, or in connection with the winding down of the affairs of a dissolved entity. All deeds must be executed in front of two subscribing witnesses and a notary public. Unlike some states, there is no per se prohibition in Florida against insuring a quitclaim deed; however, insuring a quit claim deed may require additional examination and approvals by the respective title insurer.

(b) Bill of Sale. If personal property is being transferred with commercial real property, then a bill of sale is customarily delivered. A bill of sale may be in the form of a quitclaim bill of sale or may contain such representations and warranties as the parties negotiate. For purposes of payment of documentary stamp taxes, if the subject transaction includes both real property and tangible personal property, then the purchase price may be allocated between the real property, which is subject to the documentary stamp tax, and the tangible personal property, which is not subject to the documentary stamp tax. It is important to note that the Florida Department of Revenue has rules for such apportionment. In addition, if the purchase price is allocated between the real property and the tangible personal property, it is possible that such allocation may trigger sales tax due on the personal property. There are Florida Department of Revenue rules and Technical Assistance Advisements to assist in such a determination.

(c) Mortgage. There is no statutory form of mortgage in Florida. The general requirements for a mortgage under Florida law are the intent of the mortgagor to mortgage the real property, consideration, an adequate description of the real property, a statement of the mortgagor's obligation, and delivery and acceptance of the mortgagee. In Florida, a mortgage is a lien, not an interest in real property. Therefore, witnesses are not an essential element of a mortgage. A mortgage is perfected by the recording of the instrument in the public records of the county in which the mortgaged real property is located. The recording of a mortgage provides constructive notice to all creditors and bona fide purchasers. Acknowledgement of a mortgage is required to comply with the recording statute. With proper language, a mortgage may also serve as a security agreement, a fixture filing, and as an assignment of leases and rents. The Florida documentary stamp tax is due on all notes or other obligations to pay debt secured by mortgages recorded in the State of Florida at the rate of $.35 cents on each $100.00 or fraction thereof of the indebtedness or obligation evidenced thereby. There is no limit on the documentary stamp tax due for mortgages or liens filed or recorded in Florida. Certain mortgages, characterized by statute as balloon mortgages, *i.e.*, if the final payment of principal due and payable on maturity is greater than twice the amount of regular or periodic payment of the mortgage, that do not fall under a statutory exemption, must contain a statutory disclosure of their status as a balloon mortgage.

(d) Financing. In Florida, common law governs most elements of commercial real estate financing transactions. Most complex real estate financing transactions are initially documented by a loan commitment followed by a formal loan

agreement between the borrower and the lender. In addition to a mortgage, most lenders in Florida also require a separate collateral assignment of leases and rents, which is recorded in the public records of the county in which the subject property is located. With proper language, the mortgage can also serve as an assignment of leases and rents. Florida has a statute governing certain aspects of collateral assignments of leases and rents. If the borrower is not creditworthy, then a lender may require a guaranty instrument from a creditworthy entity.

The typical document to evidence a borrower's repayment obligation in Florida is a promissory note. There is no statutorily promulgated form of promissory note in Florida. The general requirements for a promissory note under Florida law are that the instrument must contain a promise to repay a fixed amount of money, must be payable on demand or at a time certain, and must be signed by the borrower or maker. Promissory notes may be negotiable or non-negotiable instruments. Subject to a statutory cap of $2,450.00, the Florida documentary stamp tax is generally due on all promissory notes, nonnegotiable notes, and written obligations at the rate of $.35 cents on each $100 or fraction thereof of the indebtedness or obligation evidenced thereby. Promissory notes secured by a mortgage are generally subject to the Florida non-recurring intangible tax at the rate of $0.002 for every $1.00 paid at the time the lien upon the subject real property was created.

With some specific modifications, Florida has adopted Article 9 of the Uniform Commercial Code. Financing statements are filed with the Florida Secured Transaction Registry.

(e) Closing Statement. Closing statements are customarily used in all real estate and real estate financing transactions in Florida. They are typically prepared by the transaction's closing agent. If the transaction involves the financed acquisition of property, then typically there will be one closing statement for the loan transaction and another closing statement for the real estate transaction. Aside from the purchase price or loan amount, other items typically included on a closing statement are, as applicable, prorations and payment of taxes and other expenses, payment of title insurance premiums and endorsements, payment of documentary stamp taxes and nonrecurring intangible taxes, and payment of attorney fees, on a case-by-case basis.

## 9.5 Leasing

Leases for more than one (1) year must satisfy the requirements of the Florida conveyancing (*i.e.*, statute of frauds) statute (Florida Statutes § 689.01), meaning they must be executed before two witnesses. Further, purchasers of real property who have constructive notice of a lease on the subject real property generally risk taking title subject to the respective lease. *See, e.g.*, *Ruotal Corp., N. W. v. Ottati*, 391 So. 2d 308, 309 (Fla. 4th DCA 1980). In addition, the recording of a lease generally constitutes constructive notice of a lease encumbering real property (see Florida Statutes § 695.01).

### 9.5.1 Residential

Residential tenancies in Florida are generally governed by the Florida Residential Landlord Tenant Act, Chapter 83, Part II (§§ 83.40-83.682), Florida Statutes, and common law. The

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Florida Residential Landlord Tenant Act imposes duties both on the landlord and tenant; provides for the termination of a lease and removal of a tenant; provides conditions for holding and returning security deposits; and sets forth a number of rules that alter common law. Certain residential tenancies are not covered by the Florida Residential Landlord Tenant Act, including: (a) residency or detention in any facility incidental to receiving health, educational, counseling, religious, or similar services; (b) occupancy under a contract of sale of a dwelling unit or the property which it is a part; (c) transient occupancy in a public lodging or mobile home park; (d) occupancy by a lessee of a proprietary lease in a cooperative apartment or by an owner in a condominium unit. Further, in certain tenancies, such as rentals of single homes or duplexes, statutory provisions may be altered by written contract.

### 9.5.2 Commercial

Commercial tenancies in Florida are generally governed by Chapter 83, Part I (§§ 83.001-83.251), Florida Statutes, and common law. Further, Florida sales tax is due on the total rent paid for the right to use or occupy commercial real property (including rents as well as payments made by a tenant on behalf of the landlord such as ad valorem taxes, insurance, etc.), unless the rent falls within certain exemptions. Without limitation, rentals, leases, and licenses to use or occupy real property by related "persons" as defined in § 212.02(12), Florida Statutes, (including, but not limited to, a parent corporation to subsidiaries and individual/shareholder to a corporation) are also subject to sales tax.

## 9.6 The Foreclosure Process

Unlike most states, Florida does not allow non-judicial mortgage foreclosures. All mortgage foreclosures in Florida must be filed and prosecuted as civil law suits, usually in Florida's Circuit Courts, which are the state trial courts with general jurisdiction over disputes where the amount in controversy exceeds $15,000.00. However, if the requisites for diversity jurisdiction and amount in controversy are present, a mortgage foreclosure may be prosecuted in federal district court. In general, a mortgage foreclosure action is treated no differently than any other type of civil suit. Because of this, mortgage foreclosure actions are subject to the same rules governing discovery, including depositions, that apply to all other civil actions in Florida. Parties to a foreclosure action are also subject to normal motion practice, affirmative defenses, counterclaims, trial and appeals as could be expected in other civil actions. A hotly contested mortgage foreclosure in Florida can take more than a year to resolve, not including any subsequent appeal.

The plaintiff in a Florida mortgage foreclosure is the owner and holder, or the non-owner holder with rights of enforcement, of the mortgage and the underlying promissory note or other debt obligation secured by the mortgage. The identities of the defendants to the suit are usually determined by a title search, typically called a foreclosure title commitment, obtained from a title insurance agency. The commitment identifies many of the parties required to be named as defendants in the foreclosure suit, which include the owner(s) of the property, the borrower(s), if different from the owner(s), any guarantors, all junior lienholders, and those tenants whose leasehold or possessory interests arose after the mortgage and whose leasehold or possessory interests the plaintiff wishes to eliminate. If the identified defendants are named and served and the foreclosure is prosecuted to judgment in accordance with Florida law, the title insurance company providing the commitment will then issue an owner's title policy to the plaintiff if the plaintiff, or plaintiff's assignee, is the winning bidder at the foreclosure sale.

Once the suit is filed, it is prosecuted to judgment in the normal fashion of any other Florida law suit. That is, the judgment is obtained either after a trial, after a hearing on a motion for summary or default judgment, or via a stipulation by the defendant(s). In addition to the standard procedure, plaintiffs in a

mortgage foreclosure action can also avail themselves of the summary "show cause" foreclosure procedure prescribed by § 702.10, Florida Statutes. If successful, this summary procedure results in a final judgment of foreclosure being entered much more rapidly than is customary in a typical Florida civil suit. In a show cause foreclosure, it is possible for title to be issued within 90 to 120 days after the mortgage foreclosure suit is filed. However, the Florida Legislature made recent changes to the show cause procedure, and as of the date of this Guide, case law is still being decided that makes it unclear how these new procedural modifications will impact the show cause timeline. The recent changes are discussed in more detail in Section 4.6.1 below, however, participants in a foreclosure suit are urged to contact a Lex Mundi-affiliated advisor for specific advice on the procedures of foreclosure actions.

Simultaneously with the filing of the foreclosure action, the plaintiff should record a notice of *lis pendens* in the public records of the county or counties in which the real property is located. Any interest arising after the recording of the *lis pendens*, whether recorded or unrecorded, is automatically foreclosed unless the party asserting the interest affirmatively intervenes in the pending foreclosure suit within 30 days of the recording of the notice of *lis pendens*.

Once the suit is prosecuted to conclusion, either by trial, settlement, motion for default or summary judgment, or through the use of the show cause procedure under § 702.10, Florida Statutes, the final judgment of foreclosure is entered. A typical foreclosure judgment: (a) determines plaintiff's entitlement to be paid on the underlying indebtedness, (b) determines the amount of that indebtedness, including principal, interest, costs, attorneys' fees, prepayment penalties, late fees, premiums, taxes, etc., (c) forecloses the interests of the owner(s), borrower(s), all junior lienholders, those tenants who have been properly named as defendants, and those non-intervenors whose interests arose after the recording of the notice of *lis pendens*, (d) sets the foreclosure sale date, (e) directs the Clerk of the Court on the distribution of any excess sale proceeds, (f) may provide the Clerk with specific sale conduct instructions not already provided by Florida's judicial sale statute, § 45.031, Florida Statutes, (g) may set a redemption deadline different from that established by § 45.0315, Florida Statutes, and (h) reserves jurisdiction to award appropriate future relief, such as writs of possession, deficiency judgments, and, if necessary, judgments of reforeclosure.

The date, time and place of the foreclosure sale are generally set in the final judgment of foreclosure. Thereafter, a Notice of Sale is published once a week for two consecutive weeks in a general circulation periodical in the county or counties in which the real property is located. The last publication of the Notice of Sale must be at least five days before the foreclosure sale. Foreclosure sales are generally conducted as public auctions and in accordance with Florida's judicial sale statute, § 45.031, Florida Statutes. In a few counties, the foreclosure sale is a live auction held at the County Courthouse and conducted by a Clerk of the Court. However, in most counties, the sale is an on-line auction with all bidders required to register in advance. At the foreclosure sale, the plaintiff is entitled to bid on credit up to the full amount of the judgment, plus post-judgment interest which has accrued up to the date of the sale. On the other hand, non-plaintiff bidders are required to deposit with the Clerk of the Court 5% of the winning bid immediately upon the close of bidding in those counties conducting live auctions. In on-line auction counties, non-plaintiff bidders must deposit 5% of their registered maximum bid with the Clerk of the Court immediately upon registration. Most Clerks also require non-plaintiff bidders to pay the remaining 95% of the bid amount in cash or cashier's check later that same day, or by the end of the next business day. In addition to the prompt payment of the winning bid, the winning bidder has to pay a Florida documentary stamp tax based on the amount of the bid. In most counties, the tax is $0.70 on each $100 – or any portion of $100 - bid. (This roughly equates to a tax of $7 for every $1000 bid.) Because of the immediate funding requirements imposed on non-plaintiff bidders, it is unusual for a plaintiff to be out-bid, particularly at a large commercial foreclosure sale.


