

## HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

**BILL #:** CS/CS/HB 495 Business Organizations  
**SPONSOR(S):** Judiciary Committee and Civil Justice Subcommittee, Robinson  
**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 838

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**FINAL HOUSE FLOOR ACTION:** 109 Y's 0 N's **GOVERNOR'S ACTION:** Approved

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### SUMMARY ANALYSIS

CS/CS/HB 495 passed the House on March 10, 2020, as CS/SB 838 as amended. The Senate refused to concur in the House amendments on March 12, 2020, and returned the bill to the House. The House receded and passed the Senate Bill on March 13, 2020.

A corporation is a legal entity created through the laws of its state of incorporation. As of November 2019, approximately 974,990 active corporations exist in Florida, regulated under the Florida Business Corporation Act (FBCA), a law modeled after the Model Business Corporation Act (MBCA) promulgated by the American Bar Association in 1950. In 2014, the Florida Bar's Business Law Section organized a drafting task force to conduct a full FBCA study and propose FBCA revisions to:

- Bring the FBCA in line with the revised MBCA;
- Maintain Florida's competitiveness with other jurisdictions;
- Fix issues created by the existing FBCA; and
- Encourage the formation and use of Florida corporations.

The result of the task force's effort was CS/CS/HB 1009, a comprehensive revision to the FBCA and other Florida business entity statutes signed into law by the Governor on June 7, 2019, with a January 1, 2020 effective date. However, the task force subsequently identified several errors in the enrolled bill, including grammatical, typographical, and cross reference errors and business entity statute inconsistencies. The task force also studied a proposal to amend the Florida Not-For-Profit Corporation Act to allow a person who is not a member of a not-for-profit corporation's board of directors to serve on a board committee under specified circumstances.

The bill:

- Remedies identified errors in the 2019 revisions to the FBCA and related business entity statutes;
- Authorizes a not-for-profit corporation to appoint a non-board director to a board committee and to an advisory committee under certain circumstances; and
- Authorizes the Florida Department of State to direct interrogatories to a corporation under specified conditions to determine the corporation's compliance with the FBCA.

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

The bill was approved by the Governor on June 18, 2020, ch. 2020-32 L.O.F., and became effective on that date.

# I. SUBSTANTIVE INFORMATION

## A. EFFECT OF CHANGES:

### Background

A corporation is an independent legal entity created through the laws of its state of incorporation.<sup>1</sup> In 1950, the American Bar Association (ABA) promulgated the Model Business Corporations Act (MBCA), a body of laws designed to uniformly regulate United States corporations.<sup>2</sup> However, individual states may promulgate laws relating to the creation, organization, operation, and dissolution of corporations in their respective jurisdictions.<sup>3</sup>

As of November 2019, Florida has approximately 974,990 domestic<sup>4</sup> and foreign<sup>5</sup> for-profit and not-for-profit corporations<sup>6</sup> active in the state,<sup>7</sup> regulated under the Florida Business Corporation Act (FBCA),<sup>8</sup> a law largely modeled after the MBCA.<sup>9</sup> In 2014, the Corporations, Securities, and Financial Services Committee of the Florida Bar Business Law Section organized a drafting task force to recommend revisions to the FBCA, last overhauled in 1989, as the ABA was in the process of revising and modernizing the MBCA.<sup>10</sup> The task force's mission statement included a full FBCA study and the proposal of FBCA revisions to:

- Bring the FBCA in line with MBCA revisions;
- Maintain Florida's competitiveness with other jurisdictions;
- Fix issues created by the existing FBCA; and
- Encourage the formation and use of Florida corporations.<sup>11</sup>

The result of the task force's effort was CS/CS/HB 1009, a comprehensive revision to the FBCA and other Florida entity statutes<sup>12</sup> signed into law on June 7, 2019, with a January 1, 2020 effective date.<sup>13</sup> However, the task force subsequently identified several errors in the enrolled bill, including grammar, punctuation, and cross reference errors and business entity statute inconsistencies.<sup>14</sup> The task force also studied a proposal to amend the Florida Not-For-Profit Corporation Act<sup>15</sup> (FNCA) to expressly allow a person who is not a director ("non-director") serving on a not-for-profit corporation's ("NPC") board of directors<sup>16</sup> ("board") to serve on an NPC's board committee under specified circumstances.<sup>17</sup>

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<sup>1</sup> Legal Information Institute, *Corporations*, <https://www.law.cornell.edu/wex/corporations> (last visited Mar. 18, 2020).

<sup>2</sup> William H. Clark, Jr., *The Relationship of the Model Business Corporation Act to Other Entity Laws*, Law and Contemporary Problems Vol. 74, No. 57, <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1609&context=lcp> (last visited Mar. 18, 2020).

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

<sup>4</sup> "Domestic corporation" means an entity governed as to its internal affairs by the laws of this state. S. 607.01401(20), F.S.

<sup>5</sup> "Foreign corporation" means an entity incorporated or organized under laws other than the laws of this state. Ss. 607.01401(36) and 617.01401(9), F.S.

<sup>6</sup> A not-for-profit corporation is a corporation that does not distribute its income or profit to its members, directors, or officers, except as the FNCA otherwise allows. S. 617.01401(5), F.S.

<sup>7</sup> The Florida Department of State, Division of Corporations, *Yearly Statistics*, <https://dos.myflorida.com/sunbiz/about-us/yearly-statistics/> (last visited Mar. 18, 2020).

<sup>8</sup> Ch. 607, F.S.

<sup>9</sup> The Florida Bar Business Law Section, *Proposed Modifications to Chapter 607 (Florida Business Corporation Act)*, (Jan. 24, 2019).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> These included the Florida Revised Limited Liability Company Act of ch. 605, F.S., and the Florida Not for Profit Corporation Act of ch. 617, F.S.

<sup>13</sup> Ch. 2019-90, Laws of Fla.

<sup>14</sup> The Florida Bar Business Law Section, *White Paper for S.B. [838] & H.B. [495]: "An Act Relating to Business Organizations,"* (Oct. 21, 2019).

<sup>15</sup> Ch. 617, F.S.

<sup>16</sup> "Board of directors" means the group of persons vested with the management of the corporation's affairs irrespective of the name by which such group is designated, including, but not limited to, managers or trustees. S. 617.01401(2), F.S.

<sup>17</sup> *White Paper*, *supra* note 14.

## Effect of the Bill

### Florida Department of State Interrogatories

#### *Current Law*

Prior to the 2019 FBCA revision, the FBCA permitted the Florida Department of State (“Department”) to direct interrogatories<sup>18</sup> to a FBCA-regulated corporation, and to any of its officers or directors, if such interrogatories were reasonably necessary to determine the corporation’s FBCA compliance.<sup>19</sup> However, the drafters of the 2019 FBCA revision inadvertently deleted this provision from the FBCA when intending to move it to a new stand-alone section, consistent with the placement of an identical provision in the Florida Revised Limited Liability Company Act.<sup>20</sup>

#### *Changes*

The bill reinstates the Department’s authority to direct interrogatories to an FBCA-regulated corporation, and to any of its officers or directors, if such interrogatories are reasonably necessary to determine the corporation’s FBCA compliance. Like the deleted FBCA provision, the bill:

- Gives the corporation 30 days to respond or a longer period of time fixed by the Department.
- Requires that interrogatories directed to an individual be answered by said individual.
- Does not require the Department to file a court record relating to the interrogatories:
  - Until the interrogatories are answered.
  - When the answers disclose that the record does not conform to FBCA requirements.
  - If the Department determines that the parties to the record have not paid all fees, taxes, and penalties owed to the state.
- Authorizes the Department to:
  - Bring a circuit court action to collect any penalties, fees, or taxes owed to the state and to compel any legally required filing, qualification, or registration.
  - File a lis pendens<sup>21</sup> against any property owned by the corporation.
  - Certify its findings to the Department of Legal Affairs (DLA) to initiate any action DLA may deem appropriate.

However, unlike the deleted FBCA provision, the bill also:

- Clarifies that a corporation served with interrogatories may be domestic or foreign.
- Requires interrogatories directed to a corporation to be answered by the corporation’s officers or directors, shareholders if there are no officers or directors, or fiduciaries if the corporation is in the hands of a receiver, trustee, or other court-appointed fiduciary.<sup>22</sup>

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<sup>18</sup> “Interrogatories” are a list of questions one party in a civil action sends to another as part of the discovery process. The recipient must answer the questions under oath. Legal Information Institute, *Interrogatory*, <https://www.law.cornell.edu/wex/interrogatory> (last visited Mar. 18, 2020).

<sup>19</sup> S. 607.0130, F.S. (2018).

<sup>20</sup> Ch. 2019-90, Laws of Fla.; The Florida Bar Business Law Section, *supra* note 9.

<sup>21</sup> A “lis pendens,” filed with the clerk of the court, provides written notice that a lawsuit has been filed involving either title to or a claimed ownership interest in real property. Legal Information Institute, *Lis Pendens*, [https://www.law.cornell.edu/wex/lis\\_pendens](https://www.law.cornell.edu/wex/lis_pendens) (last visited Mar. 18, 2020).

<sup>22</sup> The deleted FBCA provision required such interrogatories to be answered by the corporation’s president, vice president, secretary, or assistant secretary. S. 607.0130(1), F.S. (2018).

## Not-For Profit Corporation Board Committees

### *Current Law*

An NPC's board must have three or more directors, who must be natural persons<sup>23</sup> 18 years of age or older but need not be Florida residents or NPC members unless required by the articles of incorporation<sup>24</sup> or bylaws.<sup>25</sup> The board exercises all of the NPC's corporate powers<sup>26</sup> and directs its management to ensure the NPC fulfills its member, beneficiary, donor, and community obligations.<sup>27</sup>

A director must discharge his or her duties in good faith,<sup>28</sup> with the care an ordinarily prudent person in a like position would exercise,<sup>29</sup> and in a manner he or she reasonably believes to be in the NPC's best interest.<sup>30</sup> A director is not liable for monetary damages for any statement, vote, decision to act or not act, or failure to act, unless the director breached his or her duties and such breach is:

- A criminal offense, unless the director reasonably believed his or her conduct was lawful.<sup>31</sup>
- A circumstance in which the director derived an improper personal benefit<sup>32</sup> or the unlawful distribution liability provisions<sup>33</sup> apply.<sup>34</sup>
- Conscious disregard for the NPC's best interests or willful or intentional misconduct in a proceeding by or in the right of a shareholder or the NPC.<sup>35</sup>
- In a proceeding by or in the right of someone other than the NPC or a shareholder, recklessness or an act or omission constituting bad faith or done with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.<sup>36</sup>

In addition to its other duties and obligations, an NPC's board, by resolution, may appoint board directors to a committee with all the authority of the board.<sup>37</sup> However, no such committee may:

- Approve or recommend for approval actions or proposals that members must approve;<sup>38</sup>
- Fill board or board committee vacancies;<sup>39</sup> or
- Adopt, amend, or repeal the bylaws.<sup>40</sup>

The Model Not-For-Profit Corporation Act (MNCA) also permits an NPC's board to create an advisory committee comprised of any number of directors and non-directors, or exclusively of non-directors. An advisory committee is not a board committee, may not have board authority, and may only make

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<sup>23</sup> "Person" means an individual, child, firm, association, joint adventure, partnership, estate, trust, business trust, syndicate, fiduciary, corporation, and other groups or combinations. "Natural person" means a living human being. S. 1.01(3), F.S.; Legal Information Institute, *Natural Person*, [https://www.law.cornell.edu/wex/natural\\_person](https://www.law.cornell.edu/wex/natural_person) (last visited Mar. 18, 2020).

<sup>24</sup> "Articles of Incorporation" means the corporate charter filed with the state at the time of incorporation including the corporation's name and purpose, information about the type and number of shares, and the process of electing a board of directors. Legal Information Institute, *Articles of Incorporation*, [https://www.law.cornell.edu/wex/articles\\_of\\_incorporation](https://www.law.cornell.edu/wex/articles_of_incorporation) (last visited Mar. 18, 2020).

<sup>25</sup> Ss. 617.0802(1) and 607.0803(1), F.S.

<sup>26</sup> Unless specified otherwise in the articles of incorporation, corporate powers include the power to: sue and be sued; purchase, lease, or acquire, and own, hold, improve, use, and deal with, real or personal property; sell, convey, mortgage, or otherwise dispose of all or part of its property; lend or borrow money; and make contracts and incur liabilities. S. 607.0302, F.S.

<sup>27</sup> Jeffrey A. Baskies and Cara Freedman, "To Protect and to Serve": The Duties and Responsibilities of Directors of Florida Not-For Profit Corporations, *Florida Bar Journal* Vol. 89, No. 9 (Nov. 2015), <https://www.floridabar.org/the-florida-bar-journal/to-protect-and-to-serve-the-duties-and-responsibilities-of-directors-of-florida-not-for-profit-corporations/> (last visited Mar. 18, 2020).

<sup>28</sup> S. 617.0830(1)(a), F.S.

<sup>29</sup> S. 617.0830(1)(b), F.S.

<sup>30</sup> S. 617.0830(1)(c), F.S.

<sup>31</sup> S. 607.0831(1)(a), F.S.

<sup>32</sup> S. 607.0831(1)(b), F.S.

<sup>33</sup> A director who assents to a distribution violating s. 607.06401, F.S., s. 607.1410(1), F.S., or the articles of incorporation is personally liable to the corporation for the amount of the distribution exceeding what could have been distributed without such a violation if it is established that the director did not comply with s. 607.0830, F.S. S. 607.0834, F.S.

<sup>34</sup> S. 607.0831(1)(c), F.S.

<sup>35</sup> S. 607.0831(1)(d), F.S.

<sup>36</sup> S. 607.0831(1)(e), F.S.

<sup>37</sup> S. 617.0825(1) and (3), F.S.

<sup>38</sup> S. 617.0825(1)(a), F.S.

<sup>39</sup> S. 617.0825(1)(b), F.S.

<sup>40</sup> S. 617.0825(1)(c), F.S.

recommendations to the board or the NPC's officers or members.<sup>41</sup> However, the FNCA does not contain a similar provision, and neither does the FNCA expressly allow an NPC to appoint non-directors to its board committees.<sup>42</sup> Despite a lack of express statutory authorization to do so, many NPCs are believed to organize their board committees to include non-directors.<sup>43</sup>

### *Changes*

The bill:

- Authorizes an NPC's board to appoint a non-director to certain board committees<sup>44</sup> if the majority of the other committee members are directors. The bill also allows an NPC's board committee to consist of fewer directors than non-directors, or entirely of non-directors, if the committee:
  - Is created by the board or otherwise authorized by the articles of incorporation or bylaws; and
  - Relates to director elections, nominations, or credentials or is involved in the director election process.
- Gives a non-director serving on a board committee the same responsibility and fiduciary duties regarding committee activities, and the same liability protections, as a director serving on the committee.
- Authorizes an NPC to create an advisory committee comprised of any number of non-directors that is not a board committee and may:
  - Not act on behalf of the board, exercise any board powers or authority, or bind the NPC to any action.
  - Make recommendations to the board or to the NPC's officers or members.

These changes give an NPC flexibility to organize its committees in the way in which it may already operate, bring the FNCA in line with the MNCA with respect to advisory committees, and add necessary corporate governance protections.

### Entity Statute Inconsistency Corrections

In reviewing the 2019 FBCA revisions, the drafting task force discovered inadvertent inconsistencies between comparable provisions in the FBCA and other business entity statutes. The bill corrects such inconsistencies in ss. 607.0123, 607.0601, 607.0602, 607.1102, 607.1106, 607.11920, 607.11923, 607.11924, 607.11935, 607.1422, and 605.0207, F.S.<sup>45</sup> These corrections include:

- Adding references to obligations, other securities, eligible interests, and rights to acquire any combination of shares, securities, cash, or property in connection with organic transactions.
- Altering "filed" to "accepted, as evidenced by the department's endorsement" when referencing documents filed with the Department.
- Specifying that a domestic corporation may acquire one or more classes or series of shares of another domestic or foreign corporation.
- Changing references from "business entity" to "eligible entity."
- Specifying that a series of shares authorized to receive the corporation's net assets upon dissolution may be a series with voting rights.
- Clarifying that, if a corporation's articles of incorporation so provide, a board of directors may reclassify the unissued shares of any class into one or more series within a class.

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<sup>41</sup> American Bar Association Committee on Nonprofit Organizations, Model Nonprofit Corporation Act § 8.25 (3rd ed. 2008).

<sup>42</sup> Ch. 617, F.S.

<sup>43</sup> *White Paper*, *supra* note 14.

<sup>44</sup> This section does not apply to condominium, cooperative, or homeowners' association fining or architectural review committees established under ss. 718.303(3), 719.303(3), 720.303(2), or 720.3035(1), F.S.

<sup>45</sup> Bill sections 2, 8, 9, 28, 32, 33, 35, 36, 39, 49, and 71.

## Clarifying Changes

The bill makes clarifying changes to ss. 607.0123, 607.0125, 607.0501, 607.0620, 607.0630, 607.0705, 607.0720, 607.0808, 607.0850, 607.0901, 607.1003, 607.1103, 607.11035, 607.11921, 607.1302, 607.1333, 607.1430, 607.1432, 607.14401, 607.1501, 607.1502, 607.1509, 607.15091, 607.1520, 607.1602, 607.504, 605.0116, and 605.0215, F.S.<sup>46</sup> These changes include:

- Changing “checks in payment” to “payment,” as not every relevant payment is made by check.
- Altering “bank accounts” to “accounts,” as not every applicable account is a bank account.
- Clarifying that the corporate representative to whom the Department must return a refused document must be an authorized representative.
- Changing “his or her” to “his, her, or its” in various sections describing subscribers or shareholders, as these may be natural or legal persons.
- Altering “shares” to “interests” when the term relates to affiliated transactions, as not every business entity has shares but all have interests.
- Clarifying that a foreign corporation may revoke its registered agent’s authority to accept service on its behalf, as the current language is ambiguous.
- Clarifying that a corporate shareholder may inspect and copy the corporation’s board committee records under specified circumstances, as the current language is overbroad.
- Adding “domestication” to the list of ways a business entity may become a social purpose corporation, as it was inadvertently left out.
- Specifying that a foreign corporation’s assignee may require a certificate of authority.
- Clarifying that the notice of a shareholder meeting to remove a director need only state that such action is one of the meeting’s purposes, as opposed to its sole purpose.
- Specifying that the term “expenses” includes reasonable attorney fees and expenses.
- Clarifying that a statement of change or other record designating a new registered agent is filed with the Department, not by it.
- Altering “copy” to “certified copy” when referencing the evidentiary effect of document copies delivered with Department certificates.
- Clarifying that a circuit court may dissolve a corporation if a shareholder dissolution proceeding establishes that the directors are deadlocked in corporate management and the corporation faces irreparable injury, the corporation’s business can no longer be conducted, or both.
- Clarifying that, to amend a corporation’s articles of incorporation, at least a majority of all shares entitled to vote on the amendment must vote in favor of the amendment.

## Conforming Changes

The bill makes non-substantive conforming changes to ss. 607.0120, 607.0123, 607.0141, 607.1002, 607.1202, 607.1302, 607.1403, 607.1431, 607.1502, 607.1504, 607.1907, and 605.0207, F.S.<sup>47</sup> These changes include altering references from:

- “Act” to “chapter;”
- “Do business” to “transact business;”
- “Corporation” to “domestic or foreign corporation;”
- “Filed document” and “filing” to “record filed;”
- “Rights of action” to “proceedings and actions;”
- “Action” to “proceeding;” and
- “This Act” to “Chapter 2019-90, Laws of Florida.”

## Cross Reference and Applicability Corrections

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<sup>46</sup> Bill sections 2, 3, 7, 10, 12, 14, 16, 20, 22, 25, 27, 29, 30, 34, 42, 45, 50, 52, 53, 54, 55, 60, 61, 63, 64, 69, 70, and 72.

<sup>47</sup> Bill sections 1, 2, 6, 26, 40, 42, 47, 51, 55, 57, 68, and 71.

The bill corrects missing or erroneous cross references in ss. 607.1406, 607.1422, 607.1504, 607.1604, and 607.1622, F.S.<sup>48</sup> The bill also modifies the sections, subsections, or paragraphs to which specified provisions apply in ss. 607.0721, 607.11932, and 605.0702, F.S.<sup>49</sup>

### Grammar, Punctuation, and Duplicative Language Corrections

The bill deletes unnecessary duplicative language in ss. 607.0707 and 607.1301, F.S.,<sup>50</sup> and corrects non-substantive grammar and punctuation errors in ss. 607.0127, 607.01401, 607.0501, 607.0623, 607.0630, 607.0704, 607.0732, 607.0750, 607.0832, 607.0855, 607.0858, 607.1003, 607.1103, 607.11045, 607.11932, 607.11933, 607.11935, 607.1303, 607.1320, 607.1340, 607.1430, 607.1501, 607.1503, 607.1505, 607.1507, 607.15101, 605.0215, 605.0716, and 617.0501, F.S.<sup>51</sup>

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

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

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

The bill does not appear to have an impact on state revenues.

#### **2. Expenditures:**

The bill does not appear to have an impact on state expenditures.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

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

The bill does not appear to have an impact on local government revenues.

#### **2. Expenditures:**

The bill does not appear to have an impact on local government expenditures.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

### **D. FISCAL COMMENTS:**

None.

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<sup>48</sup> Bill sections 48, 49, 57, 65, and 66.

<sup>49</sup> Bill sections 17, 37, and 73.

<sup>50</sup> Bill sections 15 and 41.

<sup>51</sup> Bill sections 4, 5, 7, 11, 12, 13, 18, 19, 21, 23, 24, 27, 29, 31, 37, 38, 39, 43, 44, 46, 50, 54, 56, 58, 59, 62, 72, 74, and 76.