

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1880

SPONSOR: Commerce and Economic Opportunities Committee and Senator Klein

SUBJECT: Corporations

DATE: April 6, 2001

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gillespie	Maclure	CM	Favorable/CS
2.			JU	
3.				
4.				
5.				
6.				

## I. Summary:

Committee Substitute for Senate Bill 1880 clarifies that Florida for-profit corporations may accept proxy appointments from shareholders by electronic transmission and through the shareholder's attorney in fact. The committee substitute defines the term "electronic transmission" for purposes of proxy voting to include telegrams, cablegrams, telephone transmissions, and transmissions through the Internet. The committee substitute also removes requirements that certain irrevocable proxies become revocable after three years unless renewed and allows corporations to adopt bylaws authorizing additional procedures for proxy voting.

This committee substitute substantially amends sections 607.01401 and 607.0722, Florida Statutes.

## II. Present Situation:

### Florida Business Corporation Act

The Florida Business Corporation Act (act)<sup>1</sup> is the general corporation code of this state. The act comprises the laws that govern the incorporation, management, merger, and dissolution of corporations. The act governs the issuance of shares by corporations and includes provisions regulating shareholder meetings and voting by shareholders. The act is substantially similar to the Model Business Corporation Act (model act). The model act is a free-standing general corporation statute drafted and revised by the Committee on Corporate Laws of the Section of

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<sup>1</sup> Chapter 607, F.S.; *see also* s. 607.0101, F.S. ("This act shall be known and may be cited as the 'Florida Business Corporation Act.'").

Business Law of the American Bar Association (ABA).<sup>2</sup> As of 1999, Florida was one of 24 states that enacted substantially all of the model act as its general corporation statute.<sup>3</sup> The successor to the Uniform Business Corporation Act, the model act was first adopted by the ABA in 1950.<sup>4</sup> After 1950, the model act has continuously been reviewed and is periodically revised. The model act was last revised in 1999 and includes provisions relating to shareholder meetings and voting by shareholders.

Parallel to the ABA's Committee on Corporate Laws, the Business Law Section of The Florida Bar includes a Committee on Corporations and Securities Law. The committee consists of practitioners and academics in the field of corporate, securities, and mergers and acquisitions law.<sup>5</sup> The committee's membership includes authors of books regarding Florida corporate law and corporate law professors at Florida law schools. As part of its continuous review of the Florida Business Corporation Act, the committee has recommended several changes relating to shareholder meetings and voting by shareholders. The committee substitute substantially implements these recommendations.

### **Corporations and Shareholders**

A corporation is a legal entity having authority, with all the rights, privileges, and responsibilities, to act as a natural person distinct from the shareholders who own it and having rights to issue stock and exist indefinitely.<sup>6</sup> A foreign corporation is one that is incorporated under the laws of another state in the United States.<sup>7</sup> Domestic corporations are those incorporated under the laws of the State of Florida.<sup>8</sup>

The ownership interest in a corporation is divided into "shares." Those who own these shares are known as "shareholders." Both natural persons and other corporations may own shares in a corporation. When a corporation is created, articles of incorporation must be filed with the Department of State.<sup>9</sup> The articles of incorporation must specify, among other things, the number

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<sup>2</sup> Introduction to Model Bus. Corp. Act xix (1999).

<sup>3</sup> *Id.*

<sup>4</sup> The Uniform Business Corporation Act was adopted by the commissioners on uniform state laws in 1928. In 1943, the commissioners withdrew the act as "uniform" and renamed it the Model Business Corporation Act. In 1958, the act was withdrawn by the commissioners altogether. *See id.* at xxi-xxii.

<sup>5</sup> Business Law Section, The Florida Bar, *Corporations & Securities Committee*, at <http://www.flabuslaw.org/Bankrupt.htm> (last modified June 23, 1999).

<sup>6</sup> *Black's Law Dictionary* 341 (7th ed. 1999); Division of Corporations, Florida Dep't of State, *Our Role and Filing Responsibilities*, at [http://www.dos.state.fl.us/doc/corp\\_rol.html](http://www.dos.state.fl.us/doc/corp_rol.html) (last modified Jan. 21, 2000).

