

# MEMO TO THE PARTNER

## PROPOSED SUBORDINATION PROVISIONS FOR MASTER TRUST INDENTURE

TAYLOR K. WIRTH\*

TO: Law Office Partner  
FROM: Associate  
RE: Proposed Subordination Provisions for Series 2013 Indenture

### I. INTRODUCTION

I attach for your review the pertinent subordination provisions for the Series 2013 Indenture (the “Indenture”) between our client, Health-E Foods, Inc., a New York benefit corporation (“Health-E” or the “Company”), and Farmer’s Bank of New York (the “Trustee”). In connection with a private placement, the Indenture will provide for tranching debentures to investors, including foundations and institutional organizations.

Attached to this memorandum is Rider A, which contains a draft of the requested subordination provisions and relevant defined terms for inclusion in the current draft of the Indenture.

This memorandum sets forth the transactional context in which Health-E’s issuance of debentures will occur, describes the statutory authority for the transaction, identifies the key substantive issues arising out of the transactional context, and analyzes drafting choices that respond to those substantive issues. Any defined term used in this memorandum, unless otherwise indicated, has the same meaning given to that term in the Indenture. These terms are included and defined in Rider A. Any term that is not defined in this memorandum or in Rider A has the meaning given to that term in previously drafted provisions of the Indenture.

### II. TRANSACTIONAL CONTEXT

Health-E is a start-up venture organized under the laws of the State of New York; the Company owns and operates five small grocery stores in

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Brooklyn, New York. Although originally chartered as a for-profit corporation in January 2011, Health-E amended its Certificate of Incorporation on January 1, 2012 to elect benefit corporation status.<sup>1</sup> Because of Health-E's focus on improving the local community and environment, its directors determined that electing benefit corporation status aligned with its existing corporate purpose and would prove a useful marketing tool to encourage investment from like-minded investors and charitable organizations, primarily private foundations as qualified by the U.S. Internal Revenue Service (the "IRS").

Health-E's corporate mission is to combine the accessibility of traditional neighborhood bodegas with healthy options for consumers by focusing on selling organic foods harvested by local farmers. Each of Health-E's stores has proved extremely fruitful, both for the Company itself and for the community at large. Last year, Health-E recorded a \$5,000,000 net profit. Despite Health-E's success, the Company is at a crossroads in terms of growth—the venture has thus far been profitable, but current market conditions prevent Health-E from raising sufficient equity capital to expand its operations into Manhattan and beyond. As a relatively new venture, the Company's capitalization is simple: all 1,000 shares of authorized and outstanding common stock are held by Health-E's founding family members and close friends of those family members who are also members of the venture capital community in New York. The only existing debt obligations include operating leases for its current storefronts.

Operating subject to the relevant provisions of New York's Business Corporation Law (the "NYBCL"),<sup>2</sup> Health-E seeks to attract \$25,000,000 through a private placement of debentures comprised of traditional institutional investing and charitable giving. The offering is structured in multiple classes (or tranches): the junior or subordinated investment from the charitable foundation, a high-risk/low-return investment, creates the financial base for the venture, which in turn subsidizes senior tranche investing with market rate, or close to market rate, returns by reducing the overall cost of capital.

In late 2011, the Company's financial advisors approached Newman's Own Foundation ("Newman's"), a qualified 501(c)(3) entity funded by the profits

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<sup>1</sup> See WILLIAM H. CLARK, JR. ET AL., THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IT IS THE LEGAL FORM THAT BEST ADDRESSES THE NEEDS OF SOCIAL ENTREPRENEURS, INVESTORS, AND, ULTIMATELY, THE PUBLIC 2 (2012), [http://benefitcorp.net/storage/documents/Benecit\\_Corporation\\_White\\_Paper\\_1\\_18\\_2013.pdf](http://benefitcorp.net/storage/documents/Benecit_Corporation_White_Paper_1_18_2013.pdf). (defining the benefit corporation as a class of corporation that creates a material, positive impact on society and the environment; takes into consideration non-monetary stakeholder interests when making decisions; and reports performance data to a third party organization for review).

