

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

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Prepared By: The Professional Staff of the Committee on Judiciary

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BILL: CS/SB 892

INTRODUCER: Commerce and Tourism Committee and Senator Passidomo

SUBJECT: Business Organizations

DATE: March 22, 2019

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Harmsen</u>	<u>McKay</u>	<u>CM</u>	<u>Fav/CS</u>
2.	<u>Tulloch</u>	<u>Cibula</u>	<u>JU</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>ATD</u>	_____
4.	_____	_____	<u>AP</u>	_____

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 892 is a comprehensive amendment to the Florida Business Corporation Act (FBCA), ch. 607, F.S. Representatives of the Florida Bar's Business Law Section recommend these revisions to modernize the FBCA, incorporate updates from the Model Business Corporation Act (Model Act), and harmonize the FBCA with the recently updated Florida Revised Limited Liability Corporate Act (FRLCA), ch. 605, F.S.

The bill modifies and creates several provisions regarding corporate governance. Significantly, these provisions of the bill:

- Modify the process for the correction of documents filed by a corporation;
- Authorize articles of incorporation and bylaws to include exclusive forum provisions in limited circumstances;
- Permit proxy access provisions in a corporation's bylaws;
- Modernize service of process provisions for corporations;
- Allow remote participation at shareholder meetings;
- Modify how a vacancy on a corporation's board of directors is filled;
- Update provisions regarding shareholder agreements;
- Clarify the prescribed composition, operation, and authority of boards and committees;
- Reorganize sections regarding derivative action and indemnification;
- Amend burdens of proof in provisions regarding director conflict of interest;

- Modify the processes of judicial dissolution of a corporation and appointment of receivers and custodians made in the process thereof;
- Update and modernize laws regarding mergers, share exchanges, and conversions;
- Expand corporate domestication under additional circumstances;
- Clarify appraisal rights provisions; and
- Make conforming changes to mirror the FRLCA provisions regarding corporate names, registered agent appointments and successorships, and qualifications to transact business in Florida.

The bill takes effect on January 1, 2020.

## II. Present Situation:

Florida generally follows the revised Model Act as a basis for its laws that govern for-profit corporations.<sup>1</sup> The Corporate Laws Committee of the American Bar Association's Business Law Section (ABA) promulgates the Model Act, and most recently re-worked the Model Act in its entirety in 2016.<sup>2</sup> The Florida Business Corporation Act (FBCA)<sup>3</sup> was last updated as a whole in 1989, and therefore does not best reflect the modern state of corporate law.<sup>4</sup>

Further discussion of the present situation is discussed below in conjunction with the Effect of Proposed Changes.

## III. Effect of Proposed Changes:

The bill's proposed changes to the FBCA generally derive from or conform to three sources:

- (1) The ABA's Model Act.<sup>5</sup>
- (2) The Delaware General Corporation Law.<sup>6</sup>
- (3) Florida's Revised Limited Liability Company Act, ch. 605, F.S.<sup>7</sup>

### Filing of Records and General Provisions (Sections 1-15)

The FBCA requires domestic and foreign corporations that seek to transact business in Florida to register and file annual reports and other notices with the Department of State (Department). These documents must be executed by an officer, incorporator, or fiduciary and contain information as prescribed by law. The Department determines whether submitted filings and forms meet the pertinent statutory requirements and then records and indexes those filings in its

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<sup>1</sup> 8A Fla. Jur 2d *Business Relationships* §4 (2018).

<sup>2</sup> American Bar Association, *Model Business Corporation Act* (2016), available at [https://www.americanbar.org/content/dam/aba/administrative/business\\_law/corplaws/2016\\_mbca.pdf](https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mbca.pdf) (last visited Mar. 20, 2019).

<sup>3</sup> Section 607.0101, F.S. (providing for short title); ch. 607, F.S.

<sup>4</sup> Ch. 89-154, Laws of Fla.

<sup>5</sup> *See n. 2, supra.*

<sup>6</sup> Delaware's corporate law statutes are considered the "gold standard" for corporate law. *See generally* Michael B. Dorff, *Why Public Benefit Corporations?*, 42 DEL. J. CORP. L. 77, 80 (2017) ("Delaware has found a formula that has attracted a clear majority of the major corporations in the U.S. Delaware law is the gold standard.") (footnote omitted).

<sup>7</sup> The Florida Bar Business Law Section, *Proposed Modifications to Chapter 607 (Florida Business Corporation Act)*, Jan. 24, 2019 (on file with Senate Judiciary Committee).

database of records.<sup>8</sup> If the Department refuses to file a document, the filing corporation may seek to remedy the defect, or may appeal the matter to a court of competent jurisdiction.

**Section 1** amends s. 607.0101, F.S., to divide the FBCA into three parts and clarifies that the provisions of Part I, ch. 607, F.S., apply generally to all corporations, including social purpose and benefit corporations.<sup>9</sup>

**Section 3** amends s. 607.0120, F.S., to allow a corporation to make its articles of incorporation or amendments thereto, terms of shares, mergers, share exchanges, domestications, or conversion transactions dependent on extrinsic facts.<sup>10</sup> The corporation must state both the fact and the effect it will have on the document. This section prohibits specific terms from being made dependent on extrinsic facts, including the identity of a corporation's registered agent and the effective date of a document.

**Sections 6 and 7** amend ss. 607.0123 and 607.0124, F.S., respectively, to clarify the determination of the effective date and effective time a document is filed, as follows:

- A corporation may make the effective date of its article of incorporation retroactive up to 5 days before the date of filing;
- No document, subject to provisions otherwise in law, may include a delayed effective date of more than 90 days from the date of filing;
- The default effective time of a document is changed from the “start of business” to “12:01 am;” and
- The default time zone is that of the location where the document was filed.

**Sections 6 and 7** also create a process for the withdrawal of a filing delivered to the Department. This withdrawal statement must be signed by or, pursuant to an agreement, signed on behalf of each person who signed the underlying document, and must be filed with the Department prior to the effective date of the document to be withdrawn. A withdrawal statement may not be filed with a delayed effective date.

**Section 7** eliminates the 30-day statute of limitations to correct a document filed by a corporation. A corporation may now correct a document at any time.<sup>11</sup>

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<sup>8</sup> Florida Department of State, Division of Corporations, *About Us*, <https://dos.myflorida.com/sunbiz/about-us/> (last visited Mar. 11, 2019). *See also*, s. 607.0125(4), F.S.

<sup>9</sup> Parts II and III contain additional provisions that specifically apply to social purpose corporations, s. 607.504, F.S., and benefit corporations, s. 607.604, F.S., respectively. The changes to Parts II and III are technical, conforming changes. *See* discussion of bill sections 231-91, *infra*.

<sup>10</sup> Extrinsic facts refer to information available from credible public sources upon which terms in the filed document or plan may be dependent. *See* ABA, *Model Business Corporation Act* (2016), p. 5, available at [https://www.americanbar.org/content/dam/aba/administrative/business\\_law/corplaws/2016\\_mbca.pdf](https://www.americanbar.org/content/dam/aba/administrative/business_law/corplaws/2016_mbca.pdf) (last visited Mar. 20, 2019). “Common examples” of extrinsic facts “are references to an interest rate such as the federal funds rate or to securities market prices.” *Id.* The Commentary to the Model Act notes that the purpose for changes to the filing requirements “are intended to minimize both the number of documents to be processed by the secretary of state and the number of disputes between persons seeking to file documents and the secretary of state as to the legal efficacy of documents.” *Id.* However, the bill does not permit a foreign corporation to make its certificate of authority dependent on extrinsic facts.

<sup>11</sup> However, the bill retains the provision that filing fees may apply to articles of correction not filed within 15 days after the notice of filing is sent under s. 607.0125, F.S.

**Section 8** amends s. 607.0125, F.S., to clarify that the Department files a document by “stamping or otherwise endorsing” it. Prior law only required to the Department to “record” it. Additionally, the section permits the Department to send a notice of filing by electronic mail, but limits the Department to sending a copy of the actual filed document through the U.S. mail.

