

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 205 Corporations Not for Profit

**SPONSOR(S):** Economic Expansion & Infrastructure Council, Seiler

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 304

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Tourism &amp; Trade</u>	<u>5 Y, 0 N</u>	<u>McGill</u>	<u>Hoagland</u>
2) <u>Economic Expansion &amp; Infrastructure Council</u>	<u>14 Y, 0 N, As CS</u>	<u>McGill/Madsen</u>	<u>Tinker</u>
3) <u>Policy &amp; Budget Council</u>	<u>(W/D)</u>	<u></u>	<u></u>
4) <u></u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

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### SUMMARY ANALYSIS

CS/HB 205 makes numerous changes to Chapter 617, F.S., in regards to Not for Profit Corporations. Provisions are added or clarified in regards to filing requirements, distributions, membership rights, voting, mergers, derivative actions and conflicts of interest.

This bill does not appear to have a fiscal impact on state or local governments.

The bill takes effect October 1, 2008.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

The bill does not appear to implicate and of the house principles.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Present Situation**

The “Florida Not for Profit Corporation Act”, codified in Chapter 617, F.S., provides for the incorporation of not for profit corporations. A “corporation not for profit” is defined as a corporation no part of the income or profit of which is distributable to its members, directors, or officers<sup>1</sup>. The formation, operation, merger and dissolution of domestic not for profit corporations are governed by this act.

Chapter 607, F.S., titled “Florida Business Corporation Act”, contains the statutes governing corporations in Florida. Some of these provisions include filing requirements, calling of meetings, voting rights, directors, and dissolution.

Specific Not for Profit Corporations are also governed by Chapter 718, F.S., regarding condominiums; Chapter 719, F.S., regarding cooperatives; Chapter 720, F.S, regarding homeowners’ associations; and Chapter 723, F.S, regarding mobile home park lot tenancies.

##### **Effect of Proposed Changes**

Chapter 607, F.S., titled “Florida Business Corporation Act” and Chapter 617, F.S., are generally sought to be in conformity as much as possible. There has been no major revision to the Not for Profit Corporation statute since 1990 while numerous changes have been made to Chapter 607, F.S. The bill seeks to make concurrent changes in Chapter 617, F.S., that have been made in Chapter 607, F.S., which are applicable to not for profit entities. Nearly all of the proposed amendments regarding membership issues are in conformity with the Revised Model Nonprofit Corporation Act prepared by the American Bar Association.

All references to “chapter” in this analysis refer to Chapter 617, F.S.

##### **Filing Requirements**

The bill seeks to make changes to filing and signature requirements pertaining to not for profits. The bill permits electronic filing of documents with the Department of State, stipulating that the document must be in a format that can be retrieved or reproduced in typewritten or printed form. The timeline for correcting a filed document is also amended, from 10 days to 30 days, and allows that if the electronic transmission of the document was defective it may be corrected in that timeframe. Current law does not permit electronic filing.

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<sup>1</sup> S. 617.01401(5), F.S.

These are provisions that were changed in Chapter 607, F.S., but were not reflected in this Chapter. The differences found within the two chapters have led to administrative problems with the Division of Corporations and these changes will aid them in their application of the law.

## **Distributions**

The bill provides a definition of “distribution” as the means the payment of a dividend or any part of the income or profit of a corporation to its members, directors, or officers. A donation or transfer of corporate assets or income to or from another not-for-profit corporation qualified as tax-exempt under s. 501 (c ) of the Internal Revenue Code or a governmental organization exempt from federal and state income taxes, if such corporation or governmental organization is a member of the corporation make such donation or transfer, is not a distribution for purposes of this chapter. Currently several provisions use this term but it is not defined in the act. Further, the bill seeks to broaden the circumstances under which it is permissible to make distributions to members by providing exceptions for entities defined as “mutual benefit corporation”. This would allow for the purchase of equity membership interest by mutual benefit corporations, such as private clubs. Exemptions from the prohibition on making distributions are provided for the following: condominium corporations (ch. 718, F.S.), cooperatives (ch. 719, F.S.),homeowners’ associations (ch. 720, F.S.), and mobile home park lots (ch. 723,F.S.) or a corporation where membership in the corporation is required. While providing permissible instances distributions may be made by mutual benefit corporations, the bill gives a direct prohibition of distributions by not for profit corporations to any of its members.