<sup>2</sup> N.Y. BUS. CORP. LAW §§ 101-2001 (McKinney 2012).

and royalties of Paul Newman’s Own food products, for the purpose of making a substantial investment towards Health-E’s expansion.<sup>3</sup> After presenting its concept and concluding that Health-E and Newman’s share comparable social missions—and also because private foundations are required under IRS regulations to annually distribute at a minimum 5% of their assets<sup>4</sup>—Newman’s agreed to make a Program-Related Investment (a “PRI”) in Health-E.<sup>5</sup> A PRI is an investment made by a qualified private foundation that supports charitable endeavors, typically one related to the foundation’s purpose.<sup>6</sup> Under the key provisions of the IRS regulations, a foundation cannot make an investment if a significant purpose of that investment is the production of income.<sup>7</sup> Accordingly, Newman’s sought and accepted a high-risk/low-return position in the junior tranche. Newman’s PRI will account for \$5,000,000, approximately one-fifth of the funding necessary for expansion. Health-E plans to issue \$5,000,000 principal amount of 2% Subordinated Debentures due 2043 to Newman’s in exchange for \$5,000,000 in cash.

With its charitable investor in place, Health-E seeks to issue an additional \$20,000,000 in debentures under the Indenture: \$10,000,000 principal amount of 6% Senior Debentures due 2043 (the “Senior Debentures”) and \$10,000,000 principal amount of 4.5% Senior Subordinated Debentures due 2043 (the “Senior Subordinated Debentures”). The Senior Debentures will occupy the senior-most tranche and will receive priority liquidation distributions from Health-E. The Senior Subordinated Debentures will occupy the mezzanine tranche, ranking below the senior tranche but above Newman’s in the junior-most tranche.

Health-E has asked what effect, if any, its financing structure, including its choices as to the Indenture’s subordination provision, will have on the venture’s

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<sup>3</sup> See 26 U.S.C. § 501(c)(3) (2012). As a private foundation under § 501(c)(3), Newman’s is qualified to make a Program-Related Investment. See *infra* note 6.

<sup>4</sup> See 26 U.S.C. § 4942(e) (2012).

<sup>5</sup> In March 2013, the IRS issued a Private Letter Ruling permitting Newman’s to make the PRI in Health-E. PRI regulations are outlined in Treas. Reg. § 53.4944-3(a), requiring that the “primary purpose of the investment is to accomplish one or more [charitable] purposes . . . ; [n]o significant purpose of the investment is the production of income or the appreciation of property; and [n]o purpose of the investment is to accomplish one or more [legislative or electoral] purposes . . . .”

<sup>6</sup> See *Program-Related Investments*, THE INTERNAL REVENUE SERVICE (Apr. 20, 2013), <http://www.irs.gov/Charities-&-Non-Profits/Private-Foundations/Program-Related-Investments>; *Knowledge Base*, GrantSpace, <http://grantspace.org/Tools/Knowledge-Base/Grantmakers/PRI>s (last visited November 22, 2013).

<sup>7</sup> See Treas. Reg. § 53.4944-3(a) (2012).

financial prospects. The subordination provision, among others in the Indenture, must accomplish two objectives: attract sufficient capital to the venture and afford relative financial certainty to the holders of Health-E's debentures by defining each tranche's right to a distribution or payment. The subordination provision affects the capital structure of a benefit corporation in a distinctive manner. On one hand, as is true in for-profit firms generally, Health-E seeks to diversify its debt obligations among investors by layering each tranche's position with regard to distributions. Accordingly, subordinating certain debt makes senior investing in the Company more attractive. On the other hand, investors in the social enterprise have divergent expectations. Most investors, including those occupying the senior tranches, seek a priority right to payments on their investment. Other investors in social enterprise entities, however, are concerned with benefitting society and the environment, rather than merely financial wealth maximization. Moreover entities making PRIs, are uniquely focused on subordinating their interests in an effort to comply with relevant IRS regulations governing charitable investments in for-profit ventures.