**Section 9** amends s. 607.0126, F.S., to limit a corporation’s venue for appeal of the Department’s refusal to file a document to the Leon County Circuit Court. Previously, a corporation could pursue an appeal in either Leon County or the county in which its principal office is located. Additionally, section 9 eliminates the 30-day statute of limitations for appealing the Department’s refusal to file a document.

**Section 10** amends s. 607.0127, F.S., to require that certified copies of documents bear the secretary of state’s signature in either original or facsimile form, and bear the state seal. Prior language did not require any specific mark. This section adds language that requires certificates issued by the Department to be received by all courts, public offices, and official bodies as prima facie evidence of the facts stated therein.

**Section 11** addresses a certificate of status which is a summary prepared by the Department of a corporation’s activity, especially related to timely reporting and payment of fees. Section 11 amends s. 607.0128, F.S., to clarify the information required on a certificate of status, and that the Department may require the requisite fee to be paid prior to its issuance.

**Section 12** amends s. 607.0130, F.S., to make a technical change that eliminates certain express powers of the Department. The trimmer version of s. 607.0130, F.S., does not, however, reduce the Department’s authority or power to administer the act.

**Sections 13-15** amend ss. 607.01401-.01402, F.S. and creates s. 607.01403, F.S., to add definitions for use in ch. 607, F.S., including the definition of “department,” which replaces the term “State” throughout the act when referring to the Florida Department of State.

**Section 14** updates forms of notice to permit electronic forms of notice, specifically requiring individual shareholder and director consent to send notice by e-mail. The section allows a corporation’s articles of incorporation or bylaws to override the consent requirement for electronic notice to directors only. Additionally, the bill incorporates terms from the federal “E-Sign Act”<sup>12</sup> and requires that the act will control to the extent permitted under federal law.<sup>13</sup>

**Section 15** defines “qualified director,” which is used in updated provisions relating to derivative actions, transactions that involve a director conflict of interest, and indemnification. A qualified director is one who has neither a material interest nor relationship with any of the interests at issue, and therefore is truly independent in his or her determinations.

**Sections 2, 4, and 5** make conforming changes to ss. 607.0102, 607.0121, and 607.0122, F.S., respectively.

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<sup>12</sup> See 15 U.S.C. s. 7001, et seq. (“Electronic Signatures in Global and National Commerce Act”).

<sup>13</sup> 15 U.S.C. s. 7002(a)(2) (exempting from federal preemption state laws that expressly adopt and modify, limit, or supersede the “E-sign Act.”).

### **Incorporation (Sections 16-23)**

A corporation must file articles of incorporation with the Department before it may transact business in the state. Generally, s. 607.0202, F.S., requires articles of incorporation to include the corporation's name and address, the number of shares it is authorized to issue, and information about the registered agent.

**Section 19** amends s. 607.0204, F.S., to hold persons liable who act or transact business on behalf of a corporation "knowing" that the corporation has not yet been formed under the act. The term "knowing" replaces "having actual knowledge" and may be read by the courts more broadly to hold someone liable if he or she "knew or should have known" the corporation was not yet incorporated. Section 19 also removes the liability exemption for others having actual knowledge that the corporation had not yet been formed.

**Section 20** amends s. 607.0205, F.S., to reduce the amount of time (from 3 to 2 days before the meeting) that a director must receive notice of a corporation's organizational meeting.

**Sections 17 and 21** amend ss. 607.0202 and 607.0206, F.S., and **section 23** creates s. 607.0208, F.S., to allow articles of incorporation and bylaws to include exclusive forum<sup>14</sup> provisions relating to the resolution of internal corporate claims. However, **section 23** prohibits articles of incorporation or bylaws from including forced arbitration clauses relating to the resolution of an internal corporate claim.

**Sections 17 and 21** limit the adoption of articles of incorporation and bylaws provisions that make shareholders liable for fees related to internal corporate claims they institute or participate in. However, section 71, *infra*, amends s. 607.0732, F.S., to allow such provisions pursuant to a shareholder agreement.

**Section 21** continues to allow a corporation to include any provision in its bylaws that is consistent with law and its articles of incorporation, but now explicitly allows provisions that permit or limit proxy access provisions.

**Section 23** creates s. 607.0208, F.S., which defines an "internal corporate claim" as:

- Any claim based on a director's, officer's, or shareholder's violation of duty;
- Any derivative action or proceeding brought on the corporation's behalf;
- Any action that asserts a claim arising pursuant to the articles of incorporation, bylaws, or ch. 607, F.S.; or
- Any action asserting a claim governed by the internal affairs doctrine not otherwise included in the forgoing actions.

**Sections 16, 18, and 22** amend ss. 607.0201, 607.0203, and 607.0207, F.S., to make clarifying and conforming changes that do not substantively change existing law.

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<sup>14</sup> BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "forum" in applicable part as "[a] court or other judicial body; a place of jurisdiction.").

### **Purposes and Powers (Sections 24-27)**

**Section 24** amends s. 607.0301, F.S., to set a default corporate purpose of “engaging in any lawful business” unless a more limited purpose is stated in a corporation’s articles of incorporation. It also limits corporations that engage in a regulated business under another Florida statute from incorporating under ch. 607, F.S., unless the underlying regulating chapter expressly permits.

**Section 27** amends s. 607.0304, F.S., to correct a term, replacing “Attorney General” with “Department of Legal Affairs.” The title has also been changed to mirror the ABA model act.

**Sections 25 and 26** amend ss. 607.0302 and 607.0303, F.S., to make clarifying and conforming changes that do not substantively change existing law.

### **Corporate Names (Sections 28-30)**

Section 607.0401, F.S., requires corporations to file a corporate name that is distinguishable and clearly indicates that the corporation is not a natural person.

**Section 28** amends s. 607.0401, F.S., to permit corporations to register under a name that is indistinguishable from another entity’s name if it files the written consent of the similarly named entity with its registration.

**Section 29** creates s. 607.04021, F.S., to restore a practice that allows a corporation to reserve its name for 120 days prior to its incorporation.<sup>15</sup> The owner of a reserved corporate name is also permitted to transfer the reservation to another person.

**Section 30** amends s. 607.0403, F.S., to make clarifying and conforming changes that do not substantively change existing law.

### **Office and Agent (Sections 31-37)**

A corporation transacting business in Florida must designate and maintain a registered agent and registered office that is located in Florida.<sup>16</sup> Currently, either a Florida resident or a corporation authorized to do business in Florida may serve as a corporation’s registered agent. **Section 31** updates these qualifications in s. 607.0501, F.S., to allow any business entity (e.g., LLCs, partnerships, etc.) authorized to do business in Florida to serve as a registered agent.

**Section 31** also explicitly provides a registered agent’s duties, including forwarding documents served to the corporation and providing proper notice of its resignation as the registered agent. This section also clarifies that a corporation that has failed to comply with this subsection may defend itself in Florida court actions, but may not prosecute or otherwise maintain such actions until it has appointed a registered agent.

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<sup>15</sup> Ch. 98-101, § 15, Laws of Fla.

<sup>16</sup> Section 607.0501, F.S.

**Sections 32** amends s. 607.0502, F.S., to require a corporation's designation of a successor registered agent to include a written statement of acceptance from the successor registered agent which operates to designate the new registered agent at the same moment of its acceptance of the position.

**Sections 33 and 34** creates ss. 607.0503 and 607.05031, F.S., to re-designate current law regarding a registered agent's resignation<sup>17</sup> or change of name or address,<sup>18</sup> respectively.

**Section 35** creates s. 607.05032, F.S., to subject delivery of notice to the Department to a different standard than the standard set forth in s. 607.0141, F.S. (providing that receipt of notice is when notice is actually received by the Department). Under s. 607.05032, F.S., a check sent to the Department for annual report or supplemental fees is deemed received as of the postmark on the transmitting envelope or package.

**Section 36** amends s. 607.0504, F.S., to update methods of service of process for corporations in the event the corporation ceases to have a registered agent or the registered agent cannot be served, requiring attempts to be made on certain parties before others may be served.

