

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1623 Florida Business Corporations Act
SPONSOR(S): Goodlette
TIED BILLS: None **IDEN./SIM. BILLS:** SB 2362

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary		Billmeier	Havlicak
2) Appropriations			
3)			
4)			
5)			

SUMMARY ANALYSIS

Chapter 607, F.S., is the "Florida Business Corporation Act." HB 1623 makes numerous changes to the Act. This bill:

- Enlarges the number of authorized signatories for filed documents to include all directors;
- Permits a corporation to specify a time of day for a filing to become effective;
- Extends the time frame for correcting a filed document from 10 to 30 days;
- Permits multiple shareholders within a single household to receive a single notice from the corporation;
- Clarifies statutes relating to corporate names for Florida and foreign corporations;
- Provides process for alien foreign corporations to withdraw their registered agents;
- Amends the preemptive rights provisions to include preemptive rights for treasury shares and to exclude shares issued pursuant to a court-approved plan of reorganization;
- Provides for a shareholder being able to participate at meetings through remote communication;
- Amends the derivative action provisions to allow a complaint to be filed 90 days after shareholder demand upon the corporation;
- Clarifies provisions relating to control-share acquisitions;
- Repeals statute which applies Florida control-share acquisition provisions to foreign corporations;
- Rewrites statutory provisions relating to dissenters' rights, which provides rights and procedures for minority shareholders to receive the fair value of their shares in certain major types of corporate transactions;
- Makes conforming changes relating to the execution and filing of articles of dissolution;
- Provides procedures for claims against corporations;
- Streamlines provisions relating to reinstatement of administratively dissolved corporations;
- Amends provisions relating to judicial dissolution of corporations;
- Provides express rights for directors to have access to corporate information; and
- Eliminates requirement that annual report include a statement whether the corporation is liable for intangible taxes.

This bill is effective on October 1, 2003.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1623.ju.doc
DATE: March 24, 2003

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

B. EFFECT OF PROPOSED CHANGES:

Chapter 607, F.S., is the “Florida Business Corporation Act.”¹ HB 1623 makes numerous changes to the Act. This bill was developed by a Task Group of the Business Law Section of the Florida Bar (“Task Group”). The group included practitioners, law professors, and representatives of the Division of Corporations of the Department of State.²

Section 1

Section 607.0120, F.S., sets forth filing requirements before a document can be filed with the Department of State. Section 607.0120(6), F.S., requires a document that is to be filed with the Department of State must be executed by either the chair or any vice chair of the board of directors, the corporation’s president or one of its officers, an incorporator, or a receiver, trustee, or other court-appointed fiduciary.

This bill amends s. 607.0120(6), F.S., to permit any director to sign documents on a corporation’s behalf.

Section 2

Section 607.0122, F.S., sets various filing fees. Under current law, it costs \$35 for a registered agent from an administratively dissolved corporation to file a resignation.³ This bill clarifies that the \$35 filing fee applies to a resignation by a registered agent from any inactive corporation. This would include corporations that have not been formally dissolved but are no longer active.

Section 3

Section 607.0123, F.S., provides that documents are effective on the day filed with the Department of State or on another date as specified in the documents. This bill amends s. 607.0123, F.S., to permit documents to specify a certain time of day which documents will become effective. The bill also requires the Department of State to record the time that a document is filed.

Section 4

¹ s. 607.0101, F.S.

² Letter from Bill Wiley to Representative Kottkamp, dated March 19, 2003.

³ See s. 607.0122(7), F.S.

Section 607.0124, F.S., permits a corporation to correct documents filed with the Department of State within 10 business days of filing if the document contains an inaccuracy, was defectively executed, attested, sealed, verified, or acknowledged, or if the electronic transmission was defective. This bill extends the time to 30 days.

Section 5

In situations where written notice must be provided to shareholders, the notice is effective upon deposit into the United States mail, if mailed postage paid to the shareholder's current address, or when electronically transmitted to the shareholder in a manner provided by the shareholder.⁴ This bill permits notice to be given to shareholders who share an address by mailing one notice to that address if the shareholders consent to such notice. This could save money in situations where all members of a family at one address are shareholders. This bill permits shareholders living at the same address to request individual written notice.

This "single notice" provision does not apply to notice required under s. 607.0620, F.S. (relating to subscriptions for shares), s. 607.1402, F.S. (relating to relating to dissolution), and s. 607.1404, F.S. (relating to revocation of dissolution).

Section 6

Current law requires that corporate names include the word "corporation," "company," or "incorporated" or the abbreviation "Corp.," "Inc.," or "Co." or "words or abbreviations of like import in language."⁵ This bill removes the phrase "or words or abbreviations of like import in language" to make clear what language must be used in Florida.