## **Mutual Benefit Corporations**

The bill provides a definition of mutual benefit corporation which has previously not been defined within the Chapter. Mutual Benefit Corporation is defined as:

“a domestic corporation that is not organized primarily or exclusively for religious purposes; is not recognized as exempt under s. 501(c)(3) of the Internal Revenue Code; and is not organized for a public or charitable purpose that is required upon its dissolution to distribute its assets to the United States, a state, a local subdivision thereof, or a person that is recognized as exempt under s. 501(c)(3) of the Internal Revenue Code. The term does not include an association organized under chapter 718, chapter 719, chapter 720, or chapter 721, or any corporation where membership in the corporation is required pursuant to a document recorded in county property records”.

Provisions pertaining to mutual benefit corporations are added including permitting the transfer of interests in mutual benefit corporations as well as allowing the purchase of membership rights under certain instances by mutual benefit corporations, these are not permitted by other forms of not for profits.

## **Membership**

CS/HB 205 contains language clarifying existing provisions relating to membership as well as providing new membership provisions. New provisions include the definition of the term voting power, which is used in instances where certain percentages are required for particular actions by members; this definition is used to reference the number of votes that a member is entitled to cast in the election of directors. Also included is the ability for members to vote by electronic means and for members to call special meetings of the membership upon the demand of at least 5% of the voting power. A new

provision is added to allow the corporation to reject a member's vote if there is a good faith and reasonable basis for doubting the member's signature.

The bill also contains provisions allowing the resignation of members, but states this resignation does not relieve them of existing obligations or commitments the member made to the corporation prior to the resignation. It is stated that the involuntary termination of membership must be fair and reasonable. Also added are procedures and qualifications for members to bring derivative actions on behalf of the corporation.

Provisions related to membership powers are also discussed under the sections titled distributions, directors, mergers, dissolutions, and records & reports.

## **Directors**

A number of provisions have been added and or clarified within the Chapter relating to directors. The bill provides a process to be taken by the corporation for the removal of directors. Clarification is given to how many votes are needed for removal of the director by the board, by members, or by organization unit. Also included are provisions relating to vacancies on the board and the powers of members and directors to fill these positions.

Guidelines are given for quorum and voting by directors on conflict of interest transactions. Standards are added in regards to the approval process and member voting. The standards are as follows:

A conflict-of interest transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the directors on the board of directors, or on the committee, who have no relationship or interest in the transaction described in subsection (1), but a transaction may not be authorized, approved, or ratified under this section by a single director. If a majority of the directors who have no such relationship or interest in the transaction vote to authorize, approve, or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of, or a vote cast by, a director having such relationship or interest in the transaction does not affect the validity of any action taken under paragraph (1)(a) if the transaction is otherwise authorized, approved, or ratified as provided in that subsection, but such presence or vote of such a director may be counted for purposes of determining whether the transaction is approved under other sections of this act.

## **Merger**

Provisions within the bill will require disclosure of the manner and basis of converting memberships into memberships of the surviving corporation when a merger takes place. Also clarified is the requirement that in a merger of a for profit corporation and a not for profit corporation the surviving corporation must be a not for profit. This provision is currently included in s. 617.0302 (16), F.S., dealing with corporate powers, and is included within this chapter for clarification purposes.

## **Dissolution**

New provisions are added providing procedures for unknown and known claims against dissolved corporations. These provisions seek to clear doubt as to the proper treatment of claims.

Within the bill an existing provision is changed to raise the current requirement for a judicial dissolution suit brought by a member. Currently any member may bring suit, the new requirement would require a

threshold of at least 50 members, members holding 10% of more of the voting power, or a director or other person authorized in the articles of incorporation.