**Section 37** makes a clarifying change in s. 607.0505, F.S., that does not substantively affect existing law.

### **Shares and Distribution (Sections 38-51)**

A corporation's articles of incorporation must prescribe the classes of shares and the number of each class that the corporation is authorized to issue.<sup>19</sup> At least one class of shares must have unlimited voting rights, and one (which may be the same as the voting class) that is entitled to the corporation's net assets. The corporation may issue the number of shares as detailed in its articles of incorporation. Shareholder and corporate rights regarding the shares are laid out in statute, but may also be defined in the corporation's articles of incorporation, bylaws, or agreement.

**Section 38** amends s. 607.0601, F.S., to clarify that a corporation may define both series and classes of shares that the corporation will issue. This section also defines the preferences, limits, and rights assigned to classes or series of shares as "terms," and, as in section 1, *supra*, permits such terms to be based on extrinsic facts, such as interest rates.

**Sections 39** amends s. 607.0602, F.S., to grant boards authority to reclassify the class or series of any unissued shares, and to determine the shares' terms without shareholder approval. Likewise, **section 50** amends s. 607.0631, F.S., to allow a board, without shareholder approval, to reacquire its issued shares in order to effectuate a reduction in its overall shares. However, any shares the corporation holds in a fiduciary capacity for the benefit of another may not be considered the corporation's property for the purpose of reducing its number of shares.

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<sup>17</sup> Section 607.0502(2), F.S.

<sup>18</sup> Section 607.0502(3), F.S.

<sup>19</sup> Section 607.0601, F.S.

**Section 40** removes requirements in s. 607.0604, F.S., that the board authorize the issuance of a scrip<sup>20</sup> only when considered desirable, and that the board's good faith judgment of the fair value of fractions of a share is conclusive.

**Section 41** amends the duration of time provided for in s. 607.0620, F.S., that a corporation must wait to sell shares to satisfy the debt incurred as the result of a subscription share from 20 days after demand is *sent* to 20 days after its *delivery*.

**Section 45** amends s. 607.0624, F.S., to authorize boards of directors to delegate to committees and officers the ability to issue equity compensation awards.

**Section 51** amends s. 607.06401, F.S., to clarify that a board may fix a record date to determine shareholders eligible for distributions made pursuant to the terms of their shares, but that date may not be retroactive. Additionally, this section excludes liquidations pursuant to ss. 607.1401-607.14401, F.S., from its application.

**Sections 42-44, and 46-49** make clarifying changes to ss. 607.0621-607.0623 and 607.0625-607.0630, F.S., respectively, that do not substantively affect existing law.

## **Shareholders (Sections 52-81)**

### ***Shareholder Meetings***

Corporations are required to hold an annual shareholders meeting to elect directors and transact business. A board of directors, persons authorized to call such a meeting, or a specified percentage of shareholders may call a special meetings for an express, limited purpose.

**Sections 52 and 53** amend ss. 607.0701 and 607.0702, F.S., respectively, to clarify that shareholders may participate in meetings by remote communication. Additionally, portions of existing ss. 607.0701 and 607.0702, F.S. were moved to **section 59**, which creates s. 607.0709, F.S., and outlines limits on participation in a meeting by remote communication. **Section 56** amends s. 607.0705, F.S., to require a corporation's board of directors to give notice of the types of remote communication that a shareholder can use to participate in a meeting.

If a corporation fails to hold an annual or special meeting in a timely manner, a court may order a meeting. **Section 54** amends s. 607.0703, F.S., to lengthen from 13 to 15 months the amount of time a corporation has to hold its annual meeting or undertake action by written consent before a court may order a meeting or other action. Section 54 also recognizes a court's ability to establish quorum requirements for separate voting groups at a meeting held upon its call.

**Sections 56 and 57** make clarifying changes to ss. 607.0705 and 607.0706, F.S., respectively, that do not substantively affect existing law.

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<sup>20</sup> BLACK'S LAW DICTIONARY (10<sup>th</sup> ed. 2014) (defining a "scrip issue" as synonymous with a "bonus issue"; defining a "bonus issue" as a corporation's "offer of free shares to existing shareholders, usually in proportion to their holdings and especially as an alternative to dividend payout.").



### ***Voting Rights***

Current law allows certain shareholders to instigate a vote by written consent. If the shareholders deliver a sufficient number of votes by written consent to the corporation within a 60-day timeframe, the matter is adopted and the corporation must give notice of the action to all shareholders who did not give written consent. **Section 55** updates s. 607.0704, F.S., to allow a corporation to delay the effectiveness of a written consent vote for a reasonable time to allow it to count the votes delivered by written consent, and also clarifies that a corporation's failure to give notice of the outcome of a written consent vote does not affect the vote's outcome.

A corporation must compile a list of shareholders eligible to participate in the corporation's meetings on the record date at a fixed period prior to the meeting. Any shareholder may inspect and copy this list.

**Section 58** amends s. 607.0707, F.S., to expressly allow a corporation's bylaws to establish more than one record date, or bifurcated record dates, to establish separate issues, e.g., which shareholders may vote at or are entitled notice to a meeting, who may demand a special meeting, or who may take other specified actions. This section also sets certain default record dates if the corporation does not establish them in their bylaws.

**Sections 59** creates s. 607.0709, F.S., and **Section 60** amends s. 607.0720, F.S., to adopt language to further implement bifurcated record dates, explicitly exclude shareholders' electronic mail addresses from the shareholder list, and remove a required \$5,000 civil penalty for the improper sale or distribution of a shareholder's list. The Florida Bar Business Law Section's commentary on the proposed bill states that the removal of the required penalty gives courts judicial discretion in determining a penalty for improper disclosure of the shareholder list.

A shareholder with voting shares is entitled to at least one vote per share on matters that are subject to a vote. However, if a corporation holds its own shares indirectly through a second corporation that it controls, those shares do not entitle their corporation owner to a vote. **Section 61** amends s. 607.0721, F.S., to further preclude a corporation from using shares it owns either directly or indirectly as a source of voting rights.

**Section 63** clarifies by amendment to s. 607.0723, F.S., the process required to create a beneficial ownership certificate, which is a designation of a third party who is treated as the record shareholder when the shares are actually held by an intermediate party. Specifically, the section requires a beneficial ownership certificate to be signed by or assented to by the record shareholder and the person on behalf of whom the shares are held.

**Section 68** creates the office of inspector of elections in s. 607.0729, F.S. A public corporation must, and any other corporation may, appoint one or more inspectors of elections to determine voting results at shareholder meetings. An inspector of elections generally determines the validity and number of votes cast and makes a written report. The inspector must be strictly impartial, and should the inspector's activities be challenged, determinations of law by inspectors are reviewed by the courts *de novo*. **Section 64** incorporates the role of an inspector of elections in s. 607.0724, F.S., and expands corporations' or inspector of elections' scope of scrutiny to

include ballots and shareholder demands in addition to votes, consents, waivers, or proxy appointments. Determinations by an inspector of elections is controlling under this section.

**Sections 70 and 71** amend ss. 607.0731 and 607.0732, F.S., to distinguish voting agreements from shareholder agreements. A voting agreement is one between shareholders that provides how they will vote on a particular subject. A shareholder agreement is a written agreement among shareholders regarding specific matters outlined in s. 607.0732(1), F.S. This bill expands matters that may be subject to a shareholder agreement to include the:

- Imposition of shareholder liability for participation in an internal corporate claim; and
- Establishment of a mechanism for breaking deadlock between the corporation's directors or shareholders or to address an oppressive action that a shareholder in a judicial dissolution proceeding asserts to exist.

**Section 67** amends the definition of a public company in s. 607.0728, F.S., to mean corporations with shares registered pursuant to section 12 of the Securities Exchange Act of 1934, rather than corporations with shares listed on the national securities exchange. **Section 71** amends s. 607.0732(4), F.S., to make a conforming reference, providing that shareholder agreements cease to be valid when shares of a corporation are registered pursuant to section 12 of the Securities Exchange Act of 1934, rather than listed on the national securities exchange or other national securities association.