The subordination provision contemplated in Rider A addresses these interests by differentiating among Health-E's various debt obligations, affording senior debentureholders priority, and balancing Newman's legal concerns, financial interests, and social objectives. It is Health-E's hope that the subordination provision will both increase the attractiveness of the venture to institutional investors and assure Newman's that its investment dovetails with the relevant IRS regulations and its financial and social goals.

### III. AUTHORITY TO ISSUE DEBENTURES

The Company is organized under the NYBCL and the Indenture contains a New York choice of law provision. The Company is validly incorporated as a benefit corporation, to which the entirety of the NYBCL applies, except that certain provisions of Article 17 control over the general provisions of the chapter.<sup>8</sup> For example, a corporation may be formed for "any lawful purpose,"<sup>9</sup> but a benefit corporation must be created for the "general public benefit."<sup>10</sup> In furtherance of these purposes, the NYBCL permits the Company to "borrow money at such rates of interest as the corporation may determine" and to "issue [ ] notes, bonds, and other obligations"<sup>11</sup> Accordingly, the NYBCL grants the

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<sup>8</sup> N.Y. BUS. CORP. LAW § 1701 (McKinney 2012).

<sup>9</sup> *Id.* § 201(a).

<sup>10</sup> *Id.* § 1706(a).

<sup>11</sup> *Id.* § 202(a)(7).

Company authority to borrow funds through the issuance of debt, including debentures, and affords the Company great discretion in regulating the terms and conditions of those instruments, including the subordination of certain classes of debt.<sup>12</sup> The Company's Certificate of Incorporation reflects this authority to act within its corporate powers, and thus permits Health-E to issue debt.<sup>13</sup>

In addition to the general statutory authority granted by the State of New York, the Company has specific authority to issue bonds for money or other property, services, obligations, or any combination thereof.<sup>14</sup> Further, section 518 of the NYBCL provides that the judgment of the board of directors, with respect to the value of consideration received, is conclusive, providing the Company with additional discretion in corporate finance matters.<sup>15</sup> The NYBCL does not explicitly restrict the subordination of certain debentures, but the Company must comply with the statute's general limitations, as well as continue to comply with relevant securities laws.

Section 5 of the Securities Act of 1933, as amended (the "Act"),<sup>16</sup> requires that offers and sales of securities be registered absent an applicable exemption. Section 4(a)(2) of the Act states that the registration requirement does not apply to "transactions by an issuer not involving a public offering."<sup>17</sup> Here, Health-E seeks to effectuate a private, rather than public, placement of debentures. The Act's registration and disclosure requirements are exempted under Rule 506 of Regulation D, a safe harbor rule under the Act for private offerings conducted under Section 4(a)(2) of the Act.<sup>18</sup> After speaking with our Securities practice group regarding the proposed transaction, Health-E should fall within the safe harbor because the regulation does not limit the amount of money which can be raised,<sup>19</sup> the Company will not engage in general advertising or solicitation (within the meaning of Regulation D) and plans to sell mostly to accredited investors

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<sup>12</sup> Subordinated debt is created by contractual agreement, and "in modern corporate financing, the subordination agreement has become almost commonplace." Deo Martin Calligar, *Subordination Agreements*, 70 YALE L.J. 376, 376 (1961).

<sup>13</sup> N.Y. BUS. CORP. LAW § 402(a)(2) (McKinney 2012).

<sup>14</sup> *Id.* § 518(a).

<sup>15</sup> *Id.*

<sup>16</sup> 15 U.S.C. § 77e (2012).

<sup>17</sup> *Id.* § 77d(a)(2).

<sup>18</sup> *See* 17 C.F.R. § 230.506 (2012).

<sup>19</sup> *See* 15 U.S.C. § 77d(a)(2) (2012).