<sup>7</sup> Section 607.01401(12), F.S.

<sup>8</sup> Section 607.01401(5), F.S.

<sup>9</sup> Sections 607.0201 & 607.0203, F.S.

of shares the corporation is authorized to issue.<sup>10</sup> In addition, corporations adopt bylaws. The bylaws contain provisions governing the management of the business and regulating the affairs of the corporation.<sup>11</sup> The bylaws must be consistent with law and the corporation's articles of incorporation.<sup>12</sup> Some rights of shareholders are guaranteed by law, but most rights are provided by the articles of incorporation and the bylaws. Generally, the rights of shareholders include approval of amendments to the articles of incorporation, the election of the corporation's board of directors, and the approval of plans to dissolve the corporation or merge the corporation with another corporation.

Under current law, each Florida corporation is also required to conduct an annual meeting of shareholders.<sup>13</sup> Except in certain circumstances or unless the corporation's articles of incorporation provide otherwise, each shareholder of a corporation is entitled to one vote on each matter submitted to a vote at the meeting of the shareholders.<sup>14</sup> If the shares of a corporation are owned in the name of another corporation, those shares may be voted by an officer, agent, or proxy as governed by the corporate shareholder's bylaws. In the absence of bylaws, the board of directors of the corporate shareholder may designate who may vote in the name of the corporation. If the board does not designate who may vote, Florida law provides a succession of who may vote in the name of the corporate shareholder: the chair of the board, the president, any vice president, the secretary, and the treasurer, in that order.<sup>15</sup>

### **Proxy Voting**

As business organizations have increased in size and complexity, the number of shareholders has also increased. As a result, proxy voting is an essential step in the governance of many corporations.<sup>16</sup> Under Florida law, in lieu of personally attending a meeting of the shareholders, a shareholder of a corporation may vote by proxy. A shareholder may appoint a proxy to vote on behalf of the shareholder by signing an appointment form. The shareholder's attorney in fact may sign the appointment form for the shareholder. Alternatively, a shareholder may also have the appointment form signed by the shareholder's authorized officer, director, employee, or agent.

An appointment form is sufficient to authorize a proxy if the form is transmitted by telegram, cablegram, or other means of electronic transmission. Photographic or photostatic reproductions and facsimiles of an appointment form are also sufficient. While current law allows appointment forms to be transmitted by "other electronic means," it is unclear whether a corporation would be

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<sup>10</sup> Section 607.0202(1)(c), F.S.

<sup>11</sup> Section 607.0206(2), F.S.

<sup>12</sup> *Id.*

<sup>13</sup> Section 607.0701, F.S.

<sup>14</sup> Section 607.0721(1), F.S.

<sup>15</sup> Section 607.0721(5), F.S.

<sup>16</sup> See Model Bus. Corp. Act s. 7.22, Official Comment (1999).

permitted to use telephonic menu systems or an Internet-based systems to accept proxy appointments. Except as otherwise provided by law, a corporation is entitled to accept the proxy's vote or other action as that of the shareholder making the proxy appointment unless the appointment form expressly limits the proxy's authority.

### **Corporation's Acceptance of Votes**

Corporations are often asked to accept a written instrument as evidence of action by a shareholder. These instruments often involve appointment forms for a proxy to vote the shares of a shareholder. Usually the corporation or its officers will have no personal knowledge of the circumstances under which the instrument was executed and no way of verifying whether the signature on the instrument is in fact the signature of the shareholder. This problem is particularly acute in large corporations with thousands of shareholders.<sup>17</sup> Under Florida law, a corporation is entitled to accept a proxy appointment and give it effect as the act of the shareholder if the name signed on the proxy appointment corresponds to the name of the shareholder.<sup>18</sup> If the proxy appointment is made by a corporate shareholder, the corporation is entitled to accept the proxy appointment if the name signed purports to be that of an officer or agent of the corporate shareholder.<sup>19</sup> In addition, the corporation is entitled to reject a proxy appointment if there is a reasonable basis for doubt about the validity of the signature on the proxy appointment or about the signatory's authority to sign for the shareholder.<sup>20</sup> These provisions are consistent with the model act.<sup>21</sup>