**Sections 62, 65-66, and 69** make clarifying changes to ss. 607.0722, 607.0725-607.0727, and 607.0730, F.S., that do not substantively affect existing law.

### *Derivative Actions*

A shareholder derivative action is a proceeding brought by a shareholder on behalf of a corporation to assert a claim that the corporation has not (or will not) itself raise and prosecute.<sup>21</sup> Under current Florida law, s. 607.07401(2), F.S., a shareholder may not pursue a derivative action in court before he or she demands that the corporation take specific action and permits the corporation 90 days to investigate and respond, *unless* irreparable injury to the corporation would result from waiting 90 days. If the corporation refuses to act, or ignores the shareholder's demand for at least 90 days, then the shareholder may file a complaint, initiating a lawsuit.

**Section 72** repeals s. 607.07401, F.S., which is currently the single statutory section governing shareholders' derivative actions. However, **sections 73-79** break out the substance of s. 607.07401, F.S., and divides its procedural aspects among seven newly created statutory provisions, conforming it to the ABA Model Act. These procedural aspects, respectively, are: (1) standing, s. 607.0741; (2) pleading requirements, s. 607.0742; (3) stay of proceedings, s. 607.0743; (4) dismissal of action, s. 607.0744; (5) discontinuance or settlement, s. 607.0745; (6) proceeds and expenses following termination of action, s. 607.0746; and (7) applicability to foreign corporations, s. 607.0747.

In **section 74** creating s. 607.0742, the pleading requirements for a shareholder's derivative action are expanded. First, the shareholder may initiate a derivative action without waiting 90

<sup>21</sup> Deborah DeMott, *Shareholder Derivative Actions: Law and Practice*, § 1:1 (Nov. 2018).

days for the corporation to respond to his or her demand if the shareholder alleges with particularity that irreparable injury to the corporation would result from waiting the 90 days, *or that the misapplication or waste of corporate assets causing material injury to the corporation would result by waiting the 90 days.* Further, the shareholder may initiate a derivative action without first making a demand when the shareholder alleges with particularity the reasons the demand was not made, i.e., a demand would have been futile.

Additionally, **sections 73-79**:

- Remove the requirement that a shareholder maintain his or her shares in the corporation during the entirety of the derivative action that the shareholder initiated;
- Replace the term “independent director” with “qualified director,” which is defined in s. 607.0143(a), F.S., of the bill, as a director who has neither a material interest in the outcome of the proceeding, nor a material relationship with a person who has a material interest in the proceeding;
- Permit a court to order the plaintiff in a derivative action to pay the defendant’s expenses and attorney fees if the court finds that the plaintiff began or maintained the action without reasonable cause or for an improper purpose; and
- In order not to implicate the internal affairs doctrine,<sup>22</sup> provide that a derivative proceeding may be filed on behalf of a foreign corporation but the procedural matters outlined in ss. 607.0743 (stays), 607.0745 (discontinuance or settlement), and 607.0746, F.S. (proceeds and expenses), are governed by the substantive laws of the jurisdiction where the foreign corporation is incorporated.

### ***Alternatives to Judicial Dissolution***

When harm is threatened to or incurred by a corporation as a result of either (1) a deadlock between its directors or (2) a director’s fraudulent activity, a shareholder may petition a court to appoint a receiver or custodian to manage the corporation’s business and affairs. However, a shareholder’s only procedural option under current law for the appointment of a receiver or custodian in these two situations, or to appoint a provisional director in the case of deadlock between the directors, is to seek judicial dissolution of the corporation under s. 607.1430, F.S. **Sections 80 and 81** create separate, alternative procedures to judicial dissolution proceeding for the appointment of a custodian, receiver, or provisional director.

Specifically, **section 80** creates s. 607.0748 establishing an alternative procedure to judicial dissolution when one of the two situations above arises (injury resulting from deadlock between directors or director fraud). Section 607.0748 authorizes a court to appoint a receiver or custodian to manage a corporation’s business and other affairs when a shareholder establishes one of these two situations during a full, properly noticed hearing. If the court appoints a custodian or receiver or both, it must specify the powers of each in its order. A custodian exercises all powers of the corporation in place of the board of directors; whereas a receiver may dispose of corporate assets and defend or bring suit on the corporation’s behalf.

Similarly, **section 81** creates s. 607.0749, F.S., establishing a separate, alternative procedure to judicial dissolution, allowing a shareholder to petition a court to appoint a provisional director to

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<sup>22</sup> “The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation’s internal affairs[.]” *Edgar v. Mite Corp*, 457 U.S. 624, 645 (1982).

break a deadlock between the directors that cannot be broken by shareholder action. The court has discretion to appoint an impartial provisional director who is neither a shareholder nor a creditor of the corporation to report back to the court on the status of the deadlock. The provisional director is vested with all the powers of an elected director, may be held liable as would any other director under s. 607.0831, and is subject to removal by a shareholder vote or court action.

### **Directors and Officers (Sections 82-114)**

A corporation is managed by and subject to the oversight of its board of directors. Florida law requires a director to be a natural person who is at least 18 years old, but other qualifications, if any, may be set by the corporation's articles of incorporation or bylaws.

**Section 83** clarifies s. 607.0802, F.S., to distinguish qualifications for nominees for directors from qualifications for current directors and when newly prescribed qualifications apply.

**Sections 86 and 87** amend ss. 607.0805 and 607.0806, F.S., respectively, to clarify the effect of staggering directors' terms of service and when a staggered term expires.

**Section 90** creates s. 607.08081, F.S., to allow a court to remove a director and order other relief, such as barring reelection of the director for a certain time, in a proceeding initiated by or on behalf of a corporation. This remedy is limited to cases in which the court finds:

- The director acted fraudulently with respect to the corporation or its shareholders, grossly abused his or her position, or intentionally inflicted harm on the corporation; and
- Removal of the director is in the best interests of the corporation and other remedies are inadequate or unavailable.

**Section 91** modifies s. 607.0809, F.S., governing how vacancies created by directors who were elected by a particular voting group will be filled. Section 607.0809(2) provides that when a particular director is to be elected by a particular voting group, any remaining directors elected by that particular voting group, or if there are no remaining directors, the shareholders in that particular voting group, will vote to fill the vacancy.

A board of directors or members of a committee may act without meeting, even if the action is otherwise required to be taken at a meeting, by way of a written consent signed by all members of the board or committee. **Section 93** amends s. 607.0821, F.S., to clarify that a written consent is only effective upon delivery to the corporation.

**Section 94** amends s. 607.0823, F.S., to require a director who objects to holding the meeting or to the business transacted at the meeting to both state an objection at the beginning of the meeting and to refuse to vote on any action taken at the meeting. If the director fails to do both, his or her presence constitutes a waiver of notice of the meeting and of all objections to the date, time, place, or purpose of the meeting. Previously, a director was required only to register his or her objection at the beginning of the meeting.

Section 607.0825, F.S., currently allows a board of directors to delegate many of its functions to a board committee. **Section 96** amends s. 607.0825 to permit a board committee to be comprised

of one person rather than two (unless otherwise required by law or the corporation's articles of incorporation or bylaws) and to allow the board to replace or fill any absent or disqualified committee members during his or her absence or disqualification. Additionally, the bill removes some of the restrictions on board committees and permits committees to issue or sell shares, or to designate a voting group's rights, preferences, and limitations.

**Section 97** creates s. 607.0826, F.S., to authorize a board of directors to enter into an agreement that contains a "force the vote" provision. Such provisions, often used in merger agreements, require the board to submit a matter to a shareholder vote even if the board no longer wants to pursue or enter into the agreement.

**Sections 98 and 99** concern Florida's business judgment rule.<sup>23</sup> **Section 98** amends s. 607.0830, F.S. to clarify a directors' fiduciary duties. Specifically, the prudent person standard of care is modified to require a director to act as an "ordinary prudent person in a like position would reasonably believe appropriate under similar circumstances." This section expands guidance of whom a board member may rely upon in discharging his or her duties. **Section 99** makes mostly technical and conforming amendments to s. 607.0831, the business judgment rule,<sup>24</sup> but removes the limitation that decisions made or not made by directors must relate to "corporate management or policy." This change potentially provides both a greater shield for the decisions of directors from liability, as well as a larger sword for holding them liable for self-interested decisions.