After bidding closes and the sale is concluded, the Clerk will issue a Certificate of Sale which identifies the successful bidder at the sale. Pursuant to § 45.0315, Florida Statutes, the Certificate of Sale eliminates all rights of redemption, unless the court has specified otherwise. Objections to a foreclosure sale must be filed within 10 days after the Clerk files the Certificate of Sale. Objections are rare, and even when they occur, are rarely granted. Assuming no one has objected to the foreclosure sale, the Clerk will issue the Certificate of Title approximately 11 days after the sale. The Certificate of Title operates as the deed to the property.

### 9.6.1 2013 Changes to Foreclosure Law and Procedure

During the 2013 Florida state legislative session, the Florida legislature adopted a bill that resulted in significant changes to the foreclosure procedure in Florida. In addition to changes to the law that took effect on July 1, 2013, the Legislature requested that the Florida Supreme Court modify the Florida Rules of Civil Procedure to conform to the act and create forms for use.

(a) New Complaint Requirements and Possession of the Original Note. For residential foreclosures, the Complaint must affirmatively allege the plaintiff is the holder of the note or the factual basis by which the plaintiff is entitled to enforce the Note under Article 3 of the UCC. This change in the pleading requirements also applies when servicers are prosecuting a foreclosure action. If the plaintiff has been delegated authority to file foreclosure, the complaint must describe the basis for the authority and identify with specificity the document that gives the plaintiff authority.

To further substantiate standing and to ensure proper enforcement of any mortgage to be foreclosed, the plaintiff must file a certification under penalty of perjury when the complaint is filed that the plaintiff is in possession of the original note, where the note is located, who verified possession and when they did so. A complete copy of the note with all allonges must be attached. The original note must be filed before judgment is entered. If the operative promissory note has been lost, plaintiffs must comply with additional statutory requirements before a foreclosure will be granted.

(b) Deficiency Judgments. Pursuant to the recent statutory changes, the statute of limitations on "actions" for a deficiency judgment post-foreclosure expires one year from "the day after the certificate is issued" by the clerk or the mortgagee accepts a deed in lieu of foreclosure. The new law also limits any deficiency in "owner-occupied residential property" to the difference between the judgment amount and the fair market value of the property as of the sale date.

## 9.7 Easements

An easement is generally defined as the right of one party to use land of another for a particular purpose. An easement is different from other interests in land (*e.g.*, licenses) in that an easement constitutes an interest in land which runs with the land and usually is permanent in nature. A license, by contrast, merely gives one permission to do a particular act on another's land, does not run with title to the land and is generally revocable at the pleasure of the grantor or after a given, usually relatively short, duration.

An easement may be created by express grant or reservation in a deed of conveyance or other stand-alone written instrument created for the purpose of establishing the easement. Since it is an interest in real estate, an easement should be executed with the same formalities as a deed which requires, at a minimum, a document signed by the grantor in the presence of two subscribing witnesses and a description of the easement area. The grantor's signature should also be notarized in order to record the easement in the official records book of the county in which it is located.

Easements can be exclusive or non-exclusive. An exclusive easement precludes any use of the easement area by the grantor or its successors or assigns. A non-exclusive easement allows the grantor to use the easement area for any purpose that does not interfere with the grantee's rights, including granting easement rights to others. Non-exclusive easements may set forth in detail such matters as degrees of exclusivity, responsibility for construction and maintenance of improvements, compliance with laws and allocation of liability/risk. If the easement does not specify whether it is exclusive or non-exclusive, it will be deemed to be non-exclusive.

Easements can be perpetual or for a specified duration. An easement will be deemed to be perpetual in duration unless otherwise specified.

An easement may be used only for its specified purpose. Typical purposes of an easement include the right to access, drain or locate utilities over, upon or under the property of another.

Under certain circumstances, easements may be established based on the actions of parties without the need for a written instrument. Prescriptive easements, for example, may be established in a manner similar to adverse possession, by the open, notorious, continued and uninterrupted use of another's land for the prescriptive period.

Implied easements may be created in cases where no express grant or reservation exists. An easement by way of necessity, for example, is an implied grant or reservation of an easement for ingress and egress that arises from the supposed intention of parties when one party conveys land that is otherwise landlocked. § 704.01, Florida Statutes, sets forth the elements necessary to establish an implied easement by way of necessity.

There are several methods by which an easement may be terminated. Most commonly, an easement may be released by a contract between the parties to the easement. In other circumstances, an easement may be terminated by operation of law, through the doctrines of merger or adverse possession, or by Florida's Marketable Record Title Act, Chapter 712, Florida Statutes. Additional judicial doctrines such as equitable estoppel may also serve to terminate an easement.

## 9.8 Land Use and Zoning

### 9.8.1 Introduction and Overview

Florida has one of the most complex growth management frameworks in the nation. Florida law requires that all local governments adopt and maintain comprehensive plans and that those plans and plan amendments be reviewed by the State for their impacts on important state facilities and resources and, in some cases, for compliance with state requirements. All development regulations and all development orders must be consistent with the adopted local comprehensive plan. The State also mandates regional and state review of large-scale projects meeting specific development thresholds and has imposed special regulations on certain key environmental areas. Within this framework, local governments still have the primary role in regulating development and the role of the State has diminished pursuant to recent legislation.

In practice, this local regulatory role involves not only traditional tools such as comprehensive planning, zoning and subdivision regulations, but also a growing number of additional restrictions, such as design standards, that are specific to each jurisdiction. This section provides an overview of Florida's growth management system.

Florida law contains substantial guidance and relatively detailed requirements for local comprehensive plans. Nevertheless, local comprehensive plans and implementing land development regulations are far from standardized, so development interests must thoroughly understand the specific requirements of each jurisdiction. Moreover, recent state legislation, particularly The Community Planning Act of 2011 (Chapter 2011-139, Laws of Florida), significantly reduced state oversight and changed many substantive and procedural requirements of statute. Florida's growth management law has continued to evolve in subsequent legislative sessions and local governments are still adjusting to the new processes and requirements. Users of this Guide are therefore cautioned to seek the advice of counsel on any transaction-specific questions of law.

### 9.8.2 Local Government Authority

Local governments in Florida enjoy home rule authority granted by the Florida Constitution, Article VIII, and further outlined through statute. They are therefore authorized to adopt plans and ordinances to control the use of land, consistent with state requirements that pertain to those subjects. Moreover, Florida statute mandates adoption of comprehensive plans and land development regulations by both cities and counties. In a few jurisdictions, there are charter provisions that give the county authority over certain planning and plan implementation decisions within their municipalities, but in general, each jurisdiction has separate planning and land use authority.

The majority of substantive and procedural requirements for local comprehensive planning in Florida are contained in Chapter 163, Part II, Florida Statutes (the Community Planning Act). While the "minimum criteria rule" for comprehensive plans (Rule 9J-5, Florida Administrative Code) was repealed in 2011, there continue to be administrative rules that set requirements for specific programs and areas.

### 9.8.3 Comprehensive Plan Requirements

Under Florida law, each local government must adopt a comprehensive plan containing sections ("elements") to address specific topics. Required elements include: future land use, transportation, infrastructure (sanitary sewer, solid waste, drainage, potable water and natural groundwater aquifer recharge), conservation, recreation and open space, housing, coastal management, intergovernmental coordination and capital improvements. Some plans also contain optional elements, such as public school facilities, urban design, economic development and public safety. The plan must be internally consistent and based on consistent data and analysis. Plans must be reviewed for possible updating every seven years.

### 9.8.4 Comprehensive Plan Authority

Unlike in many other states, in Florida the local comprehensive plan is the controlling document for regulating development. The local plan (or portion thereof) takes precedence over even zoning and other land development regulations. Land development regulations and development orders (which are broadly defined in statute) must be consistent with the plan.

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### 9.8.5 Comprehensive Plan Process

Because development must be consistent with the comprehensive plan, proposed development may require changes to the plan to ensure consistency. These changes may involve amending the future land use designation for the property or changes to other maps or text within the plan.

Comprehensive plans and most amendments to the plans are reviewed by state and regional agencies. Under the Community Planning Act, there are now two different "large-scale amendment" review processes, which consist of a preliminary and final review and a period during which the amendment may be challenged or appealed. The "expedited state review" process is used for most amendments and is substantially quicker than the "state coordinated review" process. Cases that are challenged or appealed by the state or by third parties go into an administrative hearing process. In the past, resolving these cases has taken months or years. It is unclear to what extent the procedural and legal changes within the 2011 Act might affect the ability and timing to resolve challenges. Even when no appeals are filed, it takes several months to complete a plan amendment, but the expedited state review process significantly reduces the minimum time frame. The Community Planning Act removed the previous twice-yearly limitation on large-scale amendments, but some local governments have retained such limitations, which can cause additional delay while awaiting the next amendment cycle.

The local government may also allow certain small, low-impact changes in land use designations ("small-scale amendments") to be processed at any time. These amendments are not transmitted for state and regional review.

Because numerous state and regional agencies review changes to the comprehensive plan, such changes may require negotiation with a variety of agencies to address concerns relative to impacts on other land uses (including military installations and airports), environmental resources, transportation facilities, schools and other facilities and resources. Additional information on reviewing agencies is provided at the end of this section.

### 9.8.6 Concurrency Requirement

A key component of Florida's growth management framework is the "concurrency" provision, which requires that the availability of facilities and services be timed to coincide with the impacts of development. Concurrency is mandated by the State for the following facilities and services: wastewater, potable water facilities, water supply, storm water and solid waste. Under the 2011 Community Planning Act, concurrency became a local option, rather than a state mandate, for transportation, public school facilities, and parks and recreation. As a result, some local governments have rescinded in whole or in part their concurrency requirements for these facilities, but many local governments have thus far retained them. Local plans use a variety of methods to set level of service (LOS) standards for concurrency purposes and are required to track the used and remaining capacity through concurrency management systems. As a practical matter, some local governments have not adopted or have not maintained these systems, but most of the larger and faster-growing jurisdictions do so.

Concurrency is a critical factor for development interests because if impacts of a proposed development result in level of service deficiencies, the local government must ensure that the deficiency is mitigated or deny the development. Mitigation takes many forms, including payment of fees, construction of facilities and dedication of land. There are specific statutory

requirements for some types of mitigation, including provisions to ensure that new development not be required to pay for existing deficiencies. As a practical matter, local government interpretation of these provisions varies and negotiation between the applicant and the local government is often critical.

Some local governments have adopted Transportation Concurrency Exception Areas (TCEAs), within which LOS standards do not apply. In these areas, there is usually an emphasis on other modes of travel and there may be special land use, design or transportation requirements. In the past, the ability to adopt TCEAs has been limited due to statutory criteria. Although transportation concurrency is now optional, some local governments have opted to retain transportation concurrency, but establish TCEAs within certain areas, potentially facilitating development in those locations. Other local governments have completely replaced their transportation concurrency systems with mobility plans, which typically include special requirements and fees that may vary depending on the location and character of the development area.

### 9.8.7 Land Development Regulations (LDRs)

Statutes also require that each local government adopt a unified development code to implement the comprehensive plan. These Land Development Regulations ("LDRs") must cover a broad array of topics, including: subdivision, use of land and water, compatibility, open space, environmental protection, signage, concurrency management, on-site traffic management and flood control. In most instances, LDRs are not reviewed by the State, but they must be consistent with the local comprehensive plan. They may, and often do, further limit the uses allowed under the plan and provide more specific development standards not contained within the plan.