### **Foreign Corporations**

A current provision is amended to allow 90 days as opposed to 30 days when changes are made to certificates of authority. A provision is also added to prevent duplicative names with all other corporations by adding the term "other business entity" to prevent name conflicts upon filing.

### **Records and Reports**

Provisions are provided in the bill relating to records and reports. Language is added allowing the inspection of certain records to take place at the corporation's principle office or at a reasonable location specified by the corporation. The bill increases the number of days advanced notice required for a records inspection from 5 to 10 days. The requirement for corporations to provide annual financial statements is changed to require it be provided to only those members who request it.

Repeals section 617.2103, F.S., which exempted certain corporations from provisions in this chapter, and provided alternative record keeping requirements, member inspection rights, and financial reporting for those exempt corporations. All corporations will now be subject to the same requirements.

### **Application to other regulated entities**

Within the bill a new provision is added dealing with the application of this Chapter to other regulated entities such as condominium corporations, homeowners' associations, and cooperatives. Wherever there may be a conflict between Chapter 617 and the statutes regulating these entities, the statutes regulating these industries apply. Currently exemptions are included to apply to the provisions of ss. 617.0605-617.0608, F.S. These provisions deal with transfer of membership; resignation of members, termination, expulsion, and suspension; and purchase of membership.

#### **C. SECTION DIRECTORY:**

Section 1: Amends section 617.01201, F.S., to allow for the electronic transmission of a filed document and clarifies signature requirements when submitting documents.

Section 2: Amends section 617.0122, F. S., to provide for payment of a fee if a registered agent resigns from an inactive corporation.

Section 3: Amends section 617.0124, F.S., to allow 30 days for a correcting a filed document, and to allow for the correction of documents submitted electronically, and deletes the current requirement requiring a copy of the corrected document to be returned.

Section 4: Amends section 617.01401, F.S., to make changes to the definitions of corporation not for profit, and adding definitions for distributions, department, successor entity, mutual benefit corporations, and voting power.

Section 5: Amends section 617.0205, F.S., to make a technical change adding the words "of incorporation".

Section 6: Amends section 617.0302, F.S., to allow corporations to make guaranties and inserts a reference to s. 607.1108 (1) which identifies business entities permitted to merge with not for profits.

Section 7: Creates section 617.0503 (12), F.S., to provide the process for withdrawal of a registered agent by an alien business organization.

Section 8: Amends section 617.0505, F.S., by making clarifications as to when distributions to members are permitted and expanding a 2005 provision to certain private clubs to allow all mutual benefit corporations to make distributions in certain instances. Exemptions from the prohibition on making distributions are provided for the following: condominium corporations (ch. 718, F.S.), cooperatives (ch. 719, F.S.), homeowners' associations (ch. 720, F.S.), and mobile home park lots (ch. 723, F.S.) or a corporation where membership in the corporation is required. Deleted is a reference to the issuance of stock certificates, this provision has been moved to 617.0601, F.S.

Section 9: Amends section 617.0601, F.S., reflecting a statutory revision, moving a reference to stock certificates formerly found in section 617.0505, F.S, and reflecting the fact that new resignation and termination provisions have been adopted.

Section 10: Creates section 617.0605, F.S., to provide for the possible transfer of membership interest in a mutual benefit corporation. Transfers are not permitted for any other type of not for profit corporation.

Section 11: Creates section 617.0606, F.S., to provide for the resignation of members and stipulates the effect on member obligations previously established.

Section 12: Creates section 617.0607, F.S., to provide that the involuntary termination of membership must be fair and reasonable.

Section 13: Creates section 617.0608, F.S., to provide clarification that except as otherwise provided in statute, no membership interest may be purchased by the corporation.

Section 14: Amends section 617.0701, F.S., to allow for special meetings to be called on demand of at least 5% of the voting power of members. Increases the number of days, from 60 to 90, for members to provide written consent for corporate action and increases the number of days, from 10 to 30, after obtaining written consent, to provide notice to members who are entitled to vote on corporate action.

Section 15: Amends section 617.0721, F.S., to allow participation of members by remote communication and provides that a corporation may reject a vote, consent, waiver, or proxy appointment if there is a reasonable basis for doubting the validity of the signature or the authority to sign for the member.