**Section 100** amends s. 607.0832, F.S., relating to a director's conflict of interest. The bill retains the requirement that any director's conflict of interest transaction must be fair to the corporation at the time authorized by the director to withstand challenge, but adds explicit definitions for "director's conflict of interest transaction,"<sup>25</sup> "fair to the corporation,"<sup>26</sup> and other related terms. Additionally, the bill creates a shifting burden of proof in challenges to the validity of a director's conflict of transaction: approval by a disinterested majority of directors or shareholders who received advanced notice of the conflict places the burden on the person challenging the transaction; however, the lack of any such approval places the burden on the person defending the transaction.

**Section 102** clarifies the statute of limitations for a director's liability for unlawful distributions in s. 607.0834, F.S.

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<sup>23</sup> The business judgment rule limits the liability of a corporate director by creating a limited presumption of correctness for their decisions. *Aerospace Accessory Serv., Inc. v. Abiseid*, 943 So. 2d 866, 867 (Fla. 3d DCA 2006) (noting that s. 607.0831, F.S. codifies the "business judgment rule").

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

<sup>25</sup> The bill defines a "director's conflict of interest" in s. 607.0832(1)(a) as "a transaction between a corporation and one or more of its directors, or another entity in which one or more of the corporation's directors is directly or indirectly a party to the transaction, other than being an indirect party as a result of being a shareholder of the corporation, and has a direct or indirect material financial interest or other material interest."

<sup>26</sup> The bill defines the term "fair to the corporation" in s. 607.0832(1)(b) as a "transaction that, as a whole, is beneficial to the corporation and its shareholders, taking into appropriate account whether it is: (1) fair in terms of the director's dealing with the corporation in connection with that transaction and (2) comparable to what might have been obtainable in an arm's length transaction."

**Section 104** creates s. 607.08411, F.S., which provides standards of conduct for officers that parallel a director's fiduciary duties. Generally, the bill requires an officer to act in good faith and in a manner the officer reasonable believes to be in the best interests of the corporation. This section requires an officer to report or inform superior officers or other appropriate persons within the corporation of (1) material information about the corporation's affairs, (2) actual or probable material violations of law that involve the corporation or actual or probable breaches of duty to the corporation. Lastly, this section creates guidance regarding those persons an officer may on rely in reasonably discharging his or her duties.

**Sections 82, 84-85, 88-89, 92, 95, 101, and 103** make clarifying changes or add clarifying language to ss. 607.0801, 607.0803-607.0804, 607.0807-607.0808, 607.0820, 607.0824, 607.0833, and 607.08401, F.S., which do not substantively affect existing law.

### *Indemnification and Advancement of Expenses*

Indemnification is the duty to make good any loss, damage, or liability incurred by another.<sup>27</sup> Florida law allows corporate directors, officers, employees, and agents who act in good faith and in a manner reasonably believed to be in the best interests of the corporation (and reasonably believed to be lawful) to be indemnified by the corporation.

**Sections 106-114** revises Florida's current indemnification law, s. 607.0850, F.S., by relocating provisions to newly created sections, ss. 607.0851, 607.0852, 607.0853, 607.0854, 607.0855, 607.0857, 607.0858, and 607.0859. These sections also include the following changes:

- Excludes employees and agents from the indemnification provisions but specifies that a corporation may indemnify its employees or agents under agency law or in its articles of incorporation, bylaws, or other agreement;
- Establishes a process for the board of directors to determine whether and to what extent an officer or director may be indemnified in connection with a proceeding by or in the right of the corporation;
- Sets a new, broader standard for mandatory indemnification, triggered when an officer or director involved in a proceeding in his or official capacity is "wholly successful"<sup>28</sup> in the action, whether based on a procedural defense or the merits, rather than just "successful on the merits;"
- Outlines how an advancement of expenses is authorized by either the board of directors or shareholders; and
- Clarifies a corporation's ability to obligate itself to indemnify officers and directors, as well as employees and agents, above and beyond that required by law.

**Section 105** makes clarifying changes to s. 607.0842, F.S., which do not substantively affect existing law.

<sup>27</sup> BLACK'S LAW DICTIONARY, 837 (9<sup>th</sup> Ed. 2009).

<sup>28</sup> Commentary to s. 8.52 of the Model Act provides that "A defendant is 'wholly successful' only if the entire proceeding is disposed of on a basis which does not involve a finding of liability."

### **Anti-Takeover Laws (Sections 115-116)**

Florida's affiliated transaction statute is intended to deter hostile takeovers. It protects minority shareholders in merger offers by ensuring that specific transactions are either approved by an appropriate number of disinterested directors or shareholders, or result in a fair price to all shareholders.<sup>29</sup>

**Section 115** amends s. 607.0901, F.S., to define an "interested shareholder" as a person who owns 15 percent or more of a public corporation's shares. This section requires that any affiliated transaction with an interested shareholder receive approval from either disinterested directors or a supermajority vote of disinterested shareholders. If neither of the first two are possible, this section requires a fair price to be paid to shareholders in the transaction.

Section 115 also amends the definition of an affiliated transaction to include those that constitute the sale of 10 percent or more of the corporation's assets, net income, or fair market value of the corporation's outstanding shares.

**Section 116** makes a conforming change in s. 607.0902, F.S., that does not substantively affect existing law.

### ***Amendment of Articles of Incorporation and Bylaws***

A board of directors may amend the corporation's articles of incorporation without shareholder approval in limited, usually administrative, circumstances. **Section 118** amends s. 607.1002, F.S., to allow a board to make amendments that reflect a reduction in authorized shares and to delete an extinct class of shares when no shares of that class remain.

**Section 119** deletes language in s. 607.10025, F.S., that permitted board approval of share splits or combinations without shareholder approval only in corporations with more than 35 shareholders. The effect is to now permit all corporations to take such action without shareholder approval.

**Section 120** amends s. 607.1003, F.S., to require a full copy, as compared to the summary provided for in current law, of a proposed amendment to a corporation's articles of incorporation to be provided to shareholders prior to their meeting for approval of the amendment.

Additionally, **section 120** requires that a board must obtain written consent of all shareholders who will be subject to new interest holder liability as a result of the board's amendment to the articles of incorporation. **Section 126** amends s. 607.1009, F.S., which governs the effect of interest holder liability imposed as a result of amendment to articles of incorporation for both parties who incurred new interest holder liability and those whose interest holder liability is affected.

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<sup>29</sup> Daniel Nunn, Jr., *The Wolf at the Door: Florida's Takeover Laws Revisited*, Florida Bar Journal Vol. 83, No. 3, p. 10 (Mar. 2009), available at <https://www.floridabar.org/the-florida-bar-journal/the-wolf-at-the-door-floridas-takeover-laws-revisited/> (last visited Mar. 11, 2019).

**Section 130** creates s. 607.1023, F.S., to adopt language from the Model Act that provides a method of voting for directors, though a corporation must elect to be governed by this section in its bylaws for it to have effect.

**Sections 121-125 and 127-129** make clarifying or conforming changes to ss. 607.1004-1008 and 607.1020-607.1022, F.S., that do not substantively affect existing law.

### **Mergers and Share Exchanges (Sections 131-146)**

**Section 131** makes several changes to s. 607.1101, F.S., to accommodate mergers of a domestic corporation with one or more domestic or foreign entities, or mergers of other entities into a domestic corporation that ultimately create or merge into a corporation.

Similarly, **Section 132** expands language in s. 607.1102, F.S., regarding share exchanges to accommodate such transactions between a Florida corporation and a non-corporate domestic entity or a foreign entity. A share exchange is a method by which a corporation acquires the equity interests of an acquired entity in exchange for its own equity interest or other consideration. This results in the acquired entity being wholly owned by the acquiring entity, but continuing to exist as a distinct entity.<sup>30</sup>

**Section 133** provides a more clear process under s. 607.1103, F.S., for shareholder approval of a merger or share exchange where a domestic corporation either is a party to the merger, or is the acquired entity in the share exchange.