Many local governments in Florida have an extensive set of LDRs that may include development standards for urban design and even for architectural style. More sophisticated local governments are adopting new provisions that encourage or sometimes even mandate that projects accommodate certain design criteria, such as principles of smart growth and pedestrian-oriented design. Standards may include restrictions on maximum floor area for commercial establishments, requirements for lining parking garages with habitable units, placement of surface parking to the rear of buildings, the preservation of view corridors, and the use of specific colors and materials consistent with the surrounding neighborhood. However, many local governments, especially some smaller towns and rural counties, maintain LDRs containing conventional zoning and subdivision requirements similar to those commonly found around the country.

LDRs often require that development proposals obtain special approval from the local government, either through administrative mechanisms or through public hearings before the local legislative body, planning and zoning boards, and/or design review boards. Some jurisdictions require such approval when a development proposal exceeds a certain amount of building area or floor area. Some go so far as to mandate that any development proposal consisting of more than a single-family home obtain site plan approval before the legislative body. LDRs specify those uses that require a special exception or conditional use permit, both of which entail additional processes and sometimes additional standards. Departures from the LDRs typically require application for and approval of a variance at a public hearing.

In the past, local processes often required that development proposals secure permits from federal, state and regional government agencies (such as the applicable water management

district or the Florida Department of Environmental Protection) before local approval could occur. Legislation passed in 2012 prohibits this, but allows the local government to condition its approval on issuance of such permits.

Because of the complexity of these regulations and processes, development interests are advised to seek professional assistance from a Lex Mundi-affiliated advisor who can provide counsel on the complex local and state requirements.

### 9.8.8 Development of Regional Impact (DRI) Process

One of the earliest requirements adopted into Florida's growth management system was the DRI process, a special review required for large-scale projects to ensure that the impacts of development, and particularly extra-jurisdictional impacts, are addressed and mitigated. While the DRI development order is issued by the local government, DRIs are subject to state and regional review and to appeal of the DRI development order by the state land planning agency. The determination of whether a project must go through the DRI process has been based on types of use and the amount of development. The development thresholds for triggering the DRI process vary by location.

Legislation passed in 2009 exempted development in many urbanized areas of the state from the DRI process. Additional legislation in 2011 further reduced the number of projects required to go through the process. In 2015, Chapter 2015-30, Laws of Florida essentially ended the program for new projects. New projects that are not already exempt from DRI review and meet the DRI thresholds under § 380.06, Florida Statutes, will instead be reviewed as a comprehensive plan amendment through the state-coordinated comprehensive plan review process under § 163.3184(4), Florida Statutes. There are still a number of questions regarding implementation of this provision, but it means no new projects will be required to undergo the lengthy and costly process of DRI review. Clearly, local governments will retain considerable leverage to negotiate and condition the project approval, as they do with all projects that require a comprehensive plan amendment.

The provisions of chapter 380.06 and associated administrative rules 9J-2 and 29-24, Florida Administrative Code, remain in place for existing DRIs. There are various processes for removing the DRI status of existing DRIs, but many projects will retain DRI status, either because they cannot meet the criteria for removing the DRI, or because they choose to retain it, most often due to the vesting it provides. These projects will remain subject to ongoing requirements for monitoring, record-keeping and reporting, and changes to the approved development program can trigger additional review by state and regional agencies.

### 9.8.9 Areas of Critical State Concern (ACSCs)

Florida has a handful of areas that are designated as Areas of Critical State Concern (ACSCs). This program was established to protect resources and public facilities of major statewide significance. Designated Areas of Critical State Concern are:

- City of Apalachicola (Franklin County)
- City of Key West and the Florida Keys (Monroe County)
- The Green Swamp (portions of Polk and Lake Counties)
- The Big Cypress Swamp (Collier County)

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Comprehensive plans and LDRs in these areas must address the issues that led to the ACSC designation. The State maintains more oversight of planning and development in the ACSCs, and has authority to review local development orders and appeal those that are inconsistent with state guidelines. These appeals are made to the to the Governor and Cabinet sitting as the Administration Commission. Within ACSCs, the state land planning agency also reviews and approves not only amendments to comprehensive plans but also land development regulations proposed by local governments. Comprehensive plan amendments within ACSCs are not eligible for the expedited state review process.

### 9.8.10 Agencies with Review Authority for Comprehensive Plans and DRIs

Numerous state and regional agencies are involved in review of local plans and DRIs. The Community Planning Act limits the role of reviewing agencies with respect to comprehensive plan amendments. In most cases, the oversight role for state agencies is limited to comments regarding adverse impacts on "important state resources and facilities" that pertain to each agency's specific area of responsibility.

Review of comprehensive plan amendments is coordinated by the Division of Community Planning and Development in the Department of Economic Opportunity (DEO) (the "state land planning agency"). State review agencies include the DEO, the Florida Department of Environmental Protection (DEP), the Florida Department of Transportation (DOT), the Florida Department of Education (DOE), the Florida Department of State and, for county plans and amendments, the Florida Fish and Wildlife Conservation Commission (FWC) and the Florida Department of Agriculture and Consumer Services (FDACS). Regional review agencies include the appropriate regional planning council (RPC) and water management district (WMD). Adjacent local governments and military bases may also have the right of review. The state land planning agency makes the determination on whether to challenge comprehensive plan amendments in the expedited state review process and, in the state coordinated review process, issues the notice of intent regarding whether to find the amendment in compliance with state requirements. It is also the only agency with appeal authority for DRIs.

## 9.9 Eminent Domain

The power of Eminent Domain is governed by both federal and state law.

### 9.9.1 In General

The fundamental power of the sovereign to take private property for the public use is limited by both the United States and Florida Constitutions and applicable state statutes. The Fifth Amendment to the United States Constitution prohibits the federal government from taking private property for public use without paying just compensation, and the Fourteenth Amendment extends this protection to private property takings by the state and its subordinate entities.

### 9.9.2 Florida Constitution

Article X, § 6, of the Florida Constitution provides that "no private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by a deposit in the registry of the court and available to the owner." The Florida Constitution also recognizes that the law may provide for the taking of easements by due process for the

drainage of the land of one person over or through the land of another. The key to the Florida constitutional provision is the guarantee of "full compensation" rather than the more customary "just compensation" found in other jurisdictions. Full compensation is substantially broader and includes the requirement that the condemning authority pay not only for the taking, but also the condemnee's reasonable expenses to defend against the taking. Reasonable expenses include attorney's fees as well as other professional fees for such experts as, but not limited to, appraisers, land planners, engineers, and architects .

### 9.9.3 Florida Statutes

Chapters 73 and 74, Florida Statutes, establish the process for the exercise of eminent domain. Chapter 73 establishes the overall procedure for a taking, while Chapter 74 establishes the process for takings qualifying as "Quick Takes" under the applicable statutes. Chapter 70.001, entitled The Bert J. Harris Private Property Rights Protection Act, provides for compensation to property owners where property rights have been damaged in instances not rising to the level of a direct or inverse condemnation. The authority to take has been extended to other state and local entities by a myriad of specific statutes. These statutes both authorize and limit the scope of the taking power tailored by the legislature to the specific needs of the entity.

### 9.9.4 Public Purpose and Necessity

Both a "Public Purpose" and a "Public Necessity" are required. As in federal law, public purpose and public use have become synonymous. In reaction to the federal *Kelo* case, the Florida legislature adopted legislation prohibiting taken private property from being conveyed to a private entity within 10 years of the taking. Further, in contrast to many other jurisdictions, the legislation prohibits takings of private property for slum/blight clearance. Public necessity needs to be only reasonable necessity, not absolute necessity.

### 9.9.5 Condemnation Actions

(a) By Condemnor (de jure). As in most jurisdictions, Florida has a bifurcated process in condemnation. The first issue is the authority for the condemnation, the liability phase. If the condemning entity succeeds in obtaining the court's judgment approving the taking, done at the Order of Taking hearing, the litigants then move to the second phase of the action, the damages phase. If the condemning authority fails at the liability phase, the condemnee is entitled to reasonable fees and costs from the condemnor for defending the suit. If the condemnee fails to defeat the taking at the liability phase, no fees or costs are recoverable.

(b) By Property Owner (de facto). Inverse condemnation actions are recognized in Florida as property rights are guaranteed by the Florida Constitution (Art. X, § 6; Art. I, § 9). As in *de jure* takings, full compensation must be paid to the aggrieved property owner if it prevails in the liability phase of the case. However, if the property owner fails in proving the taking, attorney fees and costs are not recoverable and the property owner may be liable for governmental costs associated with its defense. The taking occurs when the government substantially interferes with the property owners use and enjoyment of the property; the taking may be permanent or temporary.

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### 9.9.6 Private Property Rights Protection Act

The Bert J. Harris, Jr., Private Property Rights Protection Act, Florida Statutes § 70.001, provides property owners compensation as a result of new government regulations that inordinately burden the existing property rights. Claims must be filed within one year from the application of the regulation to the property with the governmental entity which then has 180 days to respond prior to a lawsuit being filed by the property owner.

### 9.9.7 Business Damage Claims

In partial takings for right-of-way only, Florida Statutes provide for compensation for business damages. Business damage claims are covered by Chapter 73. Claims for business damages must be made within 180 days of receipt by the business owner of the notice required by Florida Statutes § 73.015(2)(a). The claim must be filed in writing by the business owner, a certified public accountant or an expert in business damage claims and must be accompanied by business records that support the claim. The business records supporting the claim are exempt from disclosure under Florida's open public records statutes under two circumstances: (a) disclosure of the documents would cause the business owner substantial damage to its competitive status in the market and (b) the business owner must request the exemption.

### 9.9.8 Income Taxes

Acquisition of private property by a governmental entity through condemnation is an exchange and is a taxable event. While losses must be recognized immediately, gains may be deferred under some circumstances.

# CHAPTER 10. ENVIRONMENTAL LAW

**Federal and Florida State Environmental Compliance**
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## 10.1 Federal Environmental Laws Considerations

### 10.1.1 Resource Conservation and Recovery Act ("RCRA")

42 U.S.C. § 6901, *et seq.* RCRA gives the United States Environmental Protection Agency ("EPA") the authority to control hazardous waste from the "cradle-to-grave." This includes the generation, transportation, treatment, storage, and disposal of hazardous waste. RCRA also set forth a framework for the management of non-hazardous solid wastes. The 1986 amendments to RCRA enabled EPA to address environmental problems that could result from underground tanks storing petroleum and other hazardous substances. The administration of RCRA has been delegated to a number of states by statute (including to Florida through the Hazardous Waste Management Act) and, therefore, the states regulate most aspects of hazardous waste management within their borders.

RCRA Subtitle C authorizes EPA to regulate the treatment, storage, transportation, and disposal of hazardous wastes, which are wastes that may cause, or significantly contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or pose a substantial present or potential hazard to human health or environment when improperly treated, stored, transported, or disposed of, or otherwise managed. This RCRA program is implemented through regulatory requirements and/or federally or state issued permits.

RCRA Subtitle D also provides for the promulgation of guidelines for nonhazardous solid waste collection, transport, separation, recovery, and disposal practices and systems. "Solid waste" is defined as any garbage, refuse, or sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility, and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities. It does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges that are point sources under the Federal Water Pollution Control Act ("FWPCA"), or source, special nuclear or byproduct material as defined by the Atomic Energy Act. Perhaps the most significant impact of RCRA, as amended, is the authority to impose a total ban on land disposal of untreated hazardous wastes.

Finally, to address the growing environmental threat posed by leaking underground storage tanks ("USTs"), in November 1986, Congress amended RCRA to add Subtitle I which provides EPA with the authority to regulate USTs containing petroleum and other hazardous substances.

### 10.1.2 Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund")

42 U.S.C. § 9601, *et seq.* CERCLA, or Superfund as it is commonly called, was enacted in 1980 to provide for the clean-up of abandoned disposal sites. It also provides a vehicle for the EPA to recover for damage to natural resources caused by hazardous substance releases. This statute has possibly generated more litigation and controversy in the past 25 years than any other federal legislation.