This bill also provides that the name used in filings with the Department of State does not create any presumption of ownership beyond that which is created at common law. This clarifies that this section is not intended to override common law trademark principles.

Section 7

"Alien business organizations"⁶ that conduct business in Florida are required to have a registered agent in the state. This bill provides that an alien business corporation may withdraw its registered agent designation by showing it is no longer required to have a registered agent in the state.

Section 8

This bill amends s. 607.0630, F.S., relating to a shareholder's preemptive right⁷ to purchase shares. Section 607.0630(1), F.S., provides that shareholders have no preemptive right to acquire shares unless provided for in the articles of incorporation. This bill clarifies that the articles of incorporation can give preemptive rights to treasury shares.⁸ Current law prohibits preemptive rights in

⁴ See s. 607.0141(3), F.S.

⁵ See 607.0401(1), F.S.,

⁶ "Alien business organization" is defined as "1. Any corporation, association, partnership, trust, joint stock company, or other entity organized under any laws other than the laws of the United States, of any United States territory or possession, or of any state of the United States; or 2. Any corporation, association, partnership, trust, joint stock company, or other entity or device 10 percent or more of which is owned or controlled, directly or indirectly, by an entity described in subparagraph 1. or by a foreign natural person." s. 607.0505(11)(a), F.S.

⁷ A "preemptive right" is the "privilege of a shareholder to maintain a proportionate share of ownership by purchasing a proportionate share of any new stock issues." Black's Law Dictionary (West, 6th Edition).

⁸ "Treasury shares" means "shares of a corporation that belong to the issuing corporation, which shares are authorized and issued shares that are not outstanding, are not canceled, and have not been restored to the status of authorized but unissued shares." s. 607.01401(29), F.S.

some situations, such as shares issued as compensation to directors and officers.⁹ This bill prohibits preemptive rights in situations where shares are issued pursuant to a court-ordered reorganization plan.

Sections 9 and 10

This bill amends current law relating to annual meetings¹⁰ to permit shareholders to participate in annual meetings by means of remote communication. The bill requires that the corporation take reasonable measures to verify that person deemed present and participating by remote communication is the shareholder or proxyholder and shall take reasonable measures to provide for each shareholder and proxyholder who participates via remote communication can read and hear the proceedings.

The bill makes analogous changes to the statute relating to special meetings.¹¹

These changes could be beneficial to corporations by reducing the costs incurred by traveling to and from annual or special meetings.

Section 11

The bill amends s. 607.07401, F.S., to provide that the complaint in a shareholder derivative action¹² must allege that the demand made to obtain action by the board of directors was refused or ignored for at least 90 days. There are two exceptions to this 90 day rule: (1) if the person was notified in writing that the corporation rejected the demand prior to the expiration of the 90 day period or (2) if irreparable injury to the corporation would result by waiting until the end of the 90 day period.

Current law provides that a shareholder must demand some action by the board before commencing a derivative action. This bill sets 90 days as the presumptive period that the board has to act on that demand.

Section 13

This section clarifies that articles of amendment must be filed with the Department of State when there is a division or combination of shares¹³ pursuant to s. 607.10025, F.S.

Section 14

Section 14 conforms s. 607.1004(a), F.S., to the Model Business Corporation Act, which provides for class voting on proposed amendments to the articles of incorporation if, and only if, the holders of the affected class will be prejudiced by adoption of the proposed amendment. This bill eliminates s. 607.1004(a), F.S., because a change in the number of authorized shares of a class is not considered by itself to be a prejudicial action with regard to existing shareholders. Shareholders may still prohibit future increases or decreases in authorized shares through the articles of incorporation or through shareholder agreements.

Section 15

⁹ See s. 607.0630(2)(c), F.S.

¹⁰ See s. 607.0701, F.S.

¹¹ See s. 607.0702, F.S.

¹² "The courts have defined a derivative suit as an action in which a stockholder seeks to enforce a right of action existing in the corporation." *Chemplex Florida v. Noreilli*, 790 So. 2d 547, 549 (Fla. 4th DCA 2001).

¹³ The terms "division" and "combination" mean "dividing or combining shares of any issued and outstanding class or series into a greater or lesser number of shares of the same class or series." s. 607.10025(1), F.S.

This section amends provisions relating to the method of amending articles of incorporation to require amendments to be executed in the same manner as other documents under s. 607.0120, F.S.