This section also allows the newly formed entity's articles of incorporation to eliminate or limit separate voting rights, except when:

- The merger or share exchange includes an amendment to the new corporation's articles of incorporation that requires voting by separate groups or classes, and
- The transaction will not affect a substantive business combination.

A domestic corporation that acquires another in a share exchange is not required to seek its shareholders' approval. Conversely, shareholders that do not have voting rights tied to their shares in a corporation that is acquired under a share exchange may not seek to vote on the plan.

**Section 134** creates provisions in s. 607.11035, F.S., that permit the merger of corporations without a shareholder vote if a tender offer is first made to shareholders, and ultimately results in the offeror's acquisition of a large enough interest in the corporation to satisfy the shareholder approval that would otherwise be required. This form of merger is often called a "two-step merger."<sup>31</sup> In order to prevent predatory share devaluation of the shares held by (now minority) shareholders who did not sell in response to the tender offer, this section implements a guarantee that the unsold shares retain their right to receive the same payment offered in the initial tender

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<sup>30</sup> Duane Morris, *Florida Legislature Unanimously Approves New Limited Liability Company Act* (Jan. 31, 2014), <https://www.duanemorris.com/alerts/florida-legislature-unanimously-approves-new-LLC-act-5106.html> (last visited Mar. 11, 2019).

<sup>31</sup> Daniel Nunn, *The Wolf at the Door: Florida's Takeover Laws Revisited*, 83 Fla. B.J. 10, (Mar. 2009), available at <https://www.floridabar.org/the-florida-bar-journal/the-wolf-at-the-door-floridas-takeover-laws-revisited/> (last visited Mar. 11, 2019).



offer after their shares have been converted to the stock of the new entity created as a result of the two-step merger.

**Section 135** amends s. 607.1104, F.S., to subject mergers between a parent corporation and its subsidiary, or between a parent corporation's two subsidiaries, to the general merger provisions in ss. 607.1101-607.1107, F.S. Additionally, a parent corporation must give notice of a successful merger to each of the subsidiary's shareholders within 10 days of the merger's effective date. This notice requirement replaces a provision that required the parent company to wait 30 days after it sent notice of the merger to shareholders to file its notice of merger with the Department.

**Section 137** provides for the formalization of articles of mergers and articles of share exchanges, the content required in the articles, the method of filing the articles with the Department, and the effective date of the articles by amendment to s. 607.1105, F.S.

**Section 138** amends s. 607.1106, F.S., to clarify the effect of mergers or share exchanges on domestic and foreign corporations, especially to accommodate the inclusion of non-corporate business entities and foreign corporations in these transactions. Section 138 addresses the merger's or share exchanges' effect on its parties':

- Corporate existence;
- Property ownership;
- Debt obligations, other liabilities, and creditor rights;
- Ongoing proceedings;
- Articles of incorporation, bylaws, or organic rules; and
- Shareholders' rights and interest holder liability.

**Section 139** conforms s. 607.1107, F.S., regarding the abandonment of a merger or share exchange, to the Model Act by allowing a statement of abandonment that is signed by all the parties to result in an abandonment after articles of merger have been filed with the Department, but before they have become effective. Section 607.1107, F.S., currently only permits abandonment before the articles have been filed with the Department.

**Sections 140-146** delete ss. 607.1108-607.1115, F.S., governing mergers and conversions. These subjects are re-organized and re-written by sections 131-139 (mergers, *supra*) and 152-157 (conversions, *infra*) of the bill.

### **Domestication (Sections 147-151)**

Current law allows a non-U.S. corporation to become a Florida domestic corporation by the process of domestication. **Section 147** creates s. 607.11920, F.S., to expand the types of domestications permitted in Florida to include in-bound domestications by foreign corporations and out-bound domestications by Florida corporations into foreign corporations. Specifically, this section allows Florida corporations to domesticate into foreign corporations organized in other U.S. states and foreign corporations organized in other U.S. states to become Florida domestic corporations, if the organic law of the foreign corporation allows it.

**Sections 148-150** create ss. 607.11921-607.11923, F.S., to establish the formalization of a plan of domestication of a domestic corporation into a foreign jurisdiction, govern the effectiveness and contents of articles of domestication, and permit the amendment or abandonment of the plan under certain circumstances.

**Section 151** creates s. 607.11924, F.S., to outline the effect of the domestication on the domesticating corporation, including the ultimate ownership of property, debt and other obligations, and shares as between the two corporations, ultimate locus of governance, and overall duties.

### **Conversions (152-157)**

**Section 152** creates s. 607.11930, F.S., to generally address all conversion actions (conversion of domestic corporations into domestic or foreign entities and domestic or foreign entities into domestic corporations), and require the adoption of a plan of conversion to effectuate such actions. **Sections 153 and 154** create ss. 607.11931-607.11932, F.S., to outline the information required in a plan of conversion and the method of adoption of the plan of conversion by the subsumed corporation's board of directors and shareholders. Additionally, Section 154 provides for notice requirements to shareholders of the subsumed corporation, shareholders affected by interest holder liability because of the conversion, and shareholders who may become a general partner of the converted partnership or limited partnerships.

**Sections 155** establishes in s. 607.11933, F.S., the method for filing the articles of conversion and their effective date, as well as the effect of such filing on the business governance structure of the subsumed corporation or entity in. **Section 157** more specifically addresses the transfer of property, debt, records and rules, and other specific rights or duties to the converted entity with the creation of s. 607.11935, F.S. **Section 156** creates s. 607.11934, F.S., to allow a converting entity to amend or abandon its plan of conversion.

### **Sale of Assets (Sections 158-159)**

A corporation may sell its assets in the regular course of business without approval by shareholders, unless otherwise required by its articles of incorporation. **Section 158** amends s. 607.1201, F.S., to permit a corporation to distribute its assets pro rata to shareholders, except for as part of a dissolution, without shareholder approval. **Section 159** amends s. 607.1202, F.S., to provide that if a board wishes to dispose of all, or substantially all, of its property not in the usual course of business, then it must submit such proposal to a shareholder vote with a resolution that recommends the sale, unless specific factors apply.

### **Appraisal Rights (Sections 160-173)**

Minority shareholders may choose to sell their shares in a corporation by asserting appraisal rights, which triggers a fair payout for their shares. This right is limited to situations where a material change in the relationship between the corporation and the shareholder is proposed, e.g., a merger or share exchange, and applies whether or not the shareholder has the right to vote on the proposed action.

**Section 160** defines “interested transaction” and related terms in s. 607.1301, F.S., for purposes of an appraisal of a corporation’s shares. This section also deletes language in s. 607.1301(5)(c), F.S., to clarify that an appraisal of fair value of a share should be determined without any discount for the share’s lack of marketability or minority status.

**Section 161** expands by amendment to s. 607.1302, F.S., the transactions pursuant to which a shareholder may exercise his or her appraisal rights to include conversion and domestication transactions. This section also updates definitions of public companies that are exempt from the exercise of shareholder appraisal rights.

**Section 163** amends the notice required under s. 607.1320, F.S., which requires corporations to notify shareholders of proposed actions that trigger appraisal rights under s. 607.1302, F.S. Specifically, this section requires a statement of possible appraisal rights and appropriate law to be sent with notice of the meeting at which shareholder consent is solicited for specific transactions. If approval of a corporate action that would trigger appraisal rights is sought by written consent, then notice of the appraisal rights must be sent to any nonconsenting or nonvoting shareholders at least 10 days before the corporate action becomes effective. Additionally, this section requires the corporation to send pertinent financial documents to its shareholders with the notice of appraisal rights.