CERCLA authorizes EPA to investigate and remediate or otherwise address properties contaminated by hazardous releases and to recover the cost of cleanup and associated damages from the responsible parties. EPA's authority includes two types of response actions: (1) short–term emergency responses to releases or threatened releases of hazardous substances ("removal actions") and (2) long–term response actions that permanently and significantly reduce the danger of releases or threatened releases of hazardous substances ("remedial actions"). Sites can be cleaned up solely by EPA using the funds in the superfund, or by responsible parties under EPA oversight. EPA's cleanup monies come from a superfund created by taxes on the chemical and petroleum industries. EPA is then entitled to recover its documented costs from responsible parties, which can include owners, past owners and operators of the site and generators and transporters of waste, or other hazardous materials containing hazardous substances, sent to the site.

CERCLA allows the government and private parties to sue "potentially responsible parties," or "PRPs", for reimbursement of clean-up costs caused by releases, actual or threatened, of hazardous substances. Liability is strict, joint and several, with little or no regard for causation. By statute, there are four categories of persons liable for clean-up costs:

- "Owners or operators" of the contaminated facility. A "facility" is virtually any place in which a hazardous substance is found. The current owner or operator is liable, regardless of when the hazardous substance was disposed of at the facility and whether the present owner or operator did anything to contribute to the release.

- "Owners or operators" of the facility at the time of release of the hazardous substances. Any person who contracted or arranged to have hazardous substances taken to, disposed of, or treated at a facility. This category generally applies to generators and manufacturers.

- Transporters of hazardous substances.

- Anyone who "arranged" for the disposal of hazardous substances. An entity qualifies as an arranger only if it takes intentional steps to dispose such substances. Mere knowledge that a release may occur does not meet this intent standard.

There are limited defenses under Superfund that are narrowly construed. A PRP can escape liability if it can establish that the hazardous substance release was caused solely by an act of war, an act of God, or an act of unrelated third parties. This latter "third party" defense does not apply if the damage from hazardous substances was caused by an employee or agent of the PRP, or a third party acting in connection with a contract with the PRP.

Another provision of CERCLA, the Emergency Planning and Community Right-to–Know Act (Title III of the Superfund Amendments and Reauthorization Act, requires the reporting of the storage or of releases of hazardous substances in quantities above specified amounts (aka, reportable quantities).

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## 10.2 The Clean Air and Clean Water Acts

### 10.2.1 The Clean Air Act ("CAA")

42 U.S.C. § 7401, *et seq.* The CAA regulates air pollutants under federal standards implemented and enforced by the states. The CAA is divided into six titles: (1) Title I deals with control of pollution from stationary sources; (2) Title II deals with control of pollution from mobile sources; (3) Title III addresses general and administrative matters; (4) Title IV addresses emissions and sources that contribute to acid deposition; (5) Title V establishes an operating permit requirement for sources of air pollution; and (6) Title VI regulates substances that deplete stratospheric ozone.

The CAA requires EPA to promulgate national ambient air quality standards ("NAAQS") for certain pollutants to protect the public health (primary NAAQS) and protect the public welfare (secondary NAAQS). Each state is required to adopt a plan, called a State Implementation Plan ("SIP"), that limits emissions from air pollution sources to the degree necessary to achieve and maintain the NAAQS. The SIP provides emission limitations, schedules and timetables for compliance by stationary sources.

The CAA focuses on "major" stationary sources – defined as sources which emit, or have the potential to emit, more than a prescribed amount of a designated pollutant. Because many industrialized urban areas have not attained the standards, the 1990 Amendments established deadlines and requirements for Nonattainment areas. Control requirements for individual facilities generally are more stringent in Nonattainment areas, however, states are also required to adopt measures to prevent significant deterioration of air quality ("PSD") in "clean air areas."

In addition to the SIP regulatory scheme, the Act establishes two other major regulatory programs for stationary sources. The New Source Performance Standards ("NSPS") program establishes stringent emissions limitations for "new" sources in designated industrial categories regardless of the state in which the source is located or the air quality associated with the area. An owner or operator of a new or modified source must demonstrate compliance with the NSPS within 180 days of initial start–up of the unit. In addition, the National Emissions Standards for Hazardous Air Pollutants ("NESHAP") regulates emissions of pollutants for which no NAAQS is applicable but which cause increases in mortality or serious illnesses.

### 10.2.2 The Clean Water Act ("CWA")

33 U.S.C. § 1251, *et seq.* The CWA provides EPA with regulatory jurisdiction over discharges of pollutants into the waters of the United States, which includes the coastal waters, rivers and their tributaries, wetlands, and other bodies of water. The goal of the CWA is to restore and maintain swimmable, fishable waters throughout the U.S. and to eliminate discharge of pollutants into the nation's waters.

The § 402 National Pollutant Discharge Elimination System ("NPDES") is a permitting program to regulate the point discharges of pollutants into waters of the U.S. Under the NPDES Program, EPA, or an authorized state, processes permit requests. As discussed below, EPA has approved the State of Florida NPDES program. NPDES Permits set forth the national and state limits for pollutant discharges, as well as site specific compliance monitoring and reporting requirements. Such pollutant discharge limits generally apply at the "end-of–pipe" and are intended to ensure that the water quality is adequate for the water's designated use, such as boating, swimming or fishing.

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Section 404 of the CWA is a permitting program to regulate discharges into U.S. waters, including wetlands, of dredge and fill materials, which can include dirt, gravel, tree stumps, and other solid materials. The Army Corps of Engineers has the direct authority to process the permit applications; EPA comments on the permit applications, can veto a permit the Corps intends to issue, and has the authority to enforce these provisions of the Clean Water Act.

Section 311 provides requirements for preventing, reporting and responding to spills of oil or hazardous substances into waters of the U.S. EPA implements this program in partnership with the Coast Guard. Following the Exxon Valdez tragedy, EPA's authority was further streamlined and strengthened by passage of the Oil Pollution Act of 1990.

## 10.3 State Environmental Laws Considerations

Florida has one of the most comprehensive environmental regulatory programs in the United States. A number of state agencies and local governments in Florida implement various regulatory programs to protect Florida's diverse ecology and promote responsible development, industrial, and agricultural activities within the state. Below is a general summary of the primary environmental agencies and regulations within Florida.

### 10.3.1 Agencies

(a) Florida Department of Environmental Protection ("FDEP"). FDEP is Florida's lead environmental regulatory agency. FDEP is charged with protecting Florida's air, land, water and natural resources pursuant to certain Florida Statutes and implementing regulations in the Florida Administrative Code, as set forth in further detail below. In addition, FDEP carries out certain federal environmental programs pursuant to delegated authority from the EPA.

FDEP works closely with other state agencies and local governments (both county and municipal authorities) to implement its broad environmental regulatory programs. FDEP has the authority to delegate certain programs (including certain water, natural resources, waste management, hazardous materials, and petroleum programs) to specific qualifying local governments, who then implement such environmental programs, via FDEP-approved local ordinances, and codes.

Further, FDEP has oversight authority over Florida's water resources. FDEP generally oversees the five (5) independent Florida Water Management Districts, which have significant regulatory authority over activities involving surface waters and groundwater, including the regulation of wetlands, stormwater, and consumptive water use/pumping (of both ground and surface waters), within the respective water basins of the Florida. FDEP also coordinates the state's coastal management by serving as a clearinghouse for all information and research and providing requested assistance to coastline local governments that are developing coastal zone protection plans. FDEP has comprehensive rulemaking authority which extends to administrative regulation and enforcement activities. Rulemaking and rule challenges, licensing, declaratory statements, and "decisions affecting substantial interest" concerning FDEP and other state agencies are generally heard by administrative law judges within the Florida Department of Management Services, Division of Administrative Hearings ("DOAH") pursuant to the Florida

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Administrative Procedures Act, contained within Florida Statutes Chapter 120, and in certain circumstances, within the Florida circuit courts.

FDEP's approach to enforcement has evolved to include such concepts as compliance assistance, pollution prevention, in–kind penalties, and other creative solutions to resolve noncompliance issues. FDEP staff often work with responsible parties in a non-adversarial manner to fulfill FDEP's duty to protect the environment, while taking the varied interests of the responsible parties into account. FDEP has the authority to utilize risk based closure principles for sites. FDEP, however, still resolves the majority of noncompliance problems and violations by use of traditional regulatory enforcement tools, including, enforcement actions, consent orders, and/or litigation potentially resulting in administrative, civil, and criminal penalties, irrespective of intent.

(b) Florida Department of Agriculture and Consumer Services ("DACS"). DACS administers various state and federal environmental programs primarily through four (4) divisions/offices. The Division of Agricultural Environmental Services administers programs including coordinating the state mosquito control program; agricultural pesticide registration, testing and regulation; pest control regulation; and feed, seed and fertilizer production inspection and testing. The Division of Aquaculture generally regulates aquaculture facilities and shellfish processing plants; the opening/closing of shellfish harvesting waters; and the leasing of submerged state lands for aquaculture. The Florida Forestry Service generally manages the forest resources of Florida by implementing certain silviculture, fire suppression, and forest resource programs. The Office of Agricultural Water Policy facilitates communications among federal, state, local agencies, and the agricultural industry on water quantity and water quality issues involving agriculture.

(c) Florida Department of Economic Opportunity ("DEO"). Created in 2011, DEO succeeded the Department of Community Affairs as the Florida state planning agency. DEO impacts the development and use of Florida natural resources through its review and comment on proposed local government comprehensive plans.

(d) Executive Office of the Governor. The Florida Land and Water Adjudicatory Commission ("FLAWAC"), comprising the Governor and Cabinet, sits as a super agency to review certain DEO and FDEP permits and approvals.

(e) Florida Fish and Wildlife Conservation Commission ("FWC"). FWC exercises the Florida's executive and regulatory power over marine life, wild animal life, freshwater aquatic life, and habitat management.

(f) Florida Department of Health ("DOH"). In addition to the regulation of general public health issues, DOH has supervision and control over all private water systems and public water systems not covered or included in the Florida Safe Drinking Water Act (including septic systems, discussed in further detail below). Moreover, DOH is authorized to license and regulate the manufacture, production, transportation, use, handling, storage, disposal, sale, lease, or other disposition of radioactive material and radiation machines.

(g) Florida Division of Emergency Management ("DEM"). DEM is responsible for implementing in Florida the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA") which requires owners and operators to report threshold quantities of regulated chemicals stored on site to enable state and local agencies to track potential chemical hazards in communities. For example, commercial (including multifamily) properties with emergency generators having above ground fuel storage tanks generally containing more than 1,360 gallons of diesel fuel are required to file annual notices / registrations with DEM under EPCRA.

### 10.3.2 Regulations

Below is a brief summary of some of FDEP's primary environmental regulations.

(a) Florida Air and Water Pollution Control Act. The Florida Air and Water Pollution Control Act, Florida Statutes §§ 403.011-403.42, requires all stationary installations that reasonably will be expected to be a source of air or water pollution to have a permit issued by the FDEP, except in those limited instances in which FDEP rules authorize an exemption. Below is a summary of select programs addressed in this Florida Air and Water Pollution Control Act:

(i) Air. FDEP regulates the emission of air pollutants from major and minor stationary sources during both the construction and operation phase of such stationary sources, pursuant to Florida Statutes § 403.087. This program is modeled closely after the Federal Clean Air Act, and a many of the activities undertaken by the program involve controlling six criteria air pollutants identified by the US EPA: ozone, carbon monoxide, nitrogen dioxide, sulfur dioxide, particulate matter, and hazardous air pollutants.

The owner or operator of any facility that emits or can reasonably be expected to emit any air pollutant is generally required to obtain an individual or general air permit from FDEP, as applicable, pursuant to Rule 62-210.300, Fla. Admin. Code ("F.A.C."). Further, all major sources of air pollution (Title V sources) are subject to the air operation permit requirements of Chapter 62-213, F.A.C., except those Title V sources permittable pursuant to Rule 62-213.300, F.A.C.

Enforcement involving FDEP's air pollution control program relies upon the general statutory prohibitions in Florida Statutes Chapter 403 relating to pollution and the air program rules contained within Chapters 62-204 through 62-297, F.A.C.