(with sales to fewer than 35 non-accredited investors),<sup>20</sup> and the Company is prepared to supply non-accredited investors with required disclosures and provide the information necessary to complete a Form D.<sup>21</sup> In addition to controlling federal law, the Company should be aware of applicable state “blue sky” laws. Lastly, Health-E must also comply with indenture qualification requirements under § 304 of the Trust Indenture Act of 1939, as amended.<sup>22</sup> Issues may arise, however, with regard to integrating multiple classes of debentures within the tranche, and we will continue to coordinate with our Securities practice group to ensure compliance with all relevant federal and state securities laws.

#### IV. KEY SUBSTANTIVE ISSUES

A. Given that social enterprise turns the venture capital model on its head by offering a high-risk investment bearing a low rate of interest, should Health-E also subordinate the Debentures?

B. If so, how should Health-E construct its subordination provisions to reflect the unique investment strategy of the benefit corporation? Specifically, it is essential to address the following questions:

1. What is the proper choice of subordination provision: complete or contingent?
2. Are double dividends and subrogation desirable elements in the social enterprise context?

#### V. ANALYSIS OF SPECIFIC DRAFTING CHOICES

##### *A. Major Drafting Choices*

###### 1. Issuing Subordinated Debentures

“[S]ocial enterprise[] can be defined as an organization or venture that achieves its primary social or environmental mission using business methods, typically by operating a revenue-generating business.”<sup>23</sup> The benefit corporation, a form of social enterprise, is a relatively new construct. Consequently, the number of precedential subordination provisions, decisional law, and other

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<sup>20</sup> See 17 C.F.R. § 230.502(c) (2012).

<sup>21</sup> *Id.* at § 230.502(b).

<sup>22</sup> 15 U.S.C. § 77ddd(b) (2012) (regulating the issuance of debt instruments and providing for investor protections similar to those afforded under the Securities Act).

<sup>23</sup> Robert A. Katz & Anthony Page, *The Role of Social Enterprise*, 35 VT. L. REV. 59, 59 (2010) (citations omitted).

related literature available for drafting is lacking. Although New York law<sup>24</sup> affords Health-E's board of directors broad discretion in its corporate finance decisions, the regulations and rationale for investing in the social enterprise context acts as a general guide to encourage the subordination of debt as a means of broadening the firm's investor base.

An entity making a PRI must comply with three key requirements: (1) the investment must have a charitable purpose aligned with the purpose of the foundation making it, (2) no significant purpose of the investment may be the production of income, and (3) no purpose may be to accomplish a political goal.<sup>25</sup> Typically, a foundation seeking to make a PRI will not experience a problem with either the first or third requirements, but concerns with respect to satisfying the second condition are common.

To comply with the "no income" requirement, two related safe harbor methods regarding compliance with the IRS regulations exist.<sup>26</sup> The first method is to greatly minimize the return of the investment in an effort to avoid heightened scrutiny from the IRS. The second method is to make the investment on materially different terms than a market-rate investor.<sup>27</sup> The regulations make clear that the purpose of a PRI is not to prevent *any* income, but that, in effect, the investment should not be income determined.<sup>28</sup> The approaches reinforce the notion that a PRI is wholly "grant-like" in nature—the central purpose is for social good and the (remote) possibility of repayment is decidedly secondary.<sup>29</sup>

The "no income" theme logically extends to the concept of subordination. Just as the PRI-maker seeks to differentiate itself from market-rate investors at the outset of the venture, a provision governing payment and distribution priority at the back-end of the project should be equally distinguished. Both formation and subordination share common goals: minimizing the financial focus of the investment and attracting additional (senior)

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<sup>24</sup> N.Y. BUS. CORP. LAW §§ 202(a)(7), 518(a) (McKinney 2012).

<sup>25</sup> Treas. Reg. § 53.4944-3(a) (2012).