**Section 164** amends s. 607.1321, F.S., regarding a shareholder’s assertion of his or her appraisal rights. If a shareholder ultimately decides to assert appraisal rights, he or she must deliver notice of intent before the proposed transaction is effectuated and abstain from voting on the matter, as described in Section 164 of the bill. Additionally, the bill dictates that a shareholder who wishes to assert appraisal rights pursuant to a proposed two-step merger in which there is no shareholder vote, can assert appraisal rights by delivery of his or her shares to the corporation with intent to demand payment if the transaction occurs and holding back any of his or her shares from the tender offer.

**Section 173** limits, via creation of s. 607.1340, F.S., a shareholder from challenging a corporate transaction under which he could have asserted appraisal rights, except on the basis of fraud, material misrepresentation, omission of fact, or illegal approval.

**Sections 162-172** make clarifying and conforming changes to s. 607.1303-607.1333, F.S., that do not substantively affect existing law.

#### **Dissolution (Sections 174-195)**

**Sections 174-177** update ss. 607.1401-607.1405, F.S., which allow a corporation to dissolve at the action of its board and, if applicable, shareholders. The bill makes several conforming changes relating to the articles of dissolution a corporation must file to formalize the dissolution, and adds a grace period that allows the corporation to revoke its dissolution within 120 days of the effective date of its articles of dissolution.

**Section 178** clarifies that a “dissolved corporation,” as defined in s. 1405, F.S., is one whose articles of dissolution are effective, and includes a “successor entity” that may exist solely for the purpose of prosecuting and defending suits on behalf of the dissolved corporation. This permits

the dissolved corporation to wind up and fully liquidate its assets in an appropriate manner. This section also adds language allowing a dissolved corporation to fix a new record date for purposes of liquidation of assets to its shareholders.

**Section 179** updates the process for disposition of known claims against a dissolved corporation in s. 607.1406, F.S., requiring the dissolved corporation to give written notice to such claimants no later than 270 days before the date that is 3 years after the effect of the articles of dissolution. This section also removes contingent claims and those claims that are effective upon an event that may occur after dissolution from the definition of known claims that must receive notice from the dissolved corporation.

**Sections 181-182** create new ss. 607.1408-607.1409, F.S., to provide for the enforcement of a claim against a dissolved corporation, and for a procedure for handling unknown and contingent claims against a dissolved corporation.

**Section 183** creates s. 607.1410, F.S., to add to a director's duties the payment of claims and distributions of assets during a corporation's dissolution or liquidation. This section also shields directors from liability against claims of breach of these duties if the corporation was properly dissolved.

**Section 180** makes clarifying and conforming changes to s. 607.1407, F.S., that do not substantively affect existing law.

### *Administrative Dissolution*

**Sections 184-187** amend ss. 607.1420-607.1423, F.S., to add failure to pay a fee or penalty to the Department as bases for the administrative dissolution of a corporation by the Department. These sections also clarify that an administratively dissolved corporation may wind up its affairs and liquidate its assets. If a corporation wants to be reinstated pursuant to administrative dissolution, it may file the appropriate forms and fees with the Department. The Department may deny reinstatement, and the corporation may appeal its denial to Leon County Circuit Court. Current law allows the corporation to file such a petition where the involved state agency or corporation resides.

### *Judicial Dissolution*

A shareholder may request that a court dissolve a corporation in which he or she owns shares for several reasons ranging from fraud to ineffectiveness. **Section 188** amends s. 607.1430, F.S., to add oppressive conduct by the corporation as grounds for dissolution, but limit it as a valid claim only for those who own at least 10 percent of the corporation's outstanding shares. This section clarifies how a shareholder agreement alternative to judicial dissolution takes effect.

**Section 189** amends s. 607.1431, F.S., to require a corporation defendant in a judicial dissolution proceeding to notify all shareholders, other than the petitioner of the proceeding, that they may avoid dissolution by electing to purchase the petitioner's shares. This remedy exists in current law, but the required notice is new. **Section 192** grants, by amendment to s. 607.1434, F.S., a court in a judicial dissolution proceeding broader discretion to order remedies other than those outlined in statute to avoid dissolution.

**Section 194** amends s. 607.1436, to require as a matter of public policy that a corporation that elects to purchase its shares instead of dissolving to follow through on that transaction, and prohibit the corporation from ultimately dissolving to avoid the purchase.

**Section 195** removes a requirement from s. 607.14401, F.S., that a dissolved corporation deposit funds owed to a missing or incompetent shareholder with the Department of Financial Services *within 6 months* of the final liquidating distribution.

**Sections 190, 191, and 193** make clarifying and conforming changes to ss. 607.1432-607.1433, and 607.1435, F.S., that do not substantively affect existing law.

### **Foreign Corporations (Sections 196-216)**

Foreign corporations operate under a certificate of authority issued by the Department and, like domestic corporations, must notify the Department of their registered agent, principal office, and other pertinent information. A foreign corporation must amend its certificate of authority to reflect any change in its operating document within 90 days of the occurrence. If a foreign corporation attempts to file for a certificate of authority under a name that is already in use by another business entity, it must find a distinguishable alternative or, pursuant to changes made to s. 607.1506, F.S., in **Section 202**, it may register under a name that is not distinguishable with the written consent of the other entity.

**Section 197** creates s. 607.15015, F.S., to clarify that a foreign corporation's organic law governs its organization, internal affairs, and shareholders' interest holder liability. **Section 198** further provides by amendment to s. 607.1502, F.S., that a foreign corporation's organic law applies when the corporation fails to have a certificate of authority to transact business in Florida, and the Florida Secretary of State is the designated agent for the corporation should any unauthorized transactions occur in Florida.

**Sections 203-206** amends or creates ss. 607.1507-607.15091, F.S., to parallel the requirements regarding a foreign corporation's registered agent to those of a domestic corporation's registered agent.

**Sections 207** creates a new notice delivery requirement in s. 607.15092, F.S., to reflect electronic communication. **Section 208** implements in s. 607.15101, F.S., a specific order for alternative service if a foreign corporation's registered agent is unavailable for service.

**Sections 210 and 211** create ss. 607.1521 and 607.1522, F.S., respectively, to specify that a converting, merging, or dissolving foreign corporation must give specific notice to the Department of the transaction and the effect thereof on its certificate of authority.

**Section 212** amends s. 607.1523, F.S., to grant the Florida Department of Legal Affairs authority to maintain an action to enjoin a foreign corporation from transacting business in violation of ch. 607, F.S.

**Section 213** makes clarifying and conforming changes to s. 607.1530, F.S., and adopts the substance of s. 607.1531, F.S., which is deleted by **Section 214**.

**Section 215** amends s. 607.15315, F.S., to permit the reinstatement of a foreign corporation's certificate of authority following its revocation, but removes as a basis for reinstatement that the grounds for revocation did not or no longer exist. **Section 216** amends s. 607.1532, F.S., to designate Leon County Circuit Court as proper venue for appeals of the Department's denial of a foreign corporation's petition for reinstatement.

#### **Records and Reports (Sections 217-224)**

**Section 217** replaces a corporation's duty to "keep as permanent records" with a duty to "maintain" certain documents in s. 607.1601, F.S. This section is also updated to explicitly include financial statements and notices required under s. 607.0120(11), F.S., within the record of documents that a corporation must maintain.

**Sections 218-221** amend ss. 607.1602-607.1605, F.S., to reduce the number of days a corporation has to produce *certain records* upon shareholder request from 15 to 5, and permit such production by electronic format. A new extension of a shareholder right to inspect corporate documents of a corporation's subsidiary has been added. The bill further entitles a shareholder who must resort to court action to enforce his or her right of inspection to reimbursement of attorney fees and reasonable expenses expended in the proceeding. Lastly, these sections clarify a court's right to impose reasonable confidentiality requirements on any court-ordered right to inspection and copy of a corporation's documents.

**Section 222** revises s. 607.1620, F.S., regarding the corporation's requirement to provide *financial statements* and any related public accountant report or audit to its shareholders. Currently, a corporation must furnish shareholders with its annual financial report within 120 days of the close of each fiscal year. This section now requires a corporation to furnish such financial information to a shareholder within 5 days of his or her request. If the shareholder's initial request so specifies, the corporation must also give notice to all other shareholders of the financial information's availability. The corporation may provide the requested documents by posting them on its website, place reasonable confidentiality restrictions on their distribution, and decline the request if the corporation determines that it was made in bad faith or for an improper purpose.