(ii) Stormwater. FDEP implements the NPDES stormwater permitting program in Florida. The majority of industrial activities requiring an NPDES stormwater permit will likely qualify for an NPDES general permit, known in Florida as a "generic" permit, issued by FDEP under the authority of Florida Statutes § 403.0885, and the requirements set forth in Rule 62-621.300(5)(a), F.A.C. In the alternative,

stormwater discharges from industrial activities that are not eligible for a generic permit must be covered under an individual permit with requirements specific to the facility as specified under Chapter 62-620, F.A.C. Additional regulations applicable to both NPDES permits are contained within Chapter 62-4, F.A.C.

(iii) Wastewater. FDEP further implements the NPDES wastewater permitting program in Florida. Florida Statutes § 403.0885 establishes the NPDES program for domestic and industrial wastewater in Florida, which closely follows the Federal NPDES program. The non-NPDES domestic wastewater program is administered pursuant to the general statutory discharge prohibitions set forth throughout Florida Statutes Chapter 403 and program rules set forth in Chapters 62-600 through 62-650, F.A.C. Further, the industrial wastewater program is administered pursuant to the general statutory discharge prohibitions set forth throughout Florida Statutes Chapter 403 and program rules set forth in Chapters 62-625, 62-650, 62-660, and 62-670, F.A.C.

In a related matter, Onsite Sewage Treatment and Disposal Systems ("OSTDS"), which include septic tanks, are regulated by the Bureau of Onsite Sewage Programs in the DOH and applicable local government health departments, pursuant to Chapter 64E-6, F.A.C. In addition, beginning January 1, 2011, pursuant to recent legislation amending Florida Statutes § 381.0065, DOH will implement a program that requires owners of onsite sewage treatment and disposal systems to perform an evaluation and assessment of such systems one every five (5) year period.

(b) Florida Resource Recovery and Management Act (Solid and Hazardous Waste). The Florida Resource Recovery and Management Act, Florida Statutes §§ 403.702–403.7895, and its implementing rules govern the generation and disposal of solid and hazardous wastes within Florida. FDEP is responsible for implementing the Florida Resource Recovery and Management Act, which is modeled, in part, after the Federal Resource Conservation and Recovery Act of 1976, as amended ("RCRA"), and the Federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), and contains similar waste management and liability provisions. Chapters 62-701 through 62-722, F.A.C., generally set forth FDEP's solid waste regulations, and Chapter 62-730, F.A.C., generally set forth FDEP's hazardous waste regulations.

(c) Florida Water Resources Act. FDEP and five regional water management districts ("WMD") generally administer the provisions of the Florida Water Resource Act, set forth in Florida Statutes Chapter 373, which concerns activities involving surface and groundwater including the regulation of wetlands, stormwater, and consumptive water use/pumping (of both groundwater and surface water). Parties are generally required to obtain an environmental resource permit ("ERP") from the respective WMD to perform certain regulated activities such as dredging and filling in wetlands, construction of drainage facilities, stormwater containment and treatment,

construction of dams or reservoirs, and other activities affecting state waters. Further, parties are required to obtain a consumptive use permit ("CUP") or a water use permit ("WUP") from the respective WMD to withdraw surface or groundwater for certain reasonable and beneficial uses such as public supply (drinking water), agricultural and landscape irrigation, and industry and power generation. There are a number of variations and requirements concerning the application, maintenance, and renewal of ERPs, CUPs, and WUPs, generally set forth in Chapters 40A through 40E, F.A.C.

(d) Pollutant Discharge Prevention and Control Act. The Pollutant Discharge Prevention and Control Act, Florida Statutes §§ 376.011-376.21, generally prohibits the discharge of pollutants into or upon any waters or lands of Florida. Further, other related provisions, such as Florida Statutes § 376.302 (which identifies other similar and/or related prohibited acts), create liability for any discharges or polluting conditions.

In the event of such a violation and/or covered release, responsible parties are generally required to remediate affected properties to the extent necessary to meet to certain numeric cleanup target levels, which are different for each respective pollutant, media (*i.e.*, soil or groundwater), and land use (residential or industrial). Specific FDEP cleanup criteria are set forth in: 62-777, F.A.C. (Contaminant Cleanup Target Levels); and 62-780, F.A.C. (Contaminated Site Cleanup Criteria, *i.e.*, risk based corrective action ("RBCA")). Please note that on June 12, 2013, Chapter 62-770, F.A.C. (Petroleum Contamination Site Cleanup Criteria); 62-782, F.A.C. (Drycleaning Solvent Cleanup Criteria); and 62-785, F.A.C. (Brownfield Cleanup Criteria Rule) were repealed and certain provisions from those rule chapters were consolidated and incorporated into Chapter 62-780, F.A.C. (Contaminated Site Cleanup Criteria).

In addition to FDEP enforcement of such provisions, Florida Statutes § 376.313 has been held to create a strict liability private cause of action for adjacent properties owners impacted by certain covered releases of pollutants. See *Aramark Uniform & Career Apparel, Inc. v. Easton*, 894 So.2d 20 (Fla. 2004).

(e) Underground and Aboveground Storage Tanks. FDEP also regulates the registration, construction, maintenance, installation, removal, and disposal of underground and aboveground tanks pursuant to Florida Statutes § 376.303. Further, Florida Statutes § 376.308(1) holds a number of parties strictly liable for prohibited discharges including the person causing the discharge, the person who owned or operated the facility at the time of the discharge, the person who owned or operated the tanks at the time of the discharge, and the person who currently owns the facility. In addition, Chapters 62-761 and 62-762, F.A.C., contains FDEP's rules regulating underground and aboveground storage tanks and their associated piping.

(f) Brownfields Redevelopment Act. The Brownfields Redevelopment Act (Florida Statutes §§ 376.77–376.85), created a voluntary program for local governments and state agencies to provide financial and regulatory incentives and technical assistance to persons and businesses involved in the redevelopment of Florida "brownfield sites", which are defined in § 376.79(3)

as "…real property, the expansion, redevelopment, or reuse of which may be complicated by actual or perceived environmental contamination."

Florida offers a number of incentives for participating in the Florida brownfields program, including: a voluntary cleanup tax credit (§ 376.30781, Florida Statutes), bonus tax refunds (§ 288.107, Florida Statutes), capital investment tax credits (§ 220.191, Florida Statutes), certain exemptions from sales taxes on building materials (§ 212.08(5)(o), Florida Statutes), a loan guarantee program (§ 376.86, Florida Statutes), an innovation incentive program (§ 288.1089, Florida Statutes), an educational grant program (§ 288.047, Florida Statutes), and other various local government economic and regulatory incentives. Further, participation in the Florida brownfields program generally results in a limited liability protection to any person, including his or her or its successors and assigns, who executes and implements to successful completion a brownfield site rehabilitation agreement, pursuant to § 376.82(2), Florida Statutes.

Any person or entity that has not caused or contributed to the contamination of a brownfield site after July 1, 1997, may be eligible to participate in the brownfield rehabilitation program pursuant to § 376.82(1), Florida Statutes. Further, a local government with jurisdiction over a brownfield area is authorized to designate the area by resolution as a brownfield under the brownfield program designation and administration process set forth in § 376.80, Florida Statutes. Once a site has received the brownfield designation, the person responsible for brownfield site rehabilitation must then enter into a brownfield site rehabilitation agreement ("BSRA") with the FDEP or delegated local program if actual contamination exists at the brownfield site. The BSRA, which sets forth the parameters and timeline for brownfield site remediation, includes, among other requirements, a commitment to conduct site rehabilitation consistent with state, federal, and local laws and consistent with the brownfield site contamination cleanup criteria specified in Rules 62–780 and 62–777 of the F.A.C.

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# CHAPTER 11. DISPUTE RESOLUTION

**Dispute Resolution in Florida**
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## 11.1 Federal Court System

The trial courts of the federal court system are the U.S. District Courts. There are 94 federal Districts in the United States. Florida has three federal districts: the Northern District, the Middle District and the Southern District. The judges of the United States District Courts and United States appellate courts are appointed by the President of the United States, with the advice and consent of the Senate and hold office during good behavior. Appeals from Florida's District Courts are to the United States Court of Appeals for the Eleventh Circuit.

Federal courts are courts of limited jurisdiction. The types of cases they may hear are mandated by both Article III of the U.S. Constitution and federal statute. Federal courts have exclusive jurisdiction over cases arising in bankruptcy, patent and copyright, antitrust, postal matters, internal revenue, admiralty, federal crimes, federal torts, and customs. To the extent federal courts have jurisdiction over other matters, it is concurrent with that of the state courts. However, federal courts are not courts of "general jurisdiction," which are courts that can hear almost any case. As an example, state trial courts are courts of general jurisdiction and have jurisdiction (within certain limits) of any matter arising under a state's laws and also matters outside the exclusive jurisdiction of federal courts.

There are generally two ways to gain access to the federal district courts where concurrent jurisdiction exists. First is diversity jurisdiction, which involves disputes between "citizens of different states" with an "amount in controversy" exceeding $75,000. To be brought in federal court under diversity jurisdiction, there must be complete diversity, *i.e.*, none of the plaintiffs may be a citizen of the same state as any of the defendants and the dispute must involve an amount (somehow quantified) greater than $75,000. The second primary basis is federal question jurisdiction, which is where a dispute presents an issue arising under the Constitution, statutes, or treaties of the United States. If a plaintiff's case does not fit within one of the statutory bases for federal jurisdiction, there is no recourse to the federal courts.

The workings of the federal district courts for civil matters (separate from bankruptcy and criminal matters) are governed by the Federal Rules of Civil Procedure, promulgated by the U.S. Supreme Court and approved by the U.S. Congress. These are a uniform body of procedural rules applicable to every federal district court in the U.S. Each federal district court also establishes its own rules applicable only to the procedure in that district court, but those rules are in addition to the Federal Rules and may not contravene them.

The procedural rules often set forth very specific guidelines for the handling of an action, and close attention must be paid to them. A litigant in a suit in federal district court must be aware of that court's local rules as well as the Federal Rules of Civil Procedure.

Almost all appeals from Florida's federal courts are taken to the United States Court of Appeals for the Eleventh Circuit, which also handles appeals from Georgia and Alabama's federal courts. An exception to this is patent decisions, which are handled by the Court of Appeals for the Federal Circuit and not by the Eleventh Circuit. The vast majority of appeals are taken from final trial court judgments. Federal appellate courts have very limited jurisdiction with respect to non-final orders, which jurisdiction includes

decisions regarding injunctions and receiverships, certain admiralty decisions, and decisions certified by a trial court as being ones involving a controlling question of law as to which an appellate ruling would "materially advance the ultimate termination of the litigation." The Eleventh Circuit is the final appellate court for almost every case; only in rare cases would an issue be addressed by the United States Supreme Court. The Supreme Court chooses the cases it takes, with a vote of four Justices having to agree that an issue is worthy of consideration. Fewer than one percent of applications to the Supreme Court to take a case are granted.

## 11.2 State Court System

### 11.2.1 Trial Courts

Florida has a two-tiered trial court system composed of circuit courts and county courts.

(a) Circuit Courts. The circuit courts are sometimes referred to as courts of general jurisdiction in recognition of the fact that most criminal and civil cases originate at this level. These courts handle all trial matters except those below a monetary jurisdictional threshold.

(i) Organization. The Florida Constitution provides that a circuit court shall be established to serve each judicial circuit established by the Legislature, of which there are twenty. Within each circuit, there may be any number of judges, depending upon the population and caseload of the particular area. In more populated areas, a circuit may encompass just one county; in less populated areas, a circuit may encompass as many as seven counties.

Circuit court judges are elected by the voters of the circuits in nonpartisan, contested elections. Circuit court judges serve for six-year terms.

A chief judge is chosen from among the circuit judges and county judges in each judicial circuit to carry out administrative responsibilities for all trial courts (both circuit and county courts) within the circuit.

