HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1233 Corporations
SPONSOR(S): Fresen
TIED BILLS: **IDEN./SIM. BILLS:** SB 2330

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Insurance, Business & Financial Affairs Policy Committee	18 Y, 0 N	Callaway	Cooper
2)	General Government Policy Council		Callaway	Hamby
3)				
4)				
5)				

SUMMARY ANALYSIS

Under most state corporation statutes, including Florida, election of directors by plurality voting is the default rule. In a plurality voting system, director nominees who receive the most votes "for" election are elected, up to the number of seats being filled. In a majority voting system for board of directors, director nominees who receive more than 50 percent of the votes deemed present at the meeting are elected. If no nominee receives a majority, no nominee is elected, and either the incumbent remains in office until a new election is held or a vacancy results on the board which is filled the way another vacancy would be filled. Under current law, for a corporation organized in Florida to adopt majority voting as the voting standard for electing its directors, the corporation must go to its shareholders and seek to have the shareholders adopt an amendment to the corporation's articles of incorporation.

The bill allows public corporations to use an alternative voting requirement for the election of directors through the enactment or amendment of bylaws, as opposed to the plurality voting requirement provided for in current law. The bylaw voting requirement must require a vote greater than a plurality and once adopted by shareholders, it may not be further amended or repealed by the board of directors. The bill would allow for directors or shareholders to adopt a majority voting rule, which would require a majority of the votes of a quorum to elect a director.

Under Florida law, a director may resign at any time by delivering written notice to either the board of directors, its chair, or to the corporation and the resignation is effective when the notice is delivered, unless the notice specifies a later effective date. If a resignation is made effective at a later date, the board of directors may fill the future vacancy before the effective date if the board of directors provides that the successor does not take office until the effective date. The bill allows for the resignation of a director to be effective upon the subsequent happening of an event, as opposed to a specific effective date or upon delivery of a resignation. The bill also permits a board to fill a vacancy caused by resignation to be filled before the effective date of the resignation, as long as the successor does not take office until the effective date. The bill provides that when the resignation of a director is conditioned on the subsequent happening of an event, the director's position may be filled before the vacancy occurs, but the director may not take office until the position is vacant.

The bill does not have a fiscal impact to state or local government and is effective on July 1, 2009.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Florida businesses are organized into five general categories with the associated statutory chapters governing the business formation, operation, merger, conversion, and dissolution:

- Corporations (ch. 607, F.S);
- Limited Liability Companies (ch. 608, F.S.);
- Not-For-Profit Corporations (ch. 617, F.S.);
- Limited Partnerships (Part I, ch. 620, F.S); and
- Partnerships (Part II, ch. 620, F.S.).

Chapter 607, F.S. is the "Florida Business Corporation Act (Act)."[1] This bill makes changes to the Act relating to the election of directors of public corporations, director resignations, and filling board of director vacancies.

Election of Corporate Board of Directors

Under most state corporation statutes, including Florida, election of directors by plurality voting is the default rule. In a **plurality voting system**, director nominees who receive the most votes "for" election are elected, up to the number of seats being filled. The plurality need not be a majority of the votes cast, nor a majority of the quorum. For example, in an election for seven directors, the seven nominees receiving the most votes are elected even if some or all of the winning candidates did not receive a majority of the votes. Because in most public corporations the number of vacancies on the board of directors frequently equals the number of nominees, a nominee will be elected to the board even if he or she receives only one vote. Under the plurality standard, withheld votes or votes "against" a certain director might send a message to the corporation and director, but do not generally affect the outcome of director elections.

In a **majority voting system** for board of directors, director nominees who receive more than 50 percent of the votes deemed present at the meeting are elected. If no nominee receives a majority, no nominee is elected, and either the incumbent remains in office until a new election is held or a vacancy results on the board which is filled the way another vacancy would be filled. Under current law, for a corporation organized in Florida to adopt majority voting as the voting standard for electing its directors, the corporation must go to its shareholders and seek to have the shareholders adopt an amendment to the corporation's articles of incorporation, a process that for companies with more than 35 shareholders requires both board and shareholder approval.

[1] s. 607.0101, F.S. (2008).

In the last several years, interest in majority voting in elections of directors has grown rapidly among shareholder and corporate governance activists, and many significant public companies have adopted bylaws to facilitate majority voting. In The Florida Business Laws Annotated[2], the authors comment on this issue as follows:

> In recent years, there has been growing shareholder pressure on publicly-held companies to change the minimum vote for election from a simple plurality of votes cast to a majority of the quorum. Where elections are uncontested, which is the usual case, the plurality standards assure nominees of election as long as one or more votes are cast in their favor, regardless of withheld or opposing votes. The change to majority voting makes it more difficult for nominees, as they must obtain the favorable vote of at least a majority of the quorum. Negative votes or abstentions would therefore count against the nominee.

Additionally, the American Bar Association's Model Business Corporation Act (Model Act) has been amended to offer an alternative voting requirement.[3] Under s. 10.22 of the Model Act, a corporation may opt to use a voting system under which directors are initially elected by plurality vote, but serve for only a limited amount of time, if he or she receives more votes against, than for, his or her election. However, this rule would not apply to contested elections.[4] Generally, Florida corporate law is patterned after the Model Act.

Georgia recently changed its law relating to corporate board of director voting to allow majority voting.[5] Although Georgia maintains plurality voting for directors as the default rule, public companies are allowed to adopt majority voting in the articles of incorporation or in a bylaw adopted by the public corporation's board of directors. If such a bylaw is adopted, director nominees must receive a majority of the votes cast in order to be elected or reelected to the company's board of directors.