<sup>26</sup> See Luther M. Ragin, Jr., *Program-Related Investments in Practice*, 35 VT. L. REV. 53, 55-56 (2010); see also 26 C.F.R. § 53 (2012), available at <http://www.gpo.gov/fdsys/pkg/CFR-2012-title26-vol17/pdf/CFR-2012-title26-vol17-part53.pdf>.

<sup>27</sup> Ragin, *supra* note 26, at 55-56.

<sup>28</sup> *Id.*

<sup>29</sup> Telephone Interview with Cassidy Brewer, Assistant Professor Georgia State University (Nov. 2, 2012) (discussing the federal income tax implications and investment purposes of PRIs).

capital to the project. To effectuate these important goals, the subordinated debentureholder promises that, beginning at a specific time or instance as provided in the Indenture, it will receive no payment or distribution from Health-E on its investment until the senior debentureholders are paid. Thus, in addition to receiving a below market return on its investment, subordinating a foundation's investment to those of senior debentureholders—delaying repayment—further reinforces the underlying rationale for the above theories that the investment is not made predominantly with financial interests in mind. Thus, Health-E should subordinate the PRI-related debentures in this private placement as a means of better insuring that its investment is properly characterized, for federal income tax purposes, as a PRI.

## 2. Choice of Subordination Provision for the Subordinated Debentures: Complete or Contingent?

When drafting a subordination provision, a threshold issue is whether the payment of principal and interest is deferred until all senior debt has been paid (i.e., complete subordination) or whether payment of principal and interest is deferred only in the event of a triggering event, such as a default on senior debt, dissolution, or bankruptcy (i.e., contingent subordination). Complete subordination is somewhat severe and is not likely to be agreeable to Newman's given the probability that the Company will take on additional senior debt over time, delaying repayment on Newman's investment until some indeterminable date. Moreover, complete subordination is not normative for instruments of this type, based on the transaction documents I reviewed from other similar debt offerings.

The precedent documents reviewed in connection with my preparation of Rider A each contained some form of contingent subordination.<sup>30</sup> A contingent subordination offers a junior debentureholder at least some certainty that it will be unconditionally paid—upon some specified event—in accordance with the Indenture's terms.<sup>31</sup> Thus, I have determined that a contingent, rather than complete, subordination provision is preferable given Newman's likely concerns

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<sup>30</sup> See, e.g., Ad Hoc. Comm. for Revision of the 1983 Model Simplified Indenture, *Revised Model Simplified Indenture* 55 BUS. LAW. 1115, 1157-58; Stanley Black & Decker, Inc., Current Report (Form 8-K), Third Supplemental Indenture (Exhibit 4.1), at 12 (Jul. 25, 2012); Reinsurance Group of America, Inc., Current Report (Form 8-K), Indenture (Exhibit 4.1), at 19 (Aug. 21, 2012).

<sup>31</sup> Edward Everett, *Subordinated Debt—Nature and Enforcement*, 20 BUS. LAW. 953, 958 (1965).



with continued IRS compliance and repayment, Health-E's goals of attracting sufficient capital to the project, and industry norms.<sup>32</sup>

The language contained in Rider A that effectuates this contingent subordination involves two separate parts of the subordination provision. The "*Agreement to Subordinate*" portion of the provision addresses the existence of a contingency. The "*Liquidation; Dissolution; Bankruptcy; Etc.*" portion of the draft details the relevant specific triggering events, each of which is commonly associated with the potential or actual termination of a business. Together, these elements of the subordination provision accomplish the contingent subordination of the payments under the Debentures in a manner that promotes the objectives of the parties and reflects standard market practice.

### 3. Inclusion of Traditional Subordination Provisions: The Double Dividend and Subrogation

Standard contingent subordination provisions typically provide for two essential, interlocking components: double dividends and subrogation. Each element assists the venture in achieving the goals outlined above: minimization of the foundation's financial interest in light of regulatory considerations and the entity's purpose and attracting additional investment to the project. The "*Liquidation; Dissolution; Bankruptcy; Etc.*" part of the subordination provision contains the double dividend language; in short, to the extent that the assets distributed to holders of Senior Indebtedness fail to fully satisfy distribution obligations to Senior Indebtedness, holders of Senior Indebtedness are entitled to receive distribution amounts that would otherwise be dispensed to holders of subordinated debt.