(ii) Jurisdiction. Circuit courts have general trial jurisdiction over matters not assigned by statute to the county courts. Circuit courts also hear appeals from county court cases, except for county court orders or judgments declaring invalid a state statute or a provision of the Florida Constitution and orders or judgments of a county certified to the district court of appeal as being of great public importance and accepted for review. Thus, circuit courts are simultaneously the highest trial courts and the lowest appellate courts in Florida's judicial system.

The trial jurisdiction of circuit courts includes, among other matters, original jurisdiction over civil disputes involving more than $15,000; controversies involving the estates of decedents, minors, and persons adjudicated as incapacitated; cases relating to juveniles; criminal prosecutions for all felonies; tax disputes; actions to

determine the title and boundaries of real property; suits for declaratory judgments (ones seeking a declaration of legal rights or responsibilities regarding an existing dispute); and requests for injunctions to prevent persons or entities from acting in a manner that is asserted to be unlawful.

Circuit courts are also granted the power to issue the extraordinary writs of *certiorari*, prohibition, *mandamus*, *quo warranto*, and *habeas corpus*, and all other writs necessary to the complete exercise of their jurisdiction.

(b) County Courts

(i) Organization. The Florida Constitution establishes a county court in each of Florida's 67 counties. The number of judges in each county court varies with the population and caseload of the county.

County judges are elected by the voters of the county in nonpartisan, contested elections and serve six-year terms.

(ii) Jurisdiction. The trial jurisdiction of county courts is established by statute. The jurisdiction of county courts extends to civil disputes involving $15,000 or less. Thus, a dispute involving exactly $15,000 would be heard in county court, not circuit court.

The county courts are sometimes referred to as "the people's courts," because a large part of the courts' work involves voluminous citizen disputes, such as traffic offenses, less serious criminal matters (misdemeanors), and relatively small monetary disputes. Litigants frequently are not represented by attorneys in county courts; in fact, representation by an attorney in county court makes a litigant subject to additional procedural obligations.

### 11.2.2 Appellate Courts

(a) Supreme Court

(i) Organization. The highest Court in Florida is the Florida Supreme Court, which is composed of seven Justices. At least five Justices must participate in every case and at least four must agree for a decision to be reached. The Court's official headquarters is the Supreme Court Building in Tallahassee.

The Florida Constitution provides for a "merit retention" system for Florida's appellate judges. This system was meant to eliminate the many problems caused by judges running for office in an election.

When Justices' terms expire, their names will appear on the general election ballot for a merit retention vote if they wish to remain in office. Under this system, the voters do not choose between competing candidates for a Justice position. Instead, the question on the ballot

is: "Shall Justice [X] be retained in office?" If a majority of the votes cast are not in favor of retaining the incumbent Justice, Florida's Governor appoints another person to fill the vacancy. The Governor chooses the next Justice from a list of between three and six qualified persons recommended by the Judicial Nominating Commission.

By a majority vote of the Justices, one of the Justices is elected to serve as Chief Justice, an office that is rotated every two years. The Chief Justice presides at all proceedings of the Court. If the Chief Justice is absent from Court, the most senior Justice present becomes acting Chief Justice. By longstanding tradition, the most senior Justice who has not yet served as Chief Justice is elected to the top post in every even-numbered year.

As chief administrative officer of the judicial branch of government, the Chief Justice assigns Justices and judges, including retired Justices and judges who consent and are approved by the Court to serve, to duty in courts that require temporary assistance. The Chief Justice also supervises the compilation and presentation of the judicial budget to the Legislature.

(ii) Jurisdiction. The jurisdiction of the Florida Supreme Court is set out in the Florida Constitution with some degree of flexibility through which the Legislature may add or take away certain categories of cases. The Florida Supreme Court must review final orders imposing death sentences, district court decisions declaring a State statute or provision of the Florida Constitution invalid, bond validations, and certain orders of the Public Service Commission on utility rates and services.

In addition to these forms of mandatory review authority, the Florida Supreme Court at its discretion may review any decision of a district court of appeal that expressly declares valid a state statute, construes a provision of the state or federal constitution, affects a class of constitutional or state officers, or directly conflicts with a decision of another district court or of the Florida Supreme Court on the same question of law. A party must request that the Florida Supreme Court accept such a case, which request the Court may grant or reject. The grant of such a request is the most common way for a civil litigant to obtain review by the Florida Supreme Court, although this aspect of its jurisdiction is not often exercised by the Court.

The Florida Supreme Court may review any decision of a district court of appeal that passes on a question certified by that court to be a question of great public importance, or a question certified by a district court of appeal as being in direct conflict with a decision of another district court of appeal.

The Florida Supreme Court may review a trial court order certified by a district court of appeal as being of great public importance or to have a great effect on the administration of justice throughout the state and requiring immediate resolution by the Florida Supreme Court.

The Florida Supreme Court may review a question of Florida law certified by the Supreme Court of the United States or by a United States Court of Appeals which is deemed to be determinative of an issue governed by Florida law in a federal case for which there is no controlling precedent of the Florida Supreme Court.

The Florida Supreme Court has the constitutional authority to issue the extraordinary writs of prohibition, *mandamus*, *quo warranto*, and *habeas corpus* and to issue all other writs necessary to the complete exercise of its jurisdiction. These writs, which bear names as ancient as their common-law origins, have been considered indispensable to our legal system, and the Florida Constitution specifically authorizes their issuance in a proper case without the necessity of having to proceed initially to trial. They are by nature "extraordinary," and for that reason are not available as an alternative to the usual trial and appeal. Both by their historical development and by current judicial decisions, the writs are made available only in a narrow class of exceptional cases.

The Florida Supreme Court also renders advisory opinions to the Governor upon request on questions relating to the Governor's constitutional duties and powers and must review voting district plans submitted by the Legislature. As the state's highest tribunal, the Florida Supreme Court possesses distinctive powers that are essential to the exercise of the state's judicial power but that are not, strictly speaking, decision-making powers in contested cases.

The Florida Supreme Court promulgates rules governing the practice and procedure in all Florida courts, subject to the power of the Legislature to repeal any rule by a two-thirds vote of its membership, and the Florida Supreme Court also has the authority to repeal (if five Justices concur) any rule adopted by the Judicial Qualifications Commission.

The Florida Supreme Court has exclusive authority to regulate the admission and discipline of lawyers in Florida. To assist in the performance of those regulatory powers, the Florida Supreme Court has adopted rules of professional conduct, established the Florida Board of Bar Examiners to administer the admissions process, and created The Florida Bar to superintend bar governance.

(b) District Courts of Appeal

(i) Organization. Most trial court decisions that are appealed never reach the Florida Supreme Court. Rather, appellate review of trial

court decisions is conducted by three-judge panels of the district courts of appeal. Florida did not have district courts of appeal until 1957.

Florida's Constitution now provides that the Legislature shall divide the State into appellate court districts and that there shall be a district court of appeal for each district. There are five districts and, correspondingly, five district courts of appeal: the First District, the Second District, the Third District, the Fourth District, and the Fifth District. Roughly speaking, the First District encompasses Florida's Panhandle, the Second District encompasses southwest Florida, the Third and Fourth Districts encompass southeast Florida (including the Florida Keys), and the Fifth District encompasses northern and middle Florida.

District court judges must meet the same eligibility requirements for appointment to office, and they are subject to the same procedures and conditions for discipline and removal from office as Justices of the Florida Supreme Court. Like Florida Supreme Court Justices, district court judges also serve terms of six years and will be eligible for successive terms under a merit retention vote of the electors in their districts.

In each district court, a chief judge, who is selected by the district court judges within the district, is responsible for the administrative duties of the court.

(ii) Jurisdiction. The district courts of appeal can hear appeals from final judgments and can review specified non-final orders. By general law, the district courts have been granted the power to review final actions taken by state agencies in carrying out the duties of the executive branch of government.

Finally, the district courts have been granted constitutional authority to issue the extraordinary writs of *certiorari*, prohibition, *mandamus*, *quo warranto*, and *habeas corpus*, as well as all other writs necessary to the complete exercise of their jurisdiction.

As a general rule, decisions of the Florida district courts of appeal represent the final level of appellate review. Review of a decision of a district court of appeal would be to the Florida Supreme Court on issues of state law or to either the Florida Supreme Court and then to the United States Supreme Court or directly to the United States Supreme Court on issues of federal constitutional law or federal law as to which state and federal courts have concurrent jurisdiction. Except for the very few issues where Florida Supreme Court review is required (such as decisions invalidating a state statute), most requests for appellate review beyond a district court of appeal are denied.


## 11.3 Alternative Dispute Resolution

Florida has a long tradition of encouraging alternative dispute resolution ("ADR"). Essentially, ADR enables resolution of civil disputes without an adjudication through the court system. While there are a number of ADR methods, by far the most common are mediation and arbitration, which are addressed below.

### 11.3.1 Mediation

Mediation is an informal and non-adversarial process in which a neutral third person, the mediator, acts to encourage and facilitate the settlement of a dispute between two or more parties. The mediator has no power to adjudicate or force a settlement; all decision-making authority remains with the parties to reach a mutually acceptable and voluntary settlement. Mediation is mandatory in virtually every Florida circuit court civil dispute.

Florida Statutes Chapter 44 contains general provisions on mediation and non-binding arbitration, including:

a. With limited exceptions, the court must refer a case to mediation upon the request of any party (§ 44.102); however, in practice, most circuit trial courts make mediation mandatory.

b. The court may refer any case to non-binding arbitration (a truncated form of arbitration where the arbitral ruling is only final if no party requests a trial de novo by the court) (§ 44.103).

c. Arbitrators have judicial immunity (§§ 44.107, 682.051, 684.0045). With limited exceptions, mediators have the same immunity (§ 44.107).

d. All mediation communications are privileged and a party may not be compelled to testify regarding mediation discussions (with very rare exceptions) (§§ 44.401-406).

The procedures for mediation and court-ordered arbitration are set forth in the Florida Rules of Civil Procedure (Fla. R. Civ. P. 1.700-1.830).

The Florida Supreme Court has promulgated a separate set of Rules for Certified and Court-Appointed Mediators which include mediator qualifications, standards of professional conduct, and disciplinary rules (Fla. R. Med. 10.100-10.900).

As a practical matter, virtually every civil case filed in either state court or in federal district court in Florida will result in an order requiring the parties to mediate, and the procedures for mediation will be spelled out in the order requiring mediation. This usually occurs at the time the case is set for trial or when the first scheduling order is entered. The court will require that the mediation be completed by a certain date, usually some set amount of time before the commencement of trial, and the order will establish a procedure for the selection of the mediator and a deadline for the selection. The parties' attorneys will usually agree upon the selection of the mediator, but if they cannot the court will appoint one from an approved panel of mediators.

One of the key features of Florida mediation is that the parties or their authorized representatives having full authority to settle, not merely the attorneys of record, must attend the mediation. The parties may stipulate or the judge may allow a party to attend by telephone, upon motion made for good cause, but Florida courts are vigilant in requiring party attendance at mediation. Upon the failure of a party to attend mediation without good cause, and upon motion made, the court shall impose sanctions on the disobedient party. (Fla. R. Civ. P. 1.720(f)).

Finally, mediation is not limited to trial court disputes. Parties have the option to mediate at the appellate level if they so choose (Fla. R. App. P. 9.700), and the Fifth District Court of Appeal has a mandatory mediation process. In addition, the United States Court of Appeals for the Eleventh Circuit requires almost every civil appeal to proceed through at least an initial evaluation of the appropriateness of mediation.

### 11.3.2 Arbitration

Whereas mediation is a non-adversarial process through which the parties are encouraged to reach a voluntary settlement, arbitration is an adversarial process generally resulting in a binding decision. Arbitration is a proceeding in which a neutral third party, or panel of persons, the arbitrator(s), considers the facts and arguments presented by the parties, typically in an evidentiary hearing, and then renders a decision, or award, that is usually binding.