Section 16: Amends section 617.0724, F.S., to provide that an approval vote satisfy the greater of the voting requirement in effect or that which is being proposed.

Section 17: Creates section 617.07401, F.S., to provide for the ability of members to bring derivative actions on behalf of the corporation. Procedures and standards are provided.

Section 18: Amends section 617.0801, F.S., to provide a technical change to the title of the section.

Section 19: Amends section 617.0806, F.S., to provide that the articles of incorporation or bylaws may provide staggered terms for directors.

Section 20: Amends section 617.0808, F.S., to provide clarification and more guidelines for the process of removing a director.

Section 21: Amends section 617.0809, F.S., providing a cross reference to section 617.0808(1)(f) regarding filling of vacancies at membership meetings. Also clarified is the powers of the members and directors to fill vacancies on the board, and that the term of a replacement director expires at the next annual meeting.

Section 22: Amends section 617.0833, F.S., providing specific guidelines for quorum and voting by directors on conflict of interest transactions. Specific standards are provided in regard to the approval process. Provisions are also included setting standards for the member voting on conflict of interest transactions.

Section 23: Amends section 617.0833, F.S., making minor wording changes regarding reference to the Internal Revenue Code.

Section 24: Amends section 617.0834, F.S., making minor wording changes regarding reference to the Internal Revenue Code.

Section 25: Amends section 617.1007, F.S., inserting the words “ of incorporation” after articles, for clarification.

Section 26: Amends section 617.1101, F.S., to require the disclosure of the manner and basis of converting memberships into memberships of the surviving corporation when a merger occurs.

Section 27: Amends section 617.1102, F.S., to provide that when a merger occurs between a for profit and not for profit corporation the surviving corporation must be not for profit.

Section 28: Creates section 617.1301, F.S., providing that except as authorized by ss. 617.0505 and 617.1302, a corporation may not make any distributions to its members.

Section 29: Creates section 617.1302, F.S., providing standards as to when a mutual benefit corporation may purchase its memberships.

Section 30: Amends section 617.1405, F.S., providing that the name of a dissolved company is not available until 120 days after the date of dissolution unless the dissolved corporation provides the Department of State with an affidavit permitting the immediate assumption or use of the name by another corporation.

Section 31: Creates section 617.1407, F.S., providing for the treatment of claims against dissolved corporations that were unknown at the time of the dissolution.

Section 32: Creates section 617.1408, F.S., providing for the treatment of claims against dissolved corporations that were known at the time of the dissolution. Requires that a dissolved corporation must distribute remaining funds, after claims are settled, to members in accordance with s. 617.1406, F.S., which provides for the plan of distribution of assets.

Section 33: Provides for the repeal of subsection (6) of section 617.1421, F.S.

Section 34: Amends section 617.1422, F.S., to provide procedures for the reinstatement following administrative dissolution and providing when the name of a dissolved corporation is available.

Section 35: Amends section 617.1430, F.S., providing that at least 50 members or members holding at least 10% of the voting power or a director or other person authorized in the articles of incorporation of any corporation may bring a dissolution suit forward.

Section 36: Amends section 617.1503, F.S., to make minor wording changes from “which” to “that”.

Section 37: Amends section 617.1504, F.S., to allow 90 days for changes to be made to a certificate of authority. Currently the statute allows 30 days.

Section 38: Amends section 617.1506, F.S., to include the terms “other business entity” to include limited liability companies. This change is to prevent name conflicts. Also provide is procedures for corporations to select an alternate name, should theirs not available, and the provisions to confirm there are not duplicative names.

Section 39: Amends section 617.1530, F.S., to make minor wording changes for “secretary” to “Secretary of State”.

Section 40: Amends section 617.1601, F.S., inserting the words “of incorporation” after articles, for clarification.

Section 41: Amends section 617.1602, F.S., providing the inspection of certain records to be conducted at a reasonable location specified by the corporation and expanding the number of days of advance notice from 5 to 10 that is required for requests of inspection of records. A statutory reference to 617.1602 (4) (a) is also removed because the provision referenced no longer exists.