### **Irrevocable Proxies**

Under Florida law, unless a longer period is expressly provided in the appointment form, a proxy appointment is valid for up to 11 months.<sup>22</sup> The appointment of a proxy is revocable by the shareholder unless the appointment form conspicuously states that it is irrevocable and the appointment is coupled with an interest.<sup>23</sup> Two examples of appointments coupled with an interest include:<sup>24</sup>

- A creditor of the corporation who extended credit to the corporation under terms requiring the appointment, and
- An employee of the corporation whose employment contract requires the appointment.

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<sup>17</sup> See Model Bus. Corp. Act s. 7.24, *Official Comment* (1999).

<sup>18</sup> Section 607.0724(1), F.S.

<sup>19</sup> Section 607.0724(2)(a), F.S.

<sup>20</sup> Section 607.0724(3), F.S.

<sup>21</sup> See Model Bus. Corp. Act s. 7.24 (1999).

<sup>22</sup> Section 607.0722(3), F.S.

<sup>23</sup> Section 607.0722(5), F.S.

<sup>24</sup> *Id.*

In the first example, a corporation may pledge shares in the corporation as collateral for a loan. While the corporation may continue to own the shares, the lending institution may require the corporation to give the lender voting rights for the pledged shares during the duration of the loan. Similarly, in the second example, when a corporation issues shares to its employees as bonuses, the corporation may require the employees to cede their voting rights for the shares to the corporation. Under Florida law, an irrevocable proxy become revocable after the coupled interest is extinguished.<sup>25</sup> Thus, using these examples, the proxy would become revocable after the loan is repaid and after the employee separates from employment with the corporation. However, Florida law specifically imposes an additional requirement upon irrevocable proxies in those instances in which a creditor extends credit to a corporation under terms requiring a proxy appointment or in which an employment contract requires a proxy appointment.<sup>26</sup> In these two instances, Florida law requires that the irrevocable proxy becomes revocable after three years unless the proxy appointment is renewed.<sup>27</sup> Therefore, a lender must seek renewal of an irrevocable proxy every three years during the duration of a loan, and a corporation must seek renewal of each employee's irrevocable proxy every three years while the employee works for the corporation.

### **Electronic Transmission**

The term "electronic transmission" is defined in the Florida Business Corporation Act (act) to mean "any process of communication not directly involving the physical transfer of paper that is suitable for the retention, retrieval, and reproduction of information by the recipient."<sup>28</sup> Under current law, documents may be filed with the Department of State by electronic transmission to the extent permitted by the department.<sup>29</sup> In addition, the act allows notices provided by electronic transmission to be considered "written notice."<sup>30</sup> Because the current definition of electronic transmission requires that electronic documents be "suitable for the retention, retrieval, and reproduction of information," the statute appears to contemplate that documents transmitted electronically must be able to be printed as paper documents. This definition of "electronic transmission" is identical to the definition provided in the model act.<sup>31</sup>

### **III. Effect of Proposed Changes:**

The committee substitute amends the Florida Business Corporation Act to clarify that proxy appointments made by shareholders of Florida for-profit corporations may be accepted by these

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<sup>25</sup> See s. 607.0722(6), F.S.

<sup>26</sup> See s. 607.0722(5)(c) & (d), F.S.

<sup>27</sup> Section 607.0722(6), F.S.

<sup>28</sup> Section 607.01401(9), F.S.

<sup>29</sup> Sections 607.0120(4), (9), & 609.0125(5), F.S.

<sup>30</sup> Section 607.0141(1), F.S.

<sup>31</sup> Model Bus. Corp. Act s. 1.40 (1999).

corporations when received electronically using telephonic menu systems or Internet-based systems. In addition, the committee substitute retains the ability of shareholders to submit proxy appointments through telegrams or cablegrams. The committee substitute removes the requirements that certain irrevocable proxies become revocable after three years unless renewed and allows corporations to adopt bylaws authorizing additional procedures for proxy voting.