In addition to state actions, many boards of public corporations have implemented corporate governance policies establishing some form of majority voting system. Pfizer, Inc. adopted a corporate governance policy that requires a nominee who receives less than a majority of votes in an uncontested election to submit his or her resignation to the board of directors for their ultimate consideration. These policies, widely referred to as "Pfizer-type policies," do not upset the plurality voting standard, but instead implement a director resignation mechanism. With the increasing prevalence of director voting being able to be changed by bylaw, corporations generally are no longer adopting "Pfizer-type policies" but rather adopting bylaws that require nominees in uncontested elections to receive a majority of votes cast in order to be elected to the board. In fact, Pfizer shifted to the bylaw approach in 2007.

In Florida, unless otherwise provided under the articles of incorporation, directors of a corporation are elected by a plurality of the votes cast by the shareholders entitled to vote at a meeting at which a quorum is present. If a corporation in Florida wants to change its election requirements, it needs to solicit shareholder approval to amend its articles of incorporation and has to follow the same process to later modify those amended articles, because under s. 607.1002, F.S., a board of directors is limited as to the actions it may take without shareholder approval. Additionally, a public corporation has to follow any of the Security and Exchange Commission's requirements when soliciting the corporation's proxy for a change to the articles of incorporation, which may be a time-consuming process.[6]

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[2] Stuart R. Cohn et al., Florida Business Laws Annotated pg. 80 (2008-2009 ed.).
[3] Claudia H. Allen, *Study of Majority Voting in Director Elections*, available at http://www.ngelaw.com/files/upload/majoritystudy111207.pdf and Simpson Thatcher, *Majority Voting in Director Elections; A Look Back and A Look Ahead*, available at http://www.simpsonthacher.com/content/publications/pub560.pdf.
[4] *Id.*
[5] Ga. Code Ann. Section 216 and http://www.jonesday.com/files/Publication/dc0c2d45-16f3-4642-973f-8fdad78dbbb9/Presentation/PublicationAttachment/762998ea-80ef-4dac-980d-9824e047d05f/GeorgiaFacilitates.pdf
[6] *See note 3 supra.*

The bill allows public corporations to use an alternative voting requirement for the election of directors through the enactment or amendment of bylaws, as opposed to the plurality voting requirement provided for in current law. The bylaw voting requirement must require a vote greater than a plurality and once adopted by shareholders, it may not be further amended or repealed by the board of directors. The bill would allow for directors or shareholders to adopt a majority voting rule, which would require a majority of the votes of a quorum to elect a director. Although unlikely, the bill would also allow for directors or shareholders to adopt a supermajority voting rule, which would require a supermajority of votes to elect a director.[7]

Resignation of Directors

Under Florida law, a director may resign at any time by delivering written notice to either the board of directors, its chair, or to the corporation and the resignation is effective when the notice is delivered, unless the notice specifies a later effective date.[8] If a resignation is made effective at a later date, the board of directors may fill the future vacancy before the effective date if the board of directors provides that the successor does not take office until the effective date.[9] This prevents a director who has resigned from being "held over" after the effective date of his resignation until his or her position has been filled.

The Model Act is similar to Florida law in that it contains the same effective date language for a resignation, but has no provision concerning the filling of a vacancy caused by a resignation that is effective at a later date.[10]

The bill allows for the resignation of a director to be effective upon the subsequent happening of an event, as opposed to a specific effective date or upon delivery of a resignation. The bill also permits a board to fill a vacancy caused by resignation to be filled before the effective date of the resignation, as long as the successor does not take office until the effective date. Furthermore, resignations that are effective at a later date, or conditioned upon a later event, may be irrevocable.

Filling Board of Director Vacancies

Florida law currently provides that if there is a vacancy on a board of directors, it may be filled by the affirmative vote of a majority of the remaining directors or by the shareholders, unless the articles of incorporation provide otherwise.[11] If a vacancy will occur at a specific later date, regardless of whether it is due to a resignation, it may be filled before the vacancy occurs.[12] However, the new director may not take office until the vacancy occurs.[13] The Model Act provides for the same procedure for filling director vacancies.[14]

The bill provides that when the resignation of a director is conditioned on the subsequent happening of an event, the director's position may be filled before the vacancy occurs, but the director may not take office until the position is vacant. This provision in the bill is consistent with the provisions in the bill relating to resignation of directors.

B. SECTION DIRECTORY:

Section 1: amends s. 607.0728, F.S. relating to voting for directors and cumulative voting.

Section 2: amends s. 607.0807, F.S. relating to resignation of directors.

Section 3: amends s. 607.0809, relating to vacancies on the board of directors.

[7] Opinion of likelihood of supermajority vote rule being utilized by public corporations by Professor Stuart R. Cohn, Associate Dean for International Studies, University of Florida Levin College of Law, (received via conference on March 25, 2009 with staff of the Insurance, Business, & Financial Affairs Policy Committee).
[8] See s. 607.0807, F.S.
[9] *Id*.
[10] See § 8.07 of the ABA Model Business Corporation Act.
[11] See s. 607.0809, F.S.
[12] *Id*.
[13] *Id*.
[14] See § 8.10 of the ABA Model Business Corporation Act.

Section 4: provides an effective date of July 1, 2009.

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:

Because public corporations have to currently solicit shareholder approval to amend their articles of incorporation to change the mechanics of director elections, which is a time-consuming and costly process, the bill's provisions would save public corporations wanting to change their election processes time and money.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. This bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None provided in the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

None.