Section 42: Amends section 617.1605, F.S., providing that corporations are only required to provide annual financial statements to members who request them. The contents of the statements are also clarified.

Section 43: Creates section 617.1703, F.S., to provide that any conflicts between the provisions in this chapter and the provisions of Chapter 718, F.S., regarding condominiums; Chapter 719, F.S., regarding cooperatives; Chapter 720 regarding homeowners’ associations; Chapter 721, F.S., regarding timeshares; and Chapter 723 regarding mobile home owners’ associations, the provisions of the other chapters shall apply. Also provided is an exception to these entities from ss. 617.605-617.0608, F.S.

Section 44: Creates section 617.1803, F.S., to provide for the legal consequences of domestication.

Section 45: Amends section 617.1806, F.S., to provide a cross reference to section 617.1805, F.S.

Section 46: Amends section 617.1907, F.S., inserting the phrase “or amendment” after each reference to “repeal”.

Section 47: Repeals section 617.2103, F.S. which exempted corporations from provisions in this chapter, and provided alternative record keeping requirements, member inspection rights, and financial reporting for those exempt corporations. All corporations will be subject to the same requirements.

Section 48: Provides an effective date of October 1, 2008.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

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

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**D. STATEMENT OF THE SPONSOR**

No statement submitted.

**IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

On March 20, 2008, the Committee on Tourism and Trade adopted a strike all amendment by the bill sponsor that makes a number of technical changes to the bill as filed. The amendment also makes the following substantive changes:

- In section 4 of the amendment changes are made to definitions for chapter 607, F.S.:
  - Creates a definition for “department” to mean “department of state”.
  - Amends the definition for “distribution” to provide that a donation or transfer of corporate assets or income to or from another not-for-profit corporation that is exempt from federal and state income taxes is not a distribution for the purpose of ch. 617, F.S., the not for profit act.
  - Amends the definition for “mutual benefit corporation, as created in the bill, to exempt condominium corporations (ch. 718, F.S.), cooperatives(ch. 719, F.S.), homeowners’ associations (ch. 720, F.S.), and mobile home park lots (ch. 723, F.S.).
  - Creates a definition for “successor entity.”
  - Amends the definition for “voting power,” to replace “holders of the shares” with “members.”
- In section 8 of the amendment, exemptions from the prohibition on making distributions are provided for the following: condominium corporations (ch. 718, F.S.), cooperatives (ch. 719, F.S.),homeowners’ associations (ch. 720, F.S.), and mobile home park lots (ch. 723,F.S.) or a corporation where membership in the corporation is required.
- In section 12 of the amendment, the specification as to what will be considered “fair and reasonable” when a member is expelled or suspended is deleted.
- In section 14 of the amendment:
  - Increases the number of days, from 60 to 90, for members to provide written consent for corporate action; and
  - Increases the number of days, from 10 to 30, after obtaining written consent, to provide notice to members who are entitled to vote on corporate action.

- In section 15 of the amendment, provides that a corporation may reject a vote, consent, waiver, or proxy appointment if there is a reasonable basis for doubting the validity of the signature or the authority to sign for the member.
- Deletes section 22 of the bill, which relates to general standards of directors, to restore current law.
- In section 32 of the amendment:
  - Deletes the definition for “successor entity” as it is included, by this amendment, in section 4 of the bill; and
  - Requires that a dissolved corporation must distribute remaining funds, after claims are settled, to members in accordance with s. 617.1406, F.S., which provides for the plan of distribution of assets.
- In section 43 of the amendment, replaces the term “mobile home park lot tenancies” with mobile home owners’ associations and adds in timeshares governed in Chapter 721.
- Deletes section 47 of the bill, which relates to circuit judges authority in conversions to corporation not for profit, to restore current law.

On April 18, 2008, the Economic Expansion and Infrastructure Council reported the bill favorably as a Council Substitute, adopting the travelling strike-all amendment.

This analysis is drawn to the Council Substitute.