Double dividends provide a benefit for issuers of debt instruments. A double dividend induces capital formation because senior debentureholders have additional payment security on their investment in the event of a triggering event, which lowers the level of risk for holders of debt in the upper tranches and consequently lowers the overall cost. Without the double dividend language, subordinated creditors would be capable of appropriating the senior

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<sup>32</sup> See *id.* at 956; see, e.g., Ad Hoc. Comm. for Revision of the 1983 Model Simplified Indenture, *Revised Model Simplified Indenture* 55 BUS. LAW. 1115, 1157-58; Stanley Black & Decker, Inc., Current Report (Form 8-K), Third Supplemental Indenture (Exhibit 4.1), at 12 (Jul. 25, 2012); Reinsurance Group of America, Inc., Current Report (Form 8-K), Indenture (Exhibit 4.1), at 19 (Aug. 21, 2012).

debentureholder's claims, which would drive up the overall risk and cost of capital.<sup>33</sup>

Debentureholders will also prefer a double dividend. The inclusion of a double dividend provides assurances to senior debentureholders that they will receive assets upon a triggering event, and priority status should attract more senior investors. In the spirit of the PRI regulations—which are founded on minimizing income derived from the investment transaction—the double dividend provides a subordinated debentureholder with some recourse in the event of a triggering event without looking to the extreme (that is, either cutting off all ability for subordinated debentureholders to recoup the benefit of their investment or by providing too beneficial a provision and invoking heightened scrutiny from the IRS.

Although the double dividend does not significantly benefit the holders of subordinated debt, the inclusion of a subrogation provision in Rider A provides them some payment security. Generally, subrogation allows the subordinated debentureholder to step into the shoes of senior debentureholders. Procedurally, the subrogation clause “subrogates the junior creditor to the right to future senior [distributions] after the senior claims have been satisfied by senior and junior [distributions].”<sup>34</sup> The holder of a subordinated debenture then receives double dividends, as a senior debentureholder previously had, as a result of subrogation.<sup>35</sup> Therefore, while the subordinated investment is not secured, subrogation enables the holders of such debt to receive adequate compensation, when available, while preserving the overall goals of charitable investing.

### ***B. Minor Drafting Choices***

In addition to the major drafting choices discussed previously, I made the following minor drafting choices to improve clarity and understanding in drafting Rider A:

- I included a definition section, which should be incorporated into the appropriate definition section of the complete Indenture. Notably, I have defined “Senior Indebtedness” not only as the Company’s obligations for money borrowed, exempting the Debentures, but also as other forms of debt traditionally granted priority over subordinated

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<sup>33</sup> David Gray Carlson, *A Theory of Contractual Debt Subordination and Lien Priority*, 38 VAND. L. REV. 975, 985 (1985).

<sup>34</sup> *Id.* at 987.

<sup>35</sup> *Id.*

forms of debt. While the definition section contains numerous examples of Senior Indebtedness, it would be prudent to confirm with Health-E whether some should be omitted after this initial draft. Health-E is currently obligated to a limited amount of Senior Indebtedness (e.g., senior debentures and capital leases), but it is likely that it will later take on other indebtedness, which a broader definitional section should and could adequately encompass.

- Empty brackets (“[ ]”) have been inserted to denote the Article or Section number of various parts of Rider A to facilitate its incorporation into the complete Indenture.
- At your request, Rider A is drafted, to the greatest extent possible, in plain English.

Please let me know if you have any questions or concerns regarding this memorandum or the subordination provisions contained in Rider A.