Changes in Chapter 607 Relating to Dissenter's Rights (Sections 12, 16-33)

These sections of the bill are a substantial rewrite of the sections of statute relating to dissenter's rights, currently found in ss. 607.1301 – 607.1320, F.S.

"Dissenters' rights" allow shareholders who object to a major corporate transaction to elect to obtain payment for the fair value of their shares in cash rather than continue as shareholders.¹⁴ This bill changes the term "dissenters' rights" to "appraisal rights". Appraisal rights are only permitted in matters of substantial corporate importance, such as mergers and other actions.¹⁵ This bill requires appraisal rights in situations similar to those under current law. In addition, the bill provides appraisal rights when shareholders are asked to vote on reverse stock splits that will result in the corporation repurchasing fractional shares created by the reverse split. Reverse stock splits are sometimes a technique for squeezing out unwanted minority shareholders. An appraisal right has therefore been added in order to protect the valuation of the shares.¹⁶ The bill abolishes appraisal rights in two situations:

- (1) It eliminates appraisal rights in control share acquisition votes.¹⁷ In control share acquisition situations, existing shareholders vote upon whether the newly-acquired control shares will have voting power; and
- (2) It eliminates appraisal rights for certain amendments to articles of incorporation.¹⁸ This portion of the bill will not be effective for corporations formed prior to the effective date of the bill. Shareholders in currently existing corporations purchased their shares with the current appraisal rights provisions in place and therefore would not have considered the need for protective measures.

This bill clarifies the appraisal rights process. The current statutory provisions regarding the process for shareholders to assert their rights are contained entirely within two lengthy statutory sections, s. 607.1302 and 607.1320, F.S. It is argued that this format makes it difficult for shareholders and their advisers to understand the details involved in the appraisal process. This bill sets forth each of the procedural steps in separate sections of statute.

The bill creates section 607.1322, F.S. Under this section, the corporation must provide to the shareholder a form that specifies for the shareholder exactly the information to provide to the corporation in order to assert appraisal rights. Current statute does not require such specific notice. This bill changes the time frames in which the shareholder must act to perfect appraisal rights.¹⁹

In addition, the proposed amendments make several substantive changes to support shareholders' rights, including:

- (1) A definition of "fair value." The bill's definition provides that customary and current valuation concepts are to be used and that there should be no discount for lack of marketability or the

¹⁴ See Fla.Jur.2d. s. 257.

¹⁵ See s. 607.1302, F.S. (current law on dissenters' rights); s. 607.1302(1) of the bill (rewording of current law).

¹⁶ See s. 607.1302(1)(d) of the bill.

¹⁷ See s. 607.1302(1)(c), F.S. (current law permitting dissenters' rights in cases of control share acquisitions).

¹⁸ See s. 607.1302(1)(e), F.S. (current law permitting dissenters' rights in situations involving certain amendments to the articles of incorporation).

¹⁹ The current statute requires a shareholder response to the corporation's notice within 20 days. See s. 607.1320(3), F.S. This bill gives the shareholder 40-60 days to consider whether to assert appraisal rights and respond to the corporation. See s. 607.1322(2)(b) of the bill.

minority status of the shares except in limited instances. The current statute is silent as to these matters;²⁰

(2) Limitations on the “public market exception” to appraisal rights. The current statute excludes appraisal rights for shares registered on a national securities exchange or NASDAQ’s national market system or are held of record by at least 2,000 shareholders.²¹ This bill modifies the exclusion by narrowing it in three respects:

(a) s. 607.1302(2)(a) of the bill adds a \$10 million minimum threshold for total market value with regard to the exclusion of appraisal rights based on 2,000 shareholders;

(b) s. 607.1302(2)(c) of the bill provides that the public market exclusion of appraisal rights does not apply to transactions in which the shareholders are receiving consideration other than cash for their shares; and

(c) s. 607.1302(2)(d) of the bill provides that the public market exclusion of appraisal rights does not apply to affiliate transactions, that is, transactions in which controlling shareholders or management are parties on the other side of the proposed corporate action;

(3) Obligation on corporation to commence appraisal proceeding. Current law allows either the corporation or, if it fails to do so, the shareholder, to file an appraisal action in court if the parties cannot agree on the fair value of the shares.²² This bill requires the corporation to file an action within a particular time frame and, if it fails to do so, to pay the shareholder the amount demanded by the shareholder as fair value.²³ This reduces the time frame for the court proceeding to commence and puts the cost and filing burden on the corporation rather than leave it to the shareholder;

(4) Increased financial disclosure by corporation. This bill requires the corporation to furnish to the shareholder not only fiscal year-end financial statements but also interim financial statements to the extent available.²⁴ The additional requirement for interim financial statements could assist shareholders in determining the fair value of their shares.