### **Electronic Transmission (Section 1)**

The committee substitute amends the definition of the term “electronic transmission” to include, but not be limited to, telegrams, cablegrams, telephone transmissions, and transmissions through the Internet for purposes of proxy voting. The committee substitute uses the term “electronic transmission” throughout section 2 of the committee substitute to clarify that the appointment of proxies may be accomplished by electronic transmission, including by telegrams, cablegrams, telephone transmissions, and transmissions through the Internet. Because, the term “electronic transmission” is used in related statutes when referring to the electronic filing of documents with the Department of State, the committee substitute specifically limits the term to mean telegrams, cablegrams, telephone transmissions, and transmissions through the Internet only in the context of proxy voting.

### **Proxy Voting and Irrevocable Proxies (Section 2)**

The committee substitute allows a shareholder to appoint a proxy by electronic transmission in lieu of submitting a signed appointment form. The term “electronic transmission” is defined as any process of communication not directly involving the physical transfer of paper that is suitable for the retention, retrieval, and reproduction or information by the recipient, including, but not limited to, telegrams, cablegrams, telephone transmissions, and transmissions through the Internet. Consequently, the committee substitute would permit corporations to use telephonic menu systems or an Internet-based systems to accept proxy appointments. The committee substitute makes conforming amendments by removing current provisions that allow proxy appointments by telegram or cablegram.

When a person entitled to appoint a proxy makes the appointment through an electronic transmission, the committee substitute provides that the transmission is a sufficient appointment if it contains or is accompanied by information, or is obtained under procedures, that reasonably ensure the appointment was transmitted by the person entitled to make the appointment. The committee substitute adds this standard to replace the standard in current law that an executed telegram or cablegram appearing to have been transmitted by the person entitled to make the appointment, or a photographic, photostatic, or equivalent reproduction of an appointment form, is a sufficient appointment form. In addition, the committee substitute clarifies that the appointment of a proxy by electronic transmission is subject to the corporation’s entitlement to reject a proxy appointment if there is a reasonable basis for doubt about the validity of the appointment.

The committee substitute clarifies that the attorney in fact who may vote a shareholder’s shares must be the attorney in fact for the shareholder. The committee substitute also clarifies in several provisions throughout section 3 that the shareholder, attorney in fact for the shareholder, or other person entitled to vote on behalf of the shareholder may appoint a proxy.

The committee substitute removes the requirement that irrevocable proxies become revocable after three years unless the proxy appointment is renewed in instances of:

- A creditor of the corporation who extended credit to the corporation under terms requiring the appointment, or
- An employee of the corporation whose employment contract requires the appointment.

Accordingly, all irrevocable proxies would become revocable after the coupled interest is extinguished.

The committee substitute provides that any copy, facsimile transmission, or other reliable reproduction of an appointment form, or an electronic transmission containing a proxy appointment, may be used in lieu of the original paper form or transmission for any purpose that the original could be used if the copy is complete.

The committee substitute also allows a corporation to adopt bylaws that authorize other means or procedures for shareholders to appoint proxies.

### **Effective Date (Section 3)**

The committee substitute takes effect July 1, 2001.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

None.

### **B. Public Records/Open Meetings Issues:**

None.

### **C. Trust Funds Restrictions:**

None.

## **V. Economic Impact and Fiscal Note:**

### **A. Tax/Fee Issues:**

None.

### **B. Private Sector Impact:**

The committee substitute clarifies that proxy appointments may be accepted by Florida for-profit corporations by electronic transmissions. The committee substitute also makes clarifications to provisions relating to the verification of proxy appointments transmitted

electronically. Thus, some Florida corporations may observe a marginal decrease in costs associated with administering proxy voting procedures. However, the committee substitute is essentially technical in nature, and the financial impacts on most corporations will be minimal.

**C. Government Sector Impact:**

The Department of State reports that the committee substitute will have no impact on the operating costs of the Division of Corporations or the Department of State.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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