The Revised Florida Arbitration Code is contained in Chapter 682 of the Florida Statutes. Florida has adopted the Revised Uniform Arbitration Act with a few modifications. The key provisions include:

a. Arbitration agreements are valid, irrevocable, and enforceable (§ 682.02).

b. Courts have authority to compel or stay arbitration (§ 682.03).

c. Procedures are specified for conducting arbitration and for confirmation, vacation, modification or correction of an award (§§ 682.04-682.14).

d. Courts are to enter a judgment based on an order confirming, modifying or vacating an award (§ 682.15).

e. Appellate review is available for decisions granting, denying, or staying arbitration, confirming or vacating an award, or modifying or correcting an award (§ 682.20).

f. Provisional remedies are available to protect the effectiveness of the arbitration proceeding to the same extent as if the controversy were the subject of a civil action (§ 682.031).

g. Judicial enforcement is available for a pre-award ruling by the tribunal (§ 682.081).

Although Florida has a separate arbitration code for both domestic and international disputes (see below), the vast majority of decisions by Florida courts arise under the Federal Arbitration Act, Title 9 U.S.C. § 1, *et seq*., which governs arbitration for any issue involving interstate or foreign commerce or a maritime transaction.

The Florida Supreme Court has promulgated a separate set of Rules for Court-Appointed Arbitrators which, like the rules for mediators, include arbitrator qualifications, standards of professional conduct, and disciplinary rules (Fla. R. Arb. 11.010-11.130).

A great number of the arbitrations commenced in Florida are conducted under the rules and procedures of the American Arbitration Association ("AAA") or another arbitration organization, primarily because most contracts containing provisions for the arbitration of disputes so specify. In such instances, resort to the Florida courts, laws, and procedures is typically had only for the entry of a judgment on the award.

### 11.3.3 International Commercial Arbitration

The Florida International Commercial Arbitration Act (the "Act") was enacted in 2010, putting Florida at the forefront of international commerce and arbitration. This Act is contained in Chapter 684 of the Florida Statutes. It is based on the United Nations Model International Commercial Arbitration Act promulgated by the United Nations Commission on International Trade Law ("UNCITRAL"). The UNCITRAL Model Act has been widely adopted internationally and is well understood by the international legal community. Florida is one of only seven states to have enacted the Model Act in the United States.

Pursuant to this law, parties to an international business dispute may arbitrate in Florida when there is a written agreement providing for arbitration in Florida (§ 684.0002, 684.0049). Among the many features of the Act are the recognition and enforcement of awards, including the equal treatment of all awards regardless of the country of origin (§ 684.0047). The Act also reduces the risks of international litigation by authorizing the arbitrators to rule on their own jurisdiction (§ 684.0017), and provides them the power to enter interim measures and preliminary orders (§§ 684.0018-684.0028).

In 2013, the circuit court in Miami, Florida, created the International Commercial Arbitration Court to hear issues arising under the Federal Arbitration Act and the Florida International Commercial Arbitration Act. Under both statutes, the judicial role is quite restricted. Miami's International Commercial Arbitration Court is one of the few such courts in the United States.

# CHAPTER 12. HEALTHCARE

**Healthcare**
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What follows is an outline of certain laws which must be considered by providers and other participants in the healthcare industry in Florida, focusing primarily on the anti-referral and anti-fraud and abuse statutes. A brief discussion of licensing requirements in Florida also follows. This outline is by no means meant to be an exhaustive discussion on what are highly complex laws regulating the healthcare industry in Florida. Users of this Guide are advised to consult Lex Mundi-affiliated healthcare counsel with specific questions regarding practitioner license matters, operation matters and other healthcare practice and operations questions with respect to transaction-specific matters.

## 12.1 Federal Law

### 12.1.1 Physician Self-Referral Prohibition (Stark)

The Physician Self-Referral Prohibition, commonly referred to as the "Stark Law," generally provides that, subject to certain exceptions, a physician may not refer patients for Medicare-covered "designated health services" to any entity with which the physician (or an immediate family member of the physician) has a financial relationship, and the entity may not bill for any services provided as a result of the prohibited referral (see 42 U.S.C. § 1395nn. See also 42 C.F.R. § 411.351-357). A "designated health service" includes, among other things, inpatient and outpatient hospital services, clinical laboratory services, physical therapy services, occupational therapy services, radiology services, radiation therapy services and supplies, durable medical equipment and supplies, home health services, and outpatient prescription drugs. The full list of designated health services may be found at 42 U.S.C. § 1395nn.

The Stark Law contains approximately thirty-five (35) exceptions. These exceptions outline acceptable financial relationships which may occur that otherwise could be perceived to be potential physician self-referrals. These exceptions can be grouped into the different categories as follows: ownership and investment interests, or compensation arrangements. These exceptions include personal service contracts, non-monetary compensation, bona fide employment agreements, certain compliance training contracts, and rent for facilities, equipment and personnel.

### 12.1.2 Federal Anti-Kickback Statute

The Federal Anti-Kickback Statute, among other things, prohibits any person from "knowingly and willfully" paying or offering any remuneration in exchange for or to induce the referral of any item or service covered by a federal healthcare program. The statute has been broadly interpreted by federal courts to prohibit any payment if any one purpose of the payment is to induce the referral of covered goods or services, irrespective of whether there are other, legitimate business purposes for the payment. Conditions under the statute constitute a felony and may result in a fine of $25,000 per offense plus imprisonment of up to 5 years or both. Additionally, there is a possibility of civil exclusion from the federal healthcare programs for 5 years or more and civil monetary penalties.

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Currently there are 25 "safe harbors" to the federal anti-kickback statute. These safe harbors outline acceptable contractual and business arrangements which, if followed, do not lead to a violation of the federal anti-kickback statute. The anti-kickback statute may be found at 42 U.S.C. § 1320a-7b and the anti-kickback safe harbors may be found at 42. C.F.R. 1001.952(a)-(y).

### 12.1.3 Federal False Claims Act

The False Claims Act prohibits knowingly submitting for payment or reimbursement a claim known to be false, making or using a false record or statement material to a false or fraudulent claim or engaging in a conspiracy to commit fraud by improper submission of a false claim, and concealing, improperly avoiding, or decreasing an obligation to pay the government. The False Claims Act allows people who are not affiliated with the government to file claims against federal contractors accused of committing fraud against the government, and therefore the U.S. taxpayers. This is generally referred to as a *Qui Tam* or whistleblower lawsuit.

## 12.2 Florida Law

### 12.2.1 Patient Self-Referral Act of 1992

Under the provisions of Florida Statutes § 456.053, "A healthcare provider may not refer a patient for the provision of designated health services to an entity to which the healthcare provider is an investor or has an investment interest." This statute is similar to the federal Stark Law; however, there are specific differences between the federal and Florida laws. Most importantly, the Stark Law is limited to claims submitted to federal healthcare programs such as Medicare. The Florida Self-Referral Act applies to all claims submitted to all payers by healthcare practitioners in the state.

Designated health services under the statute include clinical laboratory services, physical therapy services, comprehensive rehabilitative services, diagnostic imaging services and radiation therapy services. It is also unlawful for a healthcare provider to refer a patient for the provision of any other healthcare item or service to an entity in which the healthcare provider is an investor unless the investment meets certain criteria. The term "healthcare provider" is defined as any licensed, medical osteopathic, chiropractic or podiatric doctor, persons licensed under The Optometry Practice Act and persons licensed as dentists or related practitioners under Chapter 466 of the Florida Statutes.

Exceptions to the self-referral prohibition include orders, recommendations and plans of care by radiologists for diagnostic imaging services, and physicians specializing in radiation therapy for such services; medical oncologists for intravenous drugs and solutions to treat cancer and related complications; cardiologists for cardiac catheterization, pathologists for diagnostic clinical laboratory services and pathologic examination services if furnished under the supervision of a pathologist pursuant to a consultation requested by another physician; healthcare providers for services provided solely to their own patients that are provided under the direct supervision; ambulatory surgical center services; urologists for lithotripsy services; dentists for dental services performed by employer/contractor of the dentist or dental group; physicians for infusion therapy services to a patient of the physician or the physicians group practice; nephrologists for renal dialysis services and supplies except for

laboratory services; and healthcare providers whose principle professional practice consist of treating patients in their private residences, except home health.

The statute also imposes additional requirements on group practices or sole providers who accept outside referrals for diagnostic imaging: no more than fifteen percent (15%) of patients referred may be from outside referrals for such an arrangement to not violate the statute. There are also limitations providing employees for services, management contracts, appropriate billing (professional/technical component) and attestation requirements regarding documentation. The provider violating the act is subject to a civil penalty of not more than $15,000 for each service where there is a violation. Circumvention arrangements are subject to a civil penalty of not more than $100,000. These violations are also the grounds for disciplinary action by the state licensing boards. These penalties are similar to the penalties which can be imposed under the Federal Stark Act.

### 12.2.2 State Anti-Kickback Statute

The state Anti-Kickback Statute may be found at Florida Statutes § 456.054. It is unlawful under the act for any healthcare provider or provider of services to offer, pay, solicit, or receive a kickback directly or indirectly overtly or covertly in cash or in kind for referring or soliciting patients. A kickback, like the Federal Anti-Kickback Statute, means remuneration or payment by or on behalf of a provider of services or items to any person as an incentive or an inducement to refer patients for past or future services or items when the payment is not tax deductible as an ordinary and necessary expense. Violations are considered patient brokering and are punishable under Florida Patient's Brokering Act, discussed below. Several individual practice acts in Florida include provisions similar to this as grounds for discipline including the Medical Practice Act at 458.331, the Osteopathic Medicine Act at 459.015, Naturopathy Act at 462.14, Occupational Therapy at 468.217 and the Respiratory Therapy Act at 468.365.

### 12.2.3 Florida Patient Brokering Act

As referenced in the section discussing the Florida Anti-Kickback Statute above, it is unlawful for any person including a healthcare provider or healthcare facility to offer, pay, solicit or receive any commission, bonus, rebate, kickback or bribe, directly or indirectly, in cash or in kind, or engage in any split fee arrangement in any form whatsoever to induce or in return for referral of patients or patronage to or from a healthcare provider or healthcare facility. This is referred to as the Florida Patient Brokering Act and may be found at Florida Statutes § 817.505. It is also unlawful to solicit or to receive remuneration in return for acceptance or acknowledgement of treatment from a healthcare provider or a facility or to aid, abet or advise or otherwise participate in any of the above conduct. The act broadly defines the term healthcare provider or facility to include any person or entity required to be licensed, certified or registered or lawfully exempt from being required to be licensed, certified or registered with the agency for healthcare administration or the Florida Department of Health. In 2012, the act was amended to exempt certain marketing, consultation, and referral activities of assisted living facilities, as referenced in Florida Statutes § 429.195(2).

The key to the Patient Brokering Act and the Florida Self-Referral and Florida Anti-Kickback Statute is the following:

If an arrangement in question does not violate the federal Anti-Kickback Statute, it is not considered to violate the Florida Patient Brokering Act, and therefore would not be considered a kickback or a violation of the self-referral prohibitions under Florida law either. The provisions also do not apply to certain arrangements within group practices, payments to healthcare providers or facilities for professional consultation services. Lawful payments include payments by health insurers under health benefit plans, payments to or by a healthcare provider facility or provider network entity for goods and services under a plan, certain commissions or fees paid to a licensed nurse registry, and payments by healthcare providers or facilities to health information services to provide information upon request and at no cost to consumers about providers in an area.

Violation of the Patient Brokering Act is a third degree felony, punishable by up to five years imprisonment, a $5,000 fine per violation and habitual offenders it could be a ten year term of imprisonment.

### 12.2.4 Fee Splitting Prohibitions

Florida's fee splitting statute prohibits physicians from, among other things, engaging in any split-fee arrangement with another person including other doctors for patients referred to providers for healthcare goods or services. The fee splitting statute may be found at Florida Statutes § 458.331(1)(i). Penalties include fines and possible medical license revocation. It should be noted that the statute does not define "fee splitting." However, the Florida Board of Medicine has reviewed and interpreted the fee splitting statute numerous times. There are dozens of Florida Board of Medicine declaratory statements regarding the fee splitting statute. Additionally, there is ample case law in Florida on the subject. Prior to providing counsel regarding the issue of fee splitting, a more in-depth analysis of the declaratory statements from the Board of Medicine as well as the case law, must be conducted.