Section 607.1331 of the bill changes the power of a court to assess costs and fees in an appraisal proceeding. The bill maintains current law that a court will assess against the corporation the shareholder’s costs except where the shareholder has acted arbitrarily, vexatiously, or not in good faith or otherwise not in compliance with the appraisal rights provisions.²⁵ However, if a court finds that a shareholder has acted arbitrarily, vexatiously, or not in good faith with regard to pursuing appraisal rights, it has the power to assess against the shareholder the fees and expenses of the corporation, including fees of counsel and experts. Section 607.1320(9), F.S., has a similar provision for the assessment of costs against shareholders but excludes fees of counsel and experts.

Section 607.1333 of the bill requires that no payment shall be made to a shareholder seeking appraisal rights if, at the time of payment, the corporation is unable to meet the distribution standards of s. 607.06401, F.S.²⁶ In such event, the shareholder shall, at the shareholder’s option:

(a) withdraw his or her notice of intent to assert appraisal rights, which shall in such event be deemed withdrawn with the consent of the corporation; or

²⁰ See s. 607.1301(4) of the bill.

²¹ See s. 607.1302(4), F.S.

²² See s. 607.1320(7), F.S.

²³ See s. 607.1330 of the bill.

²⁴ See s. 607.1322(1)(c) of the bill.

²⁵ See s. 607.1320(9), F.S.

²⁶ Section 607.06401, F.S., relates to the payment of dividends.

(b) retain his or her status as a claimant against the corporation and, if it is liquidated, be subordinated to the rights of creditors of the corporation, but have rights superior to the shareholders not asserting appraisal rights, and if it is not liquidated, retain his or her right to be paid for the shares, which right the corporation shall be obliged to satisfy when the restrictions of this section do not apply.

The shareholder must make this election within 30 days after the corporation has given written notice that the payment for shares cannot be made because of the restrictions. If the shareholder fails to exercise the option, the shareholder shall be deemed to have withdrawn his or her notice of intent to assert appraisal rights.

This bill makes conforming changes in various sections of chapter 607, F.S., to reflect the change from dissenters' rights to appraisal rights.

Section 34

This section clarifies that articles of dissolution shall be executed pursuant to s. 607.0120, F.S.

Section 35-36

Section 607.1406, F.S., sets forth a procedure for dissolved corporations to deal with claims, by creditors or other parties, against the corporation. It requires notice by the corporation and provides a 3 year window to dispose of all claims.

While s. 907.1406, F.S., works for claims that the corporation knows exist, it does not set forth a procedure for claims about which the corporation is unaware. Section 36 provides a procedure for dealing with unknown claims against a corporation at the time of dissolution. The bill provides for the corporation in the process of dissolution to file a form with the Department of State advising unknown claimants of the rights and procedure. Creditors and other claimants will have access to the forms through an online database and will thus be advised regarding their rights against the corporation or the shareholders to whom assets have been distributed. The section provides for a 4-year statute of limitation regarding the filing of unknown claims, in contrast to the 3-year period provided for known claims.

Section 35 clarifies that s. 607.1406, F.S., relating to claims against dissolved corporations, applies only to known claims against those corporations.

Section 37

Section 37 requires an administratively dissolved corporation to submit a reinstatement form or a current uniform business report and to submit all fees owed by the corporation in order to be reinstated.

Section 38

Section 38 provides to minority shareholders an additional basis for seeking judicial dissolution or other equitable remedy in the event of abusive actions by controlling shareholders or directors. The bill adds the term "oppressive" in s. 607.1430(3)(b), F.S., to give minority shareholders a basis for seeking judicial relief in freeze-out situations that are contrary to equitable principles. According to the Task Group, approximately 40 states include such a provision in their statutes and the provision is a Model Business Corporation Act provision.

This section has an effective date of October 1, 2004.

Section 39

Section 39 amends s. 607.1503, F.S., to clarify that the process regarding the filing of a name by a foreign corporation must conform to the statutory procedures in s. 607.0401, F.S. or, in the alternative, to the requirements of s. 607.1506, F.S.

Section 40

Section 40 amends current law relating to certificates of authority for foreign corporations. The Department of State recommends the amendments to clarify the process and reduce administrative burdens in processing requests for amended certificates of authority by foreign corporations. The bill extends the period for making application for an amended certificate is from 30 to 90 days and sets forth the requirements for the application.