A shareholder may enforce his or her right to review the corporation's financial documents in a circuit court in the applicable county. The corporation has the burden of demonstrating that its refusal to furnish its financial documents to a shareholder and its restrictions placed on the distribution of its financial documents are reasonable or made in good faith. Reimbursement of attorney fees and costs is available to a prevailing shareholder in these proceedings.

**Section 223** deletes s. 607.1622, F.S., which requires a corporation to notify shareholders when it provides indemnification or an advance of funds to any director, officer, employee, or agent.

**Section 224** makes conforming changes to the corporate annual reporting requirements in s. 607.1622, F.S. This section also:

- Removes a requirement that the corporation include in its annual report language permitting a voluntary contribution to be transferred into the Election Campaign Financing Trust Fund;
- Deletes a provision requiring each report to be executed by a corporate officer or director;
- Clarifies the effect of multiple submissions of an annual report in one year—that any subsequent is treated as an amended report for that calendar year;
- Confirms the corporation’s right to defend itself in an action in this state, but re-asserts that it may not prosecute or maintain an action if it has failed to timely file an annual report and related fees; and
- Requires as a condition of merger, conversion, share exchange, or domestication of any corporation active under ch. 607, F.S., that the corporation is active and current in its filings with the Department.

**Sections 196, 199-201, and 209** make clarifying and conforming changes to ss. 607.1501, 607.1503-607.1505, and 607.1520, F.S., that do not substantively affect existing law.

### Miscellaneous

The bill makes several changes throughout, including:

- Updating the language used to identify public companies from those “listed on a national securities exchange” to those “registered pursuant to s. 12 of the Securities Act of 1934;”
- Replacing “act” with “chapter” to refer to the FBCA, ch. 607, F.S.;
- Replacing “executed” with “signed;”
- Ensuring the consistent use of “department” to refer to the Florida Department of State; and
- Including Limited Liability Companies as a type of eligible entity throughout the chapter.

**Sections 225 and 226** provide that ch. 607, F.S., applies to all corporations registered or authorized to do business in Florida on January 1, 2020. **Section 229** is a savings provision that permits any pending action, proceeding, or right accrued prior to January 1, 2020, to be completed as though the amendments pursuant to this act had not become effective. **Section 230** is a severability clause that ensures provisions in the bill remain valid if any other provision is held invalid.

**Sections 231-291** make non-substantive, conforming changes to parts II and III of ch. 607, F.S., as well as chs. 331, 339, 605, 617, 620, 621, 631, 658, 662, 663, and 694, F.S.

**Section 292** provides an effective date of January 1, 2020.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

None.

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

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Corporations and those wishing to incorporate will need to familiarize themselves with the extensive updates to ch. 607, F.S.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

It is unclear what filing fee applies to an article of amendment filed pursuant to s. 607.0102, F.S.

Section 607.0742(2), F.S., regarding notice required to institute a shareholder derivative action, may be clearer if it included guidance for shareholders who make a demand of a corporation as required, but such demand is ignored for the entire duration of the required 90-day waiting period. Lines 4000-4001 require a shareholder to show that his or her demand was “refused, rejected, or ignored by the board of directors *prior* to the expiration of 90 days.”

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 607.0101, 607.0102, 607.0120, 607.0121, 607.0122, 607.0123, 607.0124, 607.0125, 607.0126, 607.0127, 607.0128, 607.0130, 607.01401, 607.0141, 607.0201, 607.0202, 607.0203, 607.0204, 607.0205, 607.0206, 607.0207, 607.0301, 607.0302, 607.0303, 607.0304, 607.0401, 607.0403, 607.0501, 607.0502, 607.0504, 607.0505, 607.0601, 607.0602, 607.0604, 607.0620, 607.0621, 607.0622, 607.0623, 607.0624, 607.0625, 607.0626, 607.0627, 607.0630, 607.0631, 607.06401, 607.0701,



607.0702, 607.0703, 607.0704, 607.0705, 607.0706, 607.0707, 607.0720, 607.0721, 607.0722, 607.0723, 607.0724, 607.0725, 607.0726, 607.0728, 607.0730, 607.0731, 607.0732, 607.0801, 607.0802, 607.0803, 607.0804, 607.0805, 607.0806, 607.0807, 607.0808, 607.0809, 607.0820, 607.0821, 607.0823, 607.0824, 607.0825, 607.0830, 607.0831, 607.0832, 607.0833, 607.0834, 607.08401, 607.0842, 607.0850, 607.0901, 607.0902, 607.1001, 607.1002, 607.10025, 607.1003, 607.1004, 607.1005, 607.1006, 607.1007, 607.1008, 607.1009, 607.1020, 607.1021, 607.1022, 607.1101, 607.1102, 607.1103, 607.1104, 607.11045, 607.1105, 607.1106, 607.1107, 607.1201, 607.1202, 607.1301, 607.1302, 607.1303, 607.1320, 607.1321, 607.1322, 607.1323, 607.1324, 607.1326, 607.1330, 607.1331, 607.1332, 607.1333, 607.1401, 607.1402, 607.1403, 607.1404, 607.1405, 607.1406, 607.1407, 607.1420, 607.1422, 607.1423, 607.1430, 607.1431, 607.1432, 607.1433, 607.1434, 607.1435, 607.1436, 607.14401, 607.1501, 607.1502, 607.1503, 607.1504, 607.1505, 607.1506, 607.1507, 607.1508, 607.1509, 607.15101, 607.1520, 607.1530, 607.15315, 607.1532, 607.1601, 607.1602, 607.1603, 607.1604, 607.1605, 607.1620, 607.1622, 607.1701, 607.1702, 607.1711, 607.1907, 607.504, 607.604, 605.0102, 605.0105, 605.0112, 605.0113, 605.0114, 605.0115, 605.0116, 605.0117, 605.0118, 605.0207, 605.0209, 605.0210, 605.0211, 605.0215, 605.04092, 605.0410, 605.0702, 605.0706, 605.0715, 605.0716, 605.0803, 605.0903, 605.0904, 605.0906, 605.0907, 605.0908, 605.0910, 605.0911, 605.0912, 605.1025, 605.1035, 605.1061, 605.1063, 605.1072, 617.0302, 617.0501, 617.0831, 617.1102, 617.1108, 617.1507, 620.1108, 620.2104, 620.2108, 620.8918, 621.12, 865.09, 662.150, 331.355, 339.12, 628.530, 631.0515, 658.44, 663.03, 663.403, and 694.16.

This bill creates the following sections of the Florida Statutes: 607.0143, 607.0208, 607.04021, 607.0503, 607.05031, 607.05032, 607.0709, 607.0729, 607.0741, 607.0742, 607.0742, 607.0744, 607.0745, 607.0746, 607.0747, 607.0748, 607.0749, 607.08081, 607.0826, 607.08411, 607.0851, 607.0852, 607.0853, 607.0854, 607.0855, 607.0857, 607.0858, 607.0859, 607.1023, 607.11035, 607.11920, 607.11921, 607.11922, 607.11923, 607.11924, 607.11930, 607.11931, 607.11932, 607.11933, 607.11934, 607.11935, 607.1340, 607.1408, 607.1409, 607.1410, 607.15015, 607.15091, 607.15092, 607.1521, 607.1522, 607.1523, 607.1908, 605.01125, 605.09091, 617.05015, and 620.11085.

This bill repeals the following sections of the Florida Statutes: 607.07401, 607.1108, 607.1109, 607.11101, 607.1112, 607.1113, 607.1114, 607.1115, 607.1421, 607.1531, 607.1621, and 607.1801.

## **IX. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

### **CS by Commerce and Tourism on March 11, 2019:**

The committee substitute reverts to current law to allow corporations to provide notice of dissolution to unknown claimants by either newspaper publication or filing with the Department of State.

B. Amendments:

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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