### 12.2.5 Professional Licensure in Florida

The Florida Statutes outline the conditions for licensure for an array of healthcare practitioners. Florida Statutes Chapter 456 sets forth general compliance statutes for all healthcare practitioners in the state. Note that it is within Chapter 456 that the Florida anti-referral prohibitions and the Florida anti-kickback statute are housed. There are profession-specific provisions as well that cover acupuncturists (Chapter 457), medical doctors (Chapter 458), Osteopaths (Chapter 459), Chiropractors (Chapter 460), Podiatrists (Chapter 461), Naturopaths (Chapter 462), Optometry (Chapter 463), Nurses (Chapter 464), Pharmacists (Chapter 465), Dentists, Hygienists and Dental Labs (Chapter 466), and Midwives (Chapter 467). There is also Chapter 468, a catchall chapter covering speech and language pathologists, audiologists, nursing home administration, occupational therapists, radiological personnel, respiratory therapists, dieticians as well as, oddly, auctioneers, talent agents and community associations. Each of these professions has a professional board that is part of the Florida Department of Health, Division of Medical Quality Assurance. These boards oversee and ensure compliance with the statutes and accompanying regulations relevant to each profession.

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## APPENDIX 1

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## APPENDIX 2

### Resources

**CareerSource Florida, Inc.** - www.careersourceflorida.com
1580 Waldo Palmer Lane
Tallahassee, FL 32308
Phone: (850) 921-1119

**Corporate Registered Agents**
NRAI: www.nrai.com
Incorporating Services, Ltd.: http://www.incserv.com
National Corporate Research: http://www.nationalcorp.com/index.htm

**Enterprise Florida, Inc. ("EFI")** - www.eflorida.com
800 N. Magnolia Ave., Suite 1100
Orlando, FL 32803
Phone: (407) 956-5600
Fax: (407) 956-5599

**Fish and Wildlife Conservation Commission ("FWC")** - www.myfwc.com
Florida Fish and Wildlife Conservation Commission
Farris Bryant Building
620 S. Meridian St.
Tallahassee, FL 32399-1600
Phone: (850) 488-4676

**Florida Department of Agriculture and Consumer Services ("DACS")** - www.freshfromflorida.com
Florida Department of Agriculture and Consumer Services
Division of Administration
The Mayo Building, Fifth Floor, M12
407 S. Calhoun St.
Tallahassee, FL 32399-0800
Phone: (850) 617-7000
Fax: (850) 922-6967 Fax

Division of Agricultural Environmental Services
Phone: (850) 617-7900
Division of Agricultural Water Policy
Phone: (850) 617-1700
Division of Aquaculture
Phone: (850) 617-7600
Florida Forest Service
Phone: (850) 681-5800

**Florida Department of Business & Professional Regulation ("DBPR")** - www.myfloridalicense.com/dbpr
1940 North Monroe Street
Tallahassee, Florida 32399
Phone: (850) 487-1395

**Florida Department of Economic Opportunity ("DEO")** - www.floridajobs.org

107 East Madison Street
Caldwell Building, MSC 150
Tallahassee, Florida 32399-4120
Phone: (850) 245-7105
Fax: (850) 921-3223

Division of Strategic Business Development
Phone: (850) 717-8960
Division of Workforce Services
Phone: (866) 352-2345
Division of Community Development
Phone: (850) 717-8500

**Florida Department of Environmental Protection ("FDEP")** - www.dep.state.fl.us/

3900 Commonwealth Boulevard M.S. 49
Tallahassee, Florida 32399
Phone: (850) 245-2118
Fax: (850) 245-2128

**Florida Department of Health ("DOH"):** www.floridahealth.gov/

Florida Department of Health
4052 Bald Cypress Way
Tallahassee, FL 32399
Phone: (850) 245-4444

**Florida Department of State, Division of Corporations:** www.sunbiz.org

P.O. Box 6327
Tallahassee, Florida 32314

Phone Numbers for Issues Relating to Corporations

| | |
|---|---|
| Florida Profit/Non-Profit Articles: | (850) 245-6052 |
| Corporate Amendments/Dissolutions/Withdrawals: | (850) 245-6050 |
| Corporate Mergers/Registered Agent Changes: | (850) 245-6050 |
| Foreign Corporation Qualification: | (850) 245-6052 |
| Corporation Annual Reports: | (850) 245-6056 |
| Reinstatements: | (850) 245-6059 |

Phone Numbers for Issues Relating to Limited Liability Companies (LLCs)

| | |
|---|---|
| Florida LLC Articles: | (850) 245-6051 |
| Foreign LLC Qualification: | (850) 245-6051 |
| LLC Amendments: | (850) 245-6051 |
| LLC Reinstatements: | (850) 245-6059 |
| LLC Annual Reports: | (850) 245-6056 |
| LLC Registered Agent Changes: | (850) 245-6051 |
| LLC Mergers: | (850) 245-6050 |

Phone Numbers for Issues Relating to Partnerships

| | |
|---|---|
| General Partnership Filings: | (850) 245-6051 |
| Limited Partnership Filings: | (850) 245-6051 |

| | |
|---|---|
| Limited Liability Partnership Filings: | (850) 245-6051 |
| Annual Reports: | (850) 245-6056 |
| LP and LLP Registered Agent Changes | (850) 245-6051 |
| LP Reinstatements: | (850) 245-6059 |
| LLP Reinstatements: | (850) 245-6051 |

Miscellaneous Issues

| | |
|---|---|
| Fictitious Names Registrations/Renewals: | (850) 245-6058 |
| Trade and Service Marks: | (850) 245-6051 |
| Federal Tax Liens: | (850) 245-6011 |
| Judgment Liens: | (850) 245-6011 |
| Apostilles: | (850) 245-6945 |
| Internet Support Section: | (850) 245-6939 |
| Certification/Copy Request: | (850) 245-6053 |
| Service of Process: | (850) 245-6953 |

**Florida Land and Water Adjudicatory Commission ("FLAWAC")** -
www.myflorida.com/myflorida/cabinet/flwac/flwac.pdf
Phone: (850) 717-9491

**Florida Legislature:** www.leg.state.fl.us/
**Florida Resource Directory*:*** http://redi.state.fl.us/
One stop source for learning about state and federal programs and agencies.

**Florida Revenue Law Library:** https://taxlaw.state.fl.us/
**My Florida*:*** www.myflorida.com
Official portal of the State of Florida's website of all things regarding Florida.

**Office of Financial Regulation** - www.flofr.com
200 East Gaines Street
Tallahassee, FL 32399
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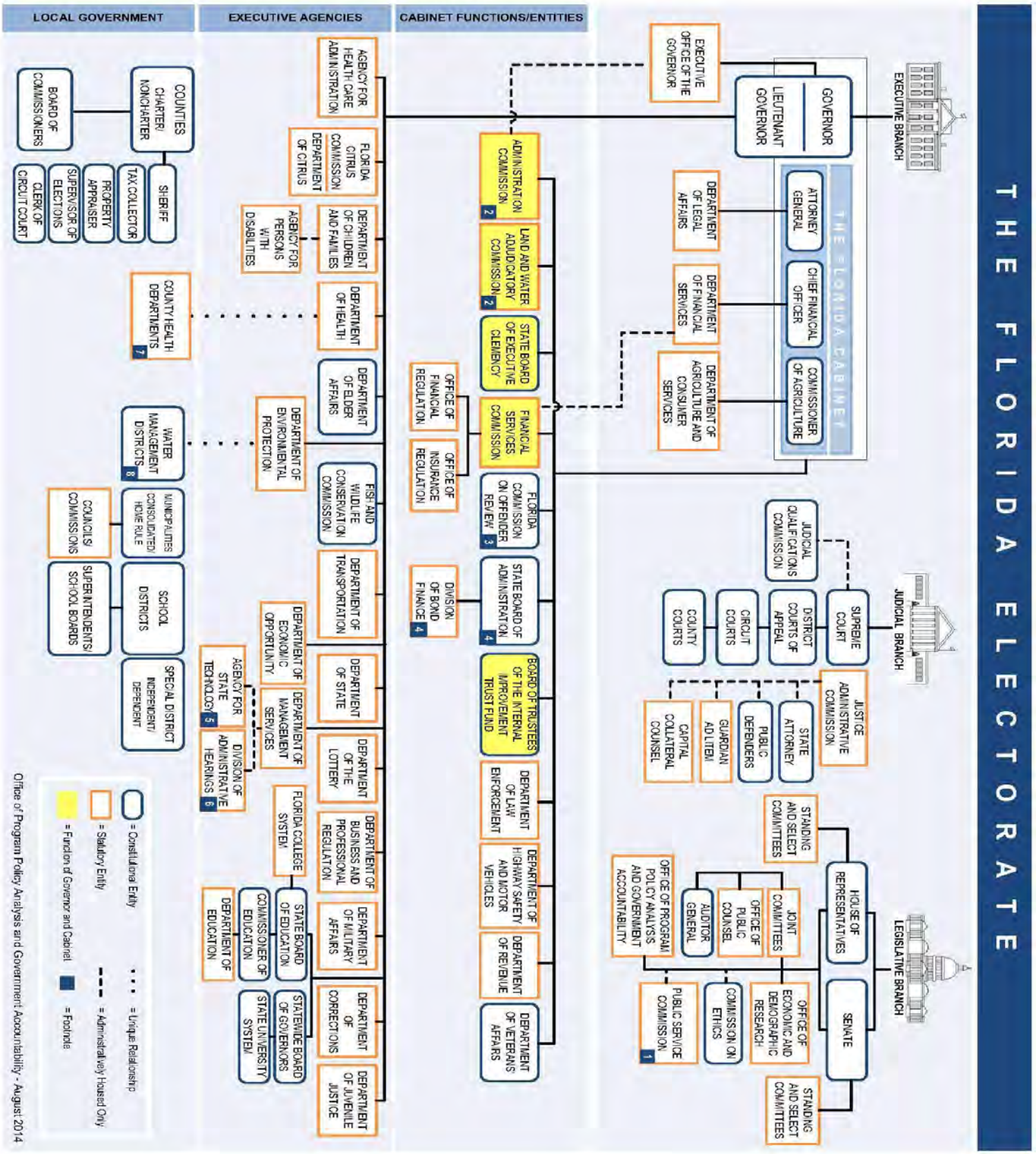
## APPENDIX 3

### Florida State Government Organizational Chart



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1. The Public Service Commission is an arm of the legislative branch of government (s. 350.001, *Florida Statutes*).
2. The Administration Commission and the Land and Water Adjudicatory Commission are composed of the Governor and the Cabinet (ss. 14.202 and 380.07, *Florida Statutes*).
3. Chapter 2014-191, *Laws of Florida*, renamed the Parole Commission as the Florida Commission on Offender Review.
4. The Commissioner of Agriculture is not a member of the State Board of Administration (Article IV, Section 4.(e), *Constitution of the State of Florida*).
5. Chapter 2014-221, *Laws of Florida*, created the Agency for State Technology within the Department of Management Services. The agency is a separate budget program and is not subject to control, supervision, or direction by the Department of Management Services.
6. The Division of Administrative Hearings is created as a division of the Department of Management Services, but the director/chief administrative law judge, who is appointed by the Administration Commission, is the agency head for all purposes. The division is a separate budget entity and is not subject to control, supervision, or direction by the Department of Management Services (s. 120.65(1), *Florida Statutes*).
7. County health departments have a contractual relationship with the Florida Department of Health (s. 154.01(3), *Florida Statutes*).
8. Water management districts have individual governing boards but the Department of Environmental Protection may exercise general supervisory authority over water management districts (s. 373.026(7), *Florida Statutes*).


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