**RIDER A**  
**SERIES 2013 INDENTURE BETWEEN**  
**HEALTH-E FOODS, INC., as Issuer**  
**AND**  
**FARMER'S BANK OF NEW YORK, as Trustee**

**Article [ ] Subordination**

**Section [ ]. Definitions**

[ ] **“Company”** shall mean Health-E Foods, Inc., a New York benefit corporation.

[ ] **“Debentures”** shall mean the 2% Subordinated Debentures due 2043.

[ ] **“Distribution”** shall mean any payment or distribution of assets or securities of the Company of any kind or character from any source, whether in cash, securities, or other property.

[ ] **“Senior Indebtedness”** shall mean the principal of, premium, if any, and interest on, and any distribution of the following, whether incurred prior to, on, or after the date hereof:

- i. all of the Company's obligations for money borrowed, including obligations evidenced by notes, debentures, bonds, or other similar instruments, including obligations incurred in connection with the acquisition of property, assets, or businesses, including all other debt securities issued by the Company to any trust, partnership, or other affiliate that acts as a financing vehicle for the Company, other than obligations relating to the Debentures;
- ii. all of the Company's obligations under leases required or permitted to be capitalized under generally accepted accounting principles;
- iii. all of the Company's reimbursement obligations with respect to letters of credit, bankers' acceptances, or other similar facilities issued for the account of the Company;
- iv. all of the Company's obligations issued or assumed as the deferred purchase price of property or services, including all obligations relating to lease transactions in which the Company or any of its subsidiaries have agreed to be treated as owner of the subject property;
- v. all of the Company's obligations with respect to derivative contracts, including but not limited to commodity contracts, interest rate,

commodity, and currency swap agreements, currency exchange or interest rates;

- vi. all compensation, reimbursement, and indemnification obligations of the Company to the Trustee under the Indenture; and
- vii. all amendments, modifications, renewals, extensions, refinancings, replacements, and refundings of any of the above types of indebtedness.

Senior Indebtedness shall continue to be Senior Indebtedness and be entitled to the subordination provisions of Article [ ] irrespective of any amendment, modification, waiver, extension, or renewal of any term of the Senior Indebtedness.

**Section [ ]. Agreement to Subordinate**

The Company and each holder of Debentures covenants and agrees that the indebtedness evidenced by the Debentures is subordinated in right of payment, to the extent and in the manner provided by Article [ ], to the prior payment in full of all Senior Indebtedness, and that the subordination is for the benefit of, and shall be enforceable by, the holders of the Senior Indebtedness.

**Section [ ]. Liquidation; Dissolution; Bankruptcy; Etc.**

In the event of:

- i. any insolvency, bankruptcy, receivership, readjustment, composition, or other similar proceeding relating to the Company, its creditors, or property;
- ii. any proceeding for the liquidation, dissolution, or other winding up of the Company, voluntarily or involuntarily, whether or not involving insolvency or bankruptcy proceedings;
- iii. any assignment for the benefit of its creditors; or
- iv. any marshaling of the assets of the Company,

all Senior Indebtedness shall first be paid in full before any distribution made by the Company on account of the Debentures. In any above described event, any distribution which would otherwise be payable or deliverable to the holders of the Debentures, shall be paid or delivered directly to the holders of Senior Indebtedness in accordance with the priorities then existing among the holders until all Senior Indebtedness shall have been paid in full.

**Section [ ]. Subrogation**

Senior Indebtedness shall not be deemed to have been paid in full unless the holders of the Senior Indebtedness have received a distribution equal to the total amount of the Senior Indebtedness outstanding. After all Senior Indebtedness is paid in full and until the Debentures are paid in full, the holders of the Debentures shall be subrogated to the rights of the holders of the Senior Indebtedness to receive distributions applicable to Senior Indebtedness to the extent that distributions otherwise payable to the holders of the Debentures have been applied to the payment of Senior Indebtedness; and distributions received by the holders of the Debentures, by reason of subrogation, which otherwise would be distributed to the holders of the Senior Indebtedness, shall be deemed to be a distribution by the Company on account of the Senior Indebtedness and not on the account of the Debentures.