Section 41

This section makes conforming changes to s. 607.1506, F.S., to reflect the changes made in s. 607.0401, F.S., to the statutes for corporate names relating to foreign corporations. Current law requires that corporate names include the word "corporation," "company," or "incorporated" or the abbreviation "Corp.," "Inc.," or "Co." or "words or abbreviations of like import in language." This bill removes the phrase "or words or abbreviations of like import in language" to make clear what language must be used in Florida.

Section 42

This section provides that a director of a corporation is entitled to inspect and copy the books, records and documents of the corporation at any reasonable time to the extent reasonably related to the performance of the director's duties as a director, including duties as a member of a committee, but not for any other purpose or in any manner that would violate any duty to the corporation.

The bill gives the circuit court of the county where the corporation's principal office (or if none in this state, its registered office) is located the authority to order inspection and copying of the books, records and documents at the corporation's expense, upon application of a director who has been refused such inspection rights, unless the corporation establishes that the director is not entitled to such inspection rights.

Section 43

This section amends s. 607.1622, F.S., to remove the requirement that the Department of State annually prepare a list of those corporations that have indicated no intangible tax liability, and provide such list to the Department of Revenue.

Section 44 makes a technical correction to s. 607.1907, F.S., by inserting a comma.

Section 45

The bill repeals s. 607.0903, F.S. This section attempts to apply provisions relating to control share acquisitions to foreign corporations. According to the Task Group, the statute has proven unworkable and has been declared unconstitutional in some states.

Section 46

This bill will take effect on October 1, 2003, except for sections where a different effective date is specified.

C. SECTION DIRECTORY:

Section 1. Amends s. 607.0120, F.S., to permit any director of a corporation to execute documents for filing by the Department of State.

Section 2. Amends s. 607.0122, F.S., to clarify that the \$35 filing fee applies to agent resignations from any inactive corporation.

Section 3. Amends s. 607.0123, F.S., to require the Department of State to record the time of day which a document is filed and to permit corporations to specify an effective time in filed documents.

Section 4. Amends s. 607.0124, F.S., to extend the time permitted to correct a filed document.

Section 5. Amends s. 607.0141, F.S., relating to notice of certain actions given by corporations.

Sections 6 and 41. Amends s. 607.0401, F.S. and s. 607.1506, F.S., relating to corporate names.

Section 7. Amends s. 607.0505, F.S., to set forth a procedure for the registered agent of an alien business organization to withdraw.

Section 8. Amends s. 607.0630, F.S., relating to preemptive rights to purchase shares.

Sections 9-10. Amends s. 607.0701, F.S., and s. 607.0702, F.S., relating to annual meetings and special meetings.

Section 11. Amends s. 607.07401, F.S., relating to shareholders' derivative actions.

Sections 12 and 16-33. Amends and substantially rewrites ss. 607.1301-607.1320, F.S., relating to dissenters' rights.

Section 13. Amends s. 607.10025, F.S., requiring articles of amendment when a division or combination of shares is effected by the board of directors.

Section 14. Amends s. 607.1004, F.S., relating to voting on amendments by voting groups.

Section 15. Amends s. 607.1006, F.S., relating to amending articles of incorporation.

Section 34. Amends s. 607.1403, F.S., to clarify the procedure for executing articles of dissolution.

Sections 35-36. Amends s. s. 607.1406, F.S. and creates a new section of law to provide procedures for dealing with known and unknown claims against corporations.

Section 37. Amends s. 607.1422, F.S., relating to reinstatement of administratively dissolved corporations.

Section 38. Amends s. 607.1430, F.S., relating to judicial dissolution of corporations.

Section 39. Amends s. 607.1503, F.S., relating to names of foreign corporations.

Section 40. Amends s. 607.1504, F.S., relating to amendments of certificates of authority by foreign corporations.

Section 41. Amends s. 607.1506, F.S., relating to corporate names of foreign corporations.

Section 42. Creates s. 607.1605, F.S., to permit directors of a corporation to inspect and copy books and records of the corporation.

Section 43. Amends s. 607.1622, F.S., relating to annual reports.

Section 44. Amends s. 607.1907, F.S., by inserting a comma to correct a technical error.

Section 45. Repeals s. 607.0903, F.S.

Section 46. Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

According to a fiscal impact statement provided by the Department of State, the bill should not have a significant impact on state revenues.

2. Expenditures:

According to a fiscal impact statement provided by the Department of State, the bill should not have a significant impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not appear to affect revenues of local governments.

2. Expenditures:

This bill does not appear to affect expenditures by local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill does not appear to have a direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to take an action requiring the expenditure of funds, does not reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

This bill contains some technical and drafting issues. The sponsor intends to offer an amendment to address these issues